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IMPROVING UNIFORM CODE OF MILITARY JUSTICE REFORM

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I. Introduction

With the National Defense Authorization Act of 2014 (2014 NDAA), Congress, for the first time in forty-five years, placed the Uniform Code of Military Justice (UCMJ) under its proverbial spotlight. The 2014 NDAA, which President Barack Obama signed into law on December 26, 2013, included the first major reform of the UCMJ since 1968.[1] The new law includes "over 30 different military justice

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[1] Rear Admiral (Rear Adm.) Sean Buck, *Accountability Actions in Sexual Assault Cases*, NAVY LIVE (Feb. 10, 2014), http://navylive.dodlive.mil/2014/02/10/accountability-actions-in-sexual-assault-cases/ ("The FY14 NDAA provided the most sweeping reform to the Uniform Code of Military Justice since 1968. . . ."); *see also* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 531, 652, 1701–1753, 127 Stat. 759, 788, 952–985. The Uniform Code of Military Justice (UCMJ) forms the primary legal foundation for the United States military's justice system. UCMJ (2012). For the purposes of this article, "major reform" is defined as a reform that alters: (1) the fundamental practice of law pursuant to the UCMJ and (2) one or more individual rights

provisions that are intended to enhance victims' rights and improve the military justice process."[2]

Some members of Congress believe that a more major UCMJ reform is necessary. After Senator Kirsten Gillibrand's proposal to remove command prosecutorial discretion in the Military Justice Improvement Act (MJIA) failed to reach the filibuster-proof majority necessary for a floor vote, she stated,

> Without a doubt, with the National Defense bill we passed, and Senator McCaskill's Victim Protection Act, we have taken good steps to stand up for victims, and hold offenders accountable. But we have not taken a step far enough. We know the deck is stacked against victims of sexual assault in the military, and today, we saw the same in the halls of Congress.[3]

Fifty-five senators publicly pledged to support Senator Gillibrand's proposal, and Senator Gillibrand hopes to raise the proposal again.[4]

Most military leaders, however, staunchly oppose the MJIA.[5] Former Secretary of Defense Chuck Hagel believes that the chain of command must maintain its central role in the UCMJ for the system to properly respond to the sexual-misconduct crisis. "I don't think you can fix the problem or have accountability within the structure of the military without the command involved in that. . . . [I]f you don't hold people accountable then you're not going to fix the problem. You can pass all the laws you want and that isn't going to work."[6]

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of servicemembers. This definition is intentionally imprecise. Reforms to the UCMJ's punitive articles that are not accompanied with procedural reforms are not major reforms.

[2] Buck, *infra* note 1.

[3] Kirsten Gillibrand, *Gillibrand Statement on Senate Vote to Reform Military Justice System*, U.S. SENATE (Mar. 6, 2014), http://www.gillibrand.senate.gov/newsroom/press/release/gillibrand-statement-on-senate-vote-to-reform-military-justice-system.

[4] *Id.*; *see* Jeremy Herb, *Why Gillibrand Bill Faces Midterm Danger*, THE HILL (Mar. 13, 2014), http://thehill.com/blogs/defcon-hill/army/200649-for-gillibrand-its-now-or-never-on-sexual-assault-bill.

[5] Eliott C. McLaughlin, *Military Chiefs Oppose Removing Commanders from Sexual Assault Probes*, CNN (June 5, 2013, 10:31 AM), http://www.cnn.com/2013/06/04/politics/senate-hearing-military-sexual-assault/. For this article the term "military leaders" includes the strategic-level leadership in the Department of Defense and their primary advisors, to include the Secretary of Defense, the service secretaries, the Chairman of the Joint Chiefs of Staff, and their senior legal advisors.

[6] Luis Martinez, *Hagel Opposes Gillibrand's Bill on Sex Assaults in Military*, ABC

While Secretary Hagel advocated for some of the 2014 NDAA changes to the UCMJ,[7] military leaders have expressed concern about others. For example, "the Pentagon has reservations" about a new provision that requires service secretary review of decisions to not refer charged sex-related offenses to trial, as there is a fear that it could have a "chilling effect on majors and captains if they think every decision gets kicked up to the service secretary."[8] Army officials also have manpower concerns about a provision that requires judge advocates to serve as preliminary hearing officers pursuant to Article 32, UCMJ.[9]

Thus, while military leaders and Congress are both taking bold action to eliminate sexual misconduct,[10] they strongly disagree about the UCMJ's role in the problem and how, if at all, the UCMJ should be modified. Military leaders have vehemently resisted what they perceive to be rapidly-drafted, unstudied proposals for change, such as the MJIA. Brigadier General Richard C. Gross, Legal Counsel to the Chairman of the Joint Chiefs of Staff, argues, for instance, that "[d]ramatic changes to the Uniform Code of Military Justice, such as removing commanders from disposition decisions without careful study/consideration of impact, increase the likelihood of unintended consequences. Some of these unintended consequences may harm the very victims that legislation proposing to remove commanders is trying to protect."[11] Brigadier

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NEWS (June 12, 2013, 2:27 PM), http://abcnews.go.com/blogs/politics/2013/06/hagel-opposes-gillibrands-bill-on-sex-assaults-in-military/.

[7] *See* Claire Boston, *Hagel Endorses McCaskill's Changes to Military Code*, THE MANEATER, Apr. 12, 2013, http://www.themaneater.com/stories/2013/4/12/hagel-endorses-mccaskills-changes-military-code/; News Release, Release No. NR-087-13, U.S. Dep't of Def., Statement of Secretary of Defense Chuck Hagel on Sexual Assault Prevention and Response (Dec. 20, 2013), *available at* http://www.defense.gov/releases/release.aspx?releaseid=16443.

[8] Donna Cassata, *Senate OKs Bill to Combat Military Sexual Assault*, ASSOCIATED PRESS (Mar. 10, 2014, 7:35 PM), http://bigstory.ap.org/article/new-senate-bill-combat-military-sexual-assaults. The 2014 NDAA requires service secretary review of certain determinations to not refer cases to court-martial. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1744, 127 Stat. 980.

[9] *See* David Vergun, Am. Forces Press Serv., *New Law Brings Changes to the Uniform Code of Military Justice*, U.S. DEP'T OF DEF. (Jan. 8, 2014), http://www.defense.gov/news/newsarticle.aspx?id=121444.

[10] *See Hearing to Receive Testimony on Sexual Assaults in the Military: Hearing Before the S. Subcomm. on Personnel, Committee on Armed Services*, 113th Cong. 52 (2013) [hereinafter 2013 *Hearing*] (statement of Lieutenant General Dana K. Chipman, U.S. Army, The Judge Advocate Gen., U.S. Army) ("We actually began the transformation to a special victims' focus in 2008.").

[11] Statement of Brigadier General Richard C. "Rich" Gross, to the Response Systems

General Gross posits, "[T]he military justice system is complex, and major changes require careful, deliberate study."[12]

What Brigadier General Gross and other military leaders fail to realize is that for twenty-one years, Congress and the American public practically begged them to study the relationship between sexual misconduct and the UCMJ. A media report raised this exact issue as early as 1992.[13] That same year, twenty-two members of Congress sponsored a resolution that outlined similar concerns.[14] Along with continued media attention,[15] indications of the UCMJ's potential problem addressing sexual-misconduct cases were outlined in scholarly articles throughout the 1990s.[16] Congress even directed military leaders to study the issue in 2005, whereupon those military leaders undertook a mere cursory, rule-based review that recommended no change.[17] Additionally, the issue of commander involvement in the UCMJ was first raised in 1949, and it has been a constant topic of concern ever since.[18] It appears that, when it comes to reforming the UCMJ, military leaders either do not understand or do not value the signals that the Congress and the American public are sending.[19]

Perhaps military leaders ignored this input because before the sexual-misconduct crisis, the American public and Congress were generally unfamiliar with the UCMJ.[20] Less than one percent of the American

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Panel 2 (25 Sept. 2013) [hereinafter Gross Statement], *available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/20130924/sr_ja_persp/BG_Gross_USA_CJCS_Statement_RSP_20130925.pdf.

[12] *Id.* at 2.

[13] *See* John Lancaster, *In Military Sex Harassment Cases, His Word Often Outranks Hers*, WASH. POST, Nov. 15, 1992, at A1.

[14] H.R. Con. Res. 359, 102d Congress (1991-1992).

[15] *See infra* notes 314–319, 406–411 and accompanying text.

[16] *See infra* notes 481–492 and accompanying text.

[17] *See infra* notes 208–210 and accompanying text.

[18] *See infra* Part II.A.2 nn. 128–129, 152, 182–183 and accompanying text.

[19] *See* Eugene R. Fidell, *The Culture of Change in Military Law*, *in* EVOLVING MILITARY JUSTICE 163 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002) ("Anyone tracing the path of military law over the last several decades will be struck by two phenomena: the extent of change that has overtaken the system . . . and the resistance to that change.").

[20] *See* John S. Cooke, *Manual for Courts-Martial 20X*, *in* EVOLVING MILITARY JUSTICE, *supra* note 19, at 173, 182 ("Finally, the public's attitude about military justice should be considered. The public's, and more specifically the Congress's and our civilian leadership's, increasing lack of familiarity with our legal system cannot be ignored. . . . This lack of familiarity increases the risk of changes that will do more harm than good.").

public has ever served on active duty,[21] and only twenty percent of the members of the 113th Congress have ever served in the military.[22] In March 2013, Senator Claire McCaskill, a leading figure in this debate and the primary sponsor of the Victim Protection Act of 2014, stated, "After meeting with many of you and many of your colleagues, I have gotten much more familiar with the UCMJ. In fact, on the advice of one of the Army JAGs, I actually downloaded it on my iPad and now I have it as an app."[23]

Military leaders may have also failed to see the signs because they trusted the two enduring institutions that are charged with the mission of continually reviewing the UCMJ.[24] It is reasonable to posit that the most senior military leaders assumed that the experts on these committees, which mostly consist of DoD personnel, appropriately considered the public's input when reviewing the UCMJ's operational performance. Unfortunately, even a cursory review of the events leading to the 2014 NDAA reveals that such an assumption was flawed.

Military leaders must understand that this country cannot afford for them to miss those signals when the next potential problem with the UCMJ is metastasizing. George Washington stated, "Discipline is the soul of an Army. It makes small numbers formidable; procures success to the weak, and esteem to all."[25] Because the UCMJ is the military's primary tool to "strengthen the national security of the United States" by "promot[ing] justice" and "maintaining good order and discipline,"[26] when Congress makes unsolicited reforms to the UCMJ that are contrary to the nearly unanimous recommendations of military leaders, an examination of the potential causes of those disagreements, as well as potential solutions, is warranted.

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[21] Sabrina Tavernise, *As Fewer Americans Serve, Growing Gap Is Found Between Civilians and Military*, N.Y. TIMES, Nov. 24, 2011, http://www.nytimes.com/2011/11/25/us/civilian-military-gap-grows-as-fewer-americans-serve.html?_r=0.

[22] JENNIFER E. MANNING, CONG. RESEARCH SERV., R42964, MEMBERSHIP OF THE 114TH CONGRESS: A PROFILE 9 (2014), *available at* http://www.fas.org/sgp/crs/misc/R42964.pdf.

[23] 2013 *Hearing*, *supra* note 10, at 63 (statement of Senator Claire McCaskill).

[24] *See infra* Parts III.A.1, III.A.2 (describing the Code Committee and Joint Service Committee (JSC)).

[25] Letter from George Washington, to Captains of Companies, General Instructions (July 29, 1757), *available at* http://founders.archives.gov/documents/Washington/02-04-02-0223.

[26] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2012) [hereinafter MCM].

Despite the fact that Congress and the President, and not military leaders, have the constitutional authority to amend the UCMJ,[27] the responsibility to shepherd the system remains with those military leaders. This is for practical and ethical reasons. Practically, military leaders are the only ones positioned to perform such a review. Given that Congress has many other concerns and military leaders manage and utilize the system on a daily basis, if military leaders do not continually examine the UCMJ, nobody will. Additionally, an inefficient, unfair, or outdated UCMJ could weaken a military leader's ability to defend the nation, as commanders would not have the requisite tools to punish misconduct. A poorly functioning UCMJ could also negatively impact recruiting and retention. As Representative John Conyers notes, "If the services want to continue to recruit the best people, there must be confidence that the military justice system is fair."[28]

Military leaders also have a professional ethical duty to understand how to properly shepherd the UCMJ. As a 2010 Army white paper on "The Profession of Arms" states, trust with the American people "must be re-earned every day through living our Ethic. . . . A self-policing Ethic is an absolute necessity, especially for the Profession of Arms, given the lethality inherent in what we do."[29] Accordingly, military leaders cannot just be reactive to issues raised in specific legal cases. To properly self-police, military leaders, particularly senior judge advocates,[30] must avoid

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[27] U.S. CONST. art. I, § 8, cl. 14.

[28] Jack Anderson & Michael Binstein, *Military Injustice*, WASH. POST, Apr. 14, 1994, at C12.

[29] CTR. FOR THE ARMY PROFESSION AND ETHIC, WHITE PAPER, PROFESSION OF ARMS 2 (Dec. 8, 2010), *available at* http://cape.army.mil/repository/ProArms/ProfessionWhite%20Paper%208%20Dec%2010.pdf. Eugene Fidell discusses how the profession of law also impacts UCMJ reform. He states, "Society ought to look to the custodians of military jurisprudence for professionalism. Professionalism, in a legal context, implies an unwillingness to accept circumstances simply because they exist if there is room for improvement in either substance or appearance." Fidell, *supra* note 19, at 168.

[30] *See* Fidell, *supra* note 19, at 167 ("[M]ilitary lawyers, unlike the serjeants-at-law and the civilian advocates of the English tradition, continue to bear unique responsibility for the development of military legal doctrine."); David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990s—A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 10 (1991) ("[I]t is the responsibility of all those within the system, including lawyers, to do all that is within their power to ensure that the system exemplifies all that is right with justice in this country."). While this article uses the term "professional ethical duty," this term is used in relation to the profession of arms, not the profession of law. In no way does this article intend to allege a violation of any legal rules of professional conduct, such as those set forth in Army Regulation 27-26. *See* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

falling into the trappings of the "cases and controversies" mindset of Article III of the Constitution in which advisory opinions are forbidden, and forward-looking, strategic thinking is discouraged.[31] Military leaders need new tools to diagnose and respond to potential problems at earlier stages.

This article is designed to assist military leaders with accomplishing their never-ending mission of shepherding the UCMJ through ever-changing times. To help military leaders break the mold that seems to have discouraged productive study of the UCMJ, this article blends historical data with concepts from law, social science, and medicine to provide military leaders better diagnostic and rehabilitative tools. To use a medical analogy, this article helps military leaders identify the symptoms of a disease at its initial stages so that Congress does not feel compelled to administer a powerful cure, which may prove to be more harmful than the underlying disease. It also provides tools to better understand and treat the disease at the early stages.

This article consists of multiple parts that serve independent, yet related, purposes. Part II gives a brief history of the major revisions of the UCMJ to familiarize the reader with the data set upon which many of the subsequent recommendations are based.[32] Part III then gives an overview of how both the Department of Defense (DoD) and the American people recommend and advocate for UCMJ reform.[33] This part first provides an overview of the various enduring and ad hoc institutions that are charged with the task of updating and modernizing the UCMJ. Comparing the dynamics of these institutions to the events surrounding the three major UCMJ reforms demonstrates that almost all of these institutions were inadequately constituted and have employed incomplete methodologies. This part then describes the two primary ways that the American public voices concerns with the UCMJ—through the media and through Congress.

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[31] U.S. CONST. art. III, § 2; *see* Letter from John Jay to George Washington (Aug. 8, 1793), *available at* http://press-pubs.uchicago.edu/founders/documents/a3_2_1s34.html (refusing to provide President Washington with an advisory opinion). During a 1991 lecture that is printed in a 1991 *Military Law Review* article, Professor Schlueter argued: "Those participating in any legal system have a professional and moral responsibility for policing the system. Those within the system should be the first to step forward and make changes where needed. In military jargon, those within the system must be 'proactive,' not simply 'reactive.'" Schlueter, *supra* note 30, at 10.

[32] *See infra* Part II.

[33] *See infra* Part III.

Armed with this information, Part IV sets forth a six-variable framework designed to accomplish two things.[34] First, military leaders can use it to determine what might constitute a problem with the UCMJ. Using the medical analogy, unlike biological diseases, the UCMJ does not harbor tangible, objectively quantifiable pathogens. Congress, therefore, is the arbiter of whether a disease actually exists. Second, military leaders can use this framework to better understand when Congress is likely to pass major UCMJ reform. This knowledge can be used either offensively or defensively. If military leaders are trying to prevent major UCMJ reform, the framework's variables and the intelligence contained therein can inform the defense. Contrarily, if military leaders are trying to enact UCMJ reform of any type, they can use this framework to inform their lines of effort to seek statutory reform.

Part V provides four tools that military leaders can use to understand when a potential problem with the UCMJ exists at a much earlier stage than when Congress either directs a review of the UCMJ or makes unsolicited reform.[35] Using the medical analogy, this part gives military leaders the diagnostic tools to identify symptoms of a disease that inflicts the UCMJ at a much earlier stage. Luckily, these early diagnostic tools, which include media reports, legislative and judicial information, and scholarship, are readily available and easy to understand.

Part VI then consolidates all of the information into a social science-informed four-step process that military leaders can use to better shepherd the UCMJ.[36] This process challenges military leaders to fundamentally change their approach to reviewing and reforming the UCMJ. The four-step process calls for military leaders to embrace complexity, research causation, develop a broad, interdisciplinary, and team-oriented dialogue, and implement experimental actions. Using the medical analogy, this part shows military leaders how to better understand the symptoms of diseases even if those diseases are not completely understood. It also helps them perform pseudo-biopsies of the information learned after applying the framework in Part IV and diagnostic tools in Part V.

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[34] *See infra* Part IV.
[35] *See infra* Part V.
[36] *See infra* Part VI.

Military leaders have almost infinite choices when determining how to review the UCMJ and when recommending changes. This article provides just one approach. The ultimate measure of effectiveness of the chosen course of action is whether or not Congress subsequently implements unsolicited UCMJ reform.

II. A History of Change

Because this article proposes a framework, a list of tools, and a process designed to assist military leaders in securing an effective, efficient, just, and widely-respected UCMJ, examining the previous major changes helps to unlock a treasure trove of information that current military leaders can use to better understand what variables indicate change might be necessary or imminent.[37] Additionally, understanding the roles, procedures, and constraints of the institutions designed to facilitate such change, as well as their roles in prior UCMJ changes, provides insight into how to effectively change the UCMJ and prevent the unintended consequences of unsolicited congressional reform.

Counting the 2014 NDAA as a major reform, the UCMJ has undergone only three major reforms in its history. Because the 2014 NDAA is discussed at length in the introduction above and throughout Parts III, IV, V, and VI below, it will not be discussed in this part.[38] The other two major reforms are the creation of the UCMJ itself and the Military Justice Act of 1968. A brief overview of what was actually changed, along with a brief description of the motivations for these major changes, is a prerequisite to a more comprehensive unpacking of the commonalities and differences between these major UCMJ changes and a host of minor ones.[39]

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[37] For a thorough history of the UCMJ up to 1973, see WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE (1973).

[38] *See infra* Part I; *see also supra* Parts III, IV, V, and VI.

[39] This is not intended to be a complete history of the UCMJ. Those familiar with the UCMJ's history will note significant omissions. While such events were considered in this analysis, this overview is designed to orient the reader who is less familiar with the UCMJ's history with the major events so that the remainder of this article is more understandable.

A. Major Reforms to the UCMJ

1. Creation of the UCMJ: Due Process, Command Authority, and Jurisdiction[40]

The birth of the UCMJ itself was the first major change. When combined with "a greater public awareness of the war through advances in communication," the actions of the (largely unrestrained) World War II military justice system under the Articles of War resulted in "severe criticism of the military justice system. . . ."[41] By the end of the war in 1945, at least 12 million people had served in the American military.[42] Over 1.7 million courts-martial were tried during the war, resulting in over 100 executions and 45,000 confined servicemembers.[43] In 1945, a panel led by Federal District Court Judge Matthew F. McGuire concluded, "It may be said categorically that the present system of military justice is not only antiquated, but outmoded."[44] Judge McGuire opined that "the present system fails" for its failure to protect individual rights.[45] Judge McGuire also stated, "Certain basic rights vital in our viewpoint as a people, and by virtue of that fact inherent in, and essentially a part of any system, naval or otherwise that purports to do justice, must be accepted and safeguarded."[46]

Abuses of the military justice system during World War II included punishment of court-members for unpopular verdicts, unduly harsh sentences on convicted servicemembers, and unqualified defense counsel.[47] Furthermore, Congress was "deluged with complaints of autocracy in the handling of these courts martial throughout the armed

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[40] Large sections of the first two historically-focused paragraphs of this part are taken verbatim from Part III.A.1 of one of my prior publications. Major John W. Brooker, *Target Analysis: How to Properly Strike a Deployed Servicemember's Right to Civilian Defense Counsel*, ARMY LAW., Nov. 2010, at 7, 13. To prevent confusion and ease readability, I have purposefully chosen to not use quotation marks for my own previous work and to leave the citations in their original form.
[41] JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775–1980, at 77 (2001).
[42] *Id.*
[43] *Id.*
[44] *Id.* at 79 (quoting Matthew F. McGuire Panel reports).
[45] *Id.* (quoting Matthew F. McGuire Panel reports).
[46] *Id.* (quoting Matthew F. McGuire Panel reports).
[47] S. SIDNEY ULMER, MILITARY JUSTICE AND THE RIGHT TO COUNSEL 57 (1970).

forces."[48] Congress responded dramatically by overhauling the entire system with the Elston Act and, ultimately, the UCMJ.[49]

Remarkably, the congressional debates about how to properly address due process and individual rights concerns sound strikingly similar to those today. For example, much like Senator Gillibrand and her colleagues, some influential advocates, members of the public, and members of Congress following World War II evinced a lack of trust in the chain of command.[50] While some debate on the role of the chain of command would arise occasionally in the intervening six decades, a keen observer would see that the seeds of mistrust, although largely dormant for sixty years, have always been present.

2. *Vietnam, the Military Justice Act of 1968, and* O'Callahan v. Parker*: Jurisdiction, Due Process, and the Role of Commanders*

The Military Justice Act of 1968 and the Supreme Court decision *O'Callahan v. Parker*[51] were the seminal culminating acts of over a decade of both public and congressional concern about individual rights protection and the UCMJ. The Military Justice Act of 1968 guaranteed additional due process and protections for accused servicemembers, while *O'Callahan v. Parker* severely restricted the UCMJ's subject matter jurisdiction for nearly two decades.[52] While one response was congressional and the other was judicial, the same concerns about due process and the role of commanders drove both decisions.[53]

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[48] *See id.* at 51–52 (quoting the *Congressional Record*).

[49] Military Selective Service Act of 1948, Pub. L. No. 80-759, §§ 201–246, 62 Stat. 604, 627-44 (1948) (commonly known as the "Elston Act"); UCMJ (1951). For an overview of the Elston Act's legacy, see Andrew S. Effron, *The Fiftieth Anniversary of the UCMJ: The Legacy of the 1948 Amendments*, *in* EVOLVING MILITARY JUSTICE, *supra* note 19, at 169–72.

[50] 95 CONG. REC. pt. 5, 5718, 10 (May 5, 1949) [hereinafter 1949 DEB.] (statement of Rep. Overton Brooks), *available at* http://www.loc.gov/rr/frd/Military_Law/UCMJ_1950.html.

[51] O'Callahan v. Parker, 395 U.S. 258 (1969).

[52] *Id.* *Solorio v. United States* overturned *O'Callahan v. Parker* in 1987. Solorio v. United States, 483 U.S. 435 (1987).

[53] While *O'Callahan v. Parker* had a large impact on the military justice system, this article does not address it in detail, as the dynamics of *stare decisis* and judicial interpretative reform are beyond its scope.

In 1962, Congress began to hold hearings to review allegations that the UCMJ, as designed and practiced, was violating the due process rights guaranteed by the Fifth and Sixth Amendments of the Constitution.[54] Again, "complaints of command control" were raised.[55] In 1963, Congress continued to discuss and debate the very same concerns and complaints in relation to the UCMJ.[56] In addition to a plethora of specific concerns about individual liberties, "[a]mong the most insistent complaints giving rise to the Uniform Code of Military Justice was that of command influence on courts-martial."[57] In 1966, lengthy hearings to debate twenty congressional bills took place.[58] The six days of hearings were to discuss UCMJ amendments that would "insure that military personnel appearing before such courts and boards receive all the rights, privileges and safeguards guaranteed to every American citizen under the Constitution."[59] Congress saw the UCMJ as an improvement over the Articles of War but "was greatly disturbed by claims that abuses persisted which the code was designed to eliminate."[60]

As a result, with the Military Justice Act of 1968, Congress amended the UCMJ to include new due process protections, such as new rights to defense counsel, the creation of the military judiciary, and new rights at special courts-martial.[61] "The Military Justice Act of 1968 was the product of several years of study, debate, compromise, within the Department of Defense and in Congress."[62]

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[54] *Constitutional Rights of Military Personnel: Hearing on S. Res. 260 Before the Subcomm. on Const. Rts. of the Comm. on the Judiciary*, 87th CONG. 4–5 (1962) [hereinafter 1962 *Hearings*] (statement of Senator Sam J. Ervin) ("And there have been instances where the safeguards of 'due process' which Congress provided in the Uniform Code of Military Justice have not been effective.").
[55] *Id.* at 4 (statement of Senator Sam J. Ervin).
[56] *Constitutional Rights of Military Personnel: Summary-Report of Hearings on S. Res. 58 Before the Subcomm. on Const. Rts. of the Comm. on the Judiciary*, 88th CONG. (1963) [hereinafter 1963 *Hearings*].
[57] *Id.* at 15.
[58] *Bills to Improve the Administration of Justice in the Armed Forces, Joint Hearings Before the Subcomm. on Const. Rts. and a Special Subcomm. of the Comm. on Armed Services*, 89th CONG. (1966) [hereinafter 1966 *Hearings*].
[59] *Id.* at 1 (statement of Senator Sam Ervin).
[60] *Id.* at 2 (statement of Senator Sam Ervin).
[61] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968); Francis T. McCoy, *Due Process for Servicemen – The Military Justice Act of 1968*, 11 WM. & MARY L. REV. 66 (1969).
[62] Brigadier General (Retired) John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 14 (2000).

In *O'Callahan v. Parker*, which was later overruled by the Court in *Solorio v. United States*,[63] the Supreme Court of the United States held that only "service connected" crimes could be tried under the UCMJ.[64] This decision greatly reduced the scope of offenses triable under the UCMJ. In justifying this reduction of the UCMJ's breadth, the Court found, "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[65] In commenting about command authority, the Court also stated, "[T]he suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger."[66]

Interestingly, in *Solorio*, the Court does not address concerns about due process or the chain of command. Instead, it uses a "plain meaning" analysis of the Constitution,[67] as well as a deference to Congress in military matters,[68] to return to a status-based jurisdictional scheme.

B. Minor Revisions: Post Vietnam Through 2006

1. Post-Vietnam and the 1980s: Collaboration and Debate

Two notable changes to the UCMJ took place between the end of the Vietnam War and the start of Operation Desert Storm/Desert Shield. The first, which was discussed above, was the 1987 Supreme Court case of *Solorio v. United States*, which brought back the status-based jurisdictional scheme in place today. The second was the passage of the Military Justice Act of 1983.[69] At least one military leader views this reform as a model of collaboration between DoD and Congress. Brigadier General Gross stated, "The considerable deliberation that went

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[63] Solorio v. United States, 483 U.S. 435 (1987).
[64] O'Callahan v. Parker, 395 U.S. 258, 272–74 (1969). The court listed several factors that could be used to justify a service connection, to include location of the offense, the connection with military duties, and the military status of the victim. *Id*. In *O'Callahan*, a sexual assault against a civilian that occurred off of a military installation and within the United States was found to lack that service connection and, therefore, could not be prosecuted under the UCMJ. *Id.*
[65] *Id.* at 265.
[66] *Id.* at 264.
[67] *Id.* at 450.
[68] *Id.* at 447–48.
[69] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983).

into the Military Justice Act of 1983, the last bill to provide comprehensive UCMJ reform, proves the potential for successful reform through a measured approach."[70] The most significant changes included more efficient pre-trial and post-trial processing procedures, independent (non-command) detailing of military judges and counsel, and an avenue, albeit limited, of Supreme Court review of Court of Military Appeals (now known as the Court of Appeals for the Armed Forces, or CAAF) decisions on grants of certiorari.[71]

More importantly, this era began the proliferation of scholarship that studied the UCMJ and its effectiveness and efficiency. One example of such scholarship is the seminal article by General (Retired) William Westmoreland, U.S. Army, former U.S. Army Chief of Staff and Commander, Military Assistance Command Vietnam, and Major General George S. Prugh, former The Judge Advocate General, U.S. Army.[72] Westmoreland and Prugh believed that the military justice system at the time of the Vietnam War was not "combat tested."[73] They argued that the military justice system in Vietnam was "particularly inept" during contingency operations, as it is "too slow, too cumbersome, too uncertain, indecisive, and lacking in the power to reinforce accomplishment of the military missions, to deter misconduct, or even to rehabilitate."[74]

Despite the superb nature of the Vietnam War experience-informed research and scholarship, many of their recommendations did not result in significant changes. For example, both Westmoreland and Prugh and the Wartime Legislation Team (WALT) recommended reducing a servicemember's unfettered statutory right to civilian counsel in a theater of operations.[75] This recommendation sat dormant until rediscovered by Iraq War experience-informed research and scholarship in 2010.[76]

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[70] Gross Statement, *supra* note 11, at 2.

[71] Pub. L. No. 98-209, 97 Stat. 1393; *see* Cooke, *supra* note 62, at 15.

[72] General William C. Westmoreland & Major General George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL'Y 1 (1980).

[73] *See id.* at 53–55.

[74] *Id.* at 52–53.

[75] *See id.* at 88–89; Lieutenant Colonel E. A. Gates & Major Gary v. Casida, *Report to the Judge Advocate General by the Wartime Legislation Team*, 104 MIL. L. REV. 139, 155–57 (1984).

[76] *See* Brooker, *supra* note 40.

Despite this, servicemembers still have an unlimited right to hire civilian counsel for any case.[77]

While this time period did not see major statutory changes to the UCMJ, and *Solorio* demonstrated an explicit attitude of judicial deference to Congress in military matters, the ongoing scholarship, along with continued and increased congressional attention on certain issues, set the stage for future challenges to the UCMJ. Some of the cries for change, such as for change to laws regarding homosexuality and the prosecution of sex-related misconduct offenses, reached a fever pitch in the 1990s.

2. The 1990s: Homosexuality, the Birth of the Sexual Misconduct Crisis, and the Role of Commanders

Throughout the 1990s, most military leaders agreed that the UCMJ and military justice system "enjoyed a period of stability and incremental change."[78] If stability is measured by a lack of congressional amendments to the UCMJ, such a view is correct. This article will argue, however, that such a myopic, inward-focused view has, in part, contributed to the existential crisis that the UCMJ faces today. The seeds of today's sexual misconduct-motivated existential threat to the UCMJ were sprouting throughout the 1990s. The fact that such sprouts were ignored or not seen is partly attributable to the structures and constraints of the institutions designed to keep the UCMJ current.

III. Recommendations and Calls for Change

When creating the UCMJ, Congress anticipated that the UCMJ would be a living document in need of revision. During the 1950 Senate debates, Senator Wayne Morse introduced into the *Congressional Record* an article by Arthur John Keeffe, a law professor, and Morton Moskin, a legal scholar, that argued, "Wasn't it Roscoe Pound who long ago pointed out that codes are rigid, codify errors, and make changes

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[77] UCMJ art. 38 (2012).

[78] Cooke, *supra* note 62, at 16–17; *see* Vergun, *supra* note 9 (stating that recent changes to the UCMJ are the most in thirty years).

more difficult? The only hope for improvement is to condition passage of the Code upon the appointment of an advisory council. . . ."[79]

Congress followed this advice and created a formal enduring institution to recommend UCMJ reform, which is discussed below. In addition, members of the executive branch, to include the President of the United States, the Secretary of Defense, and various service secretaries and judge advocates general have commissioned both enduring and ad hoc formal institutions to study and recommend appropriate changes to the UCMJ and the military justice system. These institutions are discussed below in Part III.A.[80]

Despite civilian representation on many of these institutions for change, over the past three decades, the American public made separate and distinct calls for UCMJ reform on which the formal institutions largely took no action. The more informal, yet substantially more powerful methods in which the American public makes more direct calls for change are outlined in Part III.B.[81]

A. Formal Institutions for Change

Two standing institutions are ostensibly responsible for recommending changes to the UCMJ and military justice system. Additionally, military leaders often appoint ad hoc panels or committees to review portions or all of the UCMJ or military justice system. This section explains the roles, responsibilities, structures, constraints, and, when possible, philosophies, successes, and failures of each institution. An examination of the very structure of these organizations, to include their composition, stated missions, and problem-solving methodologies demonstrates a propensity towards an inward-focused, experience-based, case-specific analysis of the UCMJ that, when performed at all, has proven inadequate.

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[79] 1949 DEB., *supra* note 50, at 287 (statement of Senator Wayne Morse, placing Arthur John Keeffe & Martin Moskin, *Codified Military Injustice—An Analysis of the Defects in The New Uniform Code of Military Justice*, 35 CORNELL L.Q. 151 (1949) into the *Congressional Record*).

[80] *See infra* Part III.A.

[81] *See infra* Part III.B.

1. The Code Committee

Article 146, UCMJ, charges that "[a] committee shall meet at least annually and shall make an annual comprehensive survey of the operation of this chapter."[82] This committee, known colloquially as the "Code Committee," is composed of CAAF's five civilian judges, the senior attorney of each military service, and two members of the public who the Secretary of Defense chooses.[83] The members of the public are not citizens from other disciplines. They must be "a recognized authority in military justice or criminal law."[84]

The Code Committee must submit an annual report to the House and Senate Armed Services Committees (HASC and SASC) and to the Secretary of Defense.[85] The reports must contain statistics and recommendations, to include recommended changes to the UCMJ, and "any other matter the committee considers appropriate."[86] Understandably, the nature of what these reports contain, as well as the nature of the matters that "the committee considers appropriate,"[87] has changed dramatically over the years. The degree of change has impacted the UCMJ.

Although its initial efforts were vigorous, the Code Committee no longer performs its statutorily mandated mission to recommend changes to the UCMJ. Between 1953 and 1968, the Code Committee reports focused on substantive issues, such as public confidence in the new UCMJ,[88] the role of commanders in the military justice system,[89] and due

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[82] UCMJ art. 146(a) (2012).
[83] *Id.* art. 146(b).
[84] *Id.* art. 146(d).
[85] *Id.* art. 146(c).
[86] *Id.* art. 146(c)(2).
[87] *Id.* art. 146(c)(2)(B)(iii).
[88] *See* U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE *passim* (Jan. 1, 1960–Dec. 31, 1960) [hereinafter 1960 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1960.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 7 (Jan. 1, 1969–Dec. 31, 1969) [hereinafter 1969 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1969.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 20 (Jan. 1, 1970–Dec. 31, 1970), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1970.pdf.
[89] *See, e.g.*, U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 3 (May 31, 1951–May 31, 1952), *available at* http://

process concerns.[90] In recent decades, though, the Code Committee has been completely dormant in terms of specific recommendations for UCMJ reform. In justifying the Code Committee's failure to make a single recommendation for UCMJ reform since 1983, civilian CAAF judges and CAAF senior staff have reasoned "that [they] should not intermix the legislative role of recommending statutory changes with [their] judicial duties. . . ."[91]

Some widely respected scholars are convinced that this hands-off approach is unwise and untenable. In an March 11, 2014 letter to the Code Committee, Charles J. Dunlap, a professor at Duke Law School and retired Major General in the Air Force Judge Advocate General's Corps, noted that "[i]t is a melancholy fact that despite its statutory mandate, the Code Committee has not furnished any recommendations to Congress in several decades."[92] Further Major General Dunlap (Ret.) persuasively argues,

> That the CAAF judges are not producing *any* recommendations as to "revising substantive and procedural law and improving criminal . . . justice" in the armed forces deprives Congress and the American

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www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-May1951-May1952.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 34, 42 (Jan. 1, 1956–Dec. 31, 1956) [hereinafter 1956 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1956.pdf; 1960 Report, *supra* note 88; U.S. COURT OF MILITARY APPEALS ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE *passim* (Jan. 1, 1962 – Dec. 31, 1962) [hereinafter 1962 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1962.pdf.

[90] *E.g.* 1962 CODE COMMITTEE REPORT, *supra* note 89, *passim*; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE *passim* (Jan. 1, 1964–Dec. 31, 1964) [hereinafter 1964 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1964.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE *passim* (Jan. 1, 1965–Dec. 31, 1965) [hereinafter 1965 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1965.pdf.

[91] Major Frank D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, ARMY LAW., Sept. 2010, at 12, 31 (summarizing conversations with "two CAAF judges and CAAF senior staff. . . .). Interestingly, the Court of Appeals of the Armed Forces (CAAF) judges wear their robes to Code Committee meetings despite the fact that "it is not a judicial proceeding of any kind." Letter of Charles J. Dunlap to Code Committee 6 (Mar. 11, 2014) [hereinafter Dunlap Letter], *available at* http://www.caaflog.com/wp-content/uploads/Dunlap-Memorandum.pdf.

[92] Dunlap Letter, *supra* note 91, at 6.

> people of wisdom extant in an exceptionally talented group of jurists who are, as the commentary puts it, "specially learned" in military law. This is a profound tragedy as today we face an unparalleled array of challenges to the military justice system writ large.[93]

In addition, the five judges, who are civilians, could represent interests outside of those in DoD. Such has happened before, as in 1955 when the judges disagreed with the service judge advocates general about proposed UCMJ reforms that would reduce a servicemember's due process rights.[94] In 1960, similarly motivated disagreements were so profound that the Code Committee could not reach a consensus and was therefore not able to produce a joint report.[95]

The value of civilian input and a broad perspective was evident in the earlier days of the UCMJ. In the 1963 Code Committee Report, Major General Charles Decker, The Judge Advocate General, U.S. Army, a member of the Code Committee, indicated that a broader approach would be more advisable. Major General Decker stated, "[I]n my opinion only one truly outstanding inquiry has been made by persons outside of the service into the administration of justice during over 32 years of service."[96] Major General Decker saw the value in an older, more experienced civilian-led review panel that possessed a "wealth of judicial experience" and was "remote from recent connection with the administration of military justice."[97] He specifically saw the benefit of a review panel that "covered all sources of information, those charged with the administration of justice, the commanders, community leaders who had lived in close proximity to the troops, those who had been tried by military courts, and those who had complaints."[98] Major General Decker

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93 *Id.* at 7.

94 U.S. COURT OF MILITARY APPEALS ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 10 (Jan. 1, 1955–Dec. 31, 1955) [hereinafter 1955 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1955.pdf; *Reforming Military Justice*, WASH. POST, June 5, 1955, at E4.

95 *See* 1960 CODE COMMITTEE REPORT, *supra* note 88, Contents, at 3–5.

96 U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 73 (Jan. 1, 1963–Dec. 31, 1963) [hereinafter 1963 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1963.pdf (statement of Major General Decker).

97 *Id.*

98 *Id.* at 73–74.

argued that this perspective provided "a scope that gave a balanced base from which to draw conclusions."[99]

During its initial years, the Code Committee raised valid concerns and made both broad-based and reasoned recommendations for change when a particular suboptimal result arose in or impacted appellate litigation. Between 1953 and 1959, the Code Committee persisted with seventeen different recommendations for UCMJ reform, fourteen of which impacted the due process rights of an accused.[100] In fact, starting in 1956, the Code Committee provided Congress with actual draft legislation.[101] Many of these recommendations, along with at least six more additional protections for accused servicemembers that were recommended between 1962 and 1967,[102] formed the basis for the Military Justice Act of 1968.[103] In its 1969 report, the Code Committee proudly stated that the Military Justice Act of 1968 "represented

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[99] *Id.*

[100] U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 4–11 (Jan. 1, 1953–Dec. 31, 1953), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1953.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 5–10 (Jan. 1, 1954–Dec. 31, 1954), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1954.pdf; 1955 CODE COMMITTEE REPORT, *supra* note 94, at 10; 1956 CODE COMMITTEE REPORT, *supra* note 89, at 7–21; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 5–21 (Jan. 1, 1957–Dec. 31, 1957), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1957.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 4–24 (Jan. 1, 1958–Dec. 31, 1958), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1958.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 4–22 (Jan. 1, 1959–Dec. 31, 1959), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1959.pdf.

[101] 1956 CODE COMMITTEE REPORT, *supra* note 89, at 7–21. This continued until 1964. 1964 CODE COMMITTEE REPORT, *supra* note 90, at 7–39.

[102] 1962 CODE COMMITTEE REPORT, *supra* note 89, *passim*; 1963 CODE COMMITTEE REPORT, *supra* note 96, *passim*; 1964 CODE COMMITTEE REPORT, *supra* note 90, at *passim*; 1965 CODE COMMITTEE REPORT, *supra* note 90, *passim*; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE *passim* (Jan. 1, 1966–Dec. 31, 1966) [hereinafter 1966 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1966.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE *passim* (Jan. 1, 1967–Dec. 31, 1967) [hereinafter 1967 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1967.pdf.

[103] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

improvements in military justice long advocated by the Code Committee."[104]

Things changed following the Military Justice Act of 1968. Between 1969 and 1983, the Code Committee made approximately one dozen relatively minor recommendations for legislative reform.[105] Four of these recommendations dealt specifically with somewhat narrow appellate-review concerns,[106] while two recommendations were in response to a fear that the Supreme Court would find Article 134 unconstitutional.[107] The era of Code Committee recommendations for the UCMJ ended completely starting in 1984.[108]

The Code Committee is not the only enduring institution charged with making UCMJ reform recommendations. One possible reason for the Code Committee's decision to abdicate its responsibility to make

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[104] 1969 CODE COMMITTEE REPORT, *supra* note 88, at 2.

[105] The precise number of recommendations is difficult to determine because of confusing language regarding the nature of the recommendations contained in some of the reports. *See infra* note 106 (discussing the CODE COMMITTEE REPORT in 1978).

[106] In 1971, the Code Committee requested that Congress "consider legislation that would [] specify the extent to which the Court of Military Appeals, the Courts of Military Review, and military judges may entertain certain petitions for extraordinary relief." U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 1 (Jan. 1, 1971–Dec. 31, 1971) [hereinafter 1971 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1971.pdf. In 1976, the *Code Committee Report* was not clear to whom their recommendation was directed but nonetheless stated that they "recommended consideration of other legislation which would implement a concept of continuing jurisdiction for military trial courts." U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 2 (Jan. 1, 1976–Dec. 31, 1976), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1976.pdf. In 1977, the Code Committee passively promoted the continuing jurisdiction concept and an increase in the number of judges on the Court of Military Appeals, but the judges took "no formal position on the legislation." U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 1 (Oct. 1, 1977–Sept. 30, 1977), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1977.pdf. In 1978, the Code Committee considered recommending legislation to allow en banc appellate review. U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 1 (Oct. 1, 1978–Sept. 30, 1978), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1978.pdf.

[107] *See* 1971 CODE COMMITTEE REPORT, *supra* note 106, at 2; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 2 (Jan. 1, 1972–Dec. 31, 1972), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1972.pdf.

[108] Rosenblatt, *supra* note 91.

recommendations is because another enduring institution, which is somewhat nested within the Code Committee, has the same mission. Then again, this second institution is also surrounded by mystery. Whereas the Code Committee's reasons for ignoring a statutory mandate for over 30 years are puzzling, the Joint Service Committee's recommendations for UCMJ reform are typically not widely available to the public.[109]

2. *The Joint Service Committee on Military Justice*

Another institution designed to help DoD make UCMJ change recommendations to Congress is the Joint Service Committee on Military Justice (JSC). The JSC, which was formed in 1972 and operates under the supervision of the General Counsel of the Department of Defense,[110] has the following mission:

> To prepare and evaluate such proposed amendments and changes as may from time to time appear necessary or desirable in the interest of keeping the Uniform Code of Military Justice (UCMJ) and Manual for Courts-Martial (MCM) current with the decisions of the U.S. Supreme Court, the U.S. Court of Appeals for the Armed Forces, and established principles of law and judicial administration applicable to military justice, as well as with the changing needs of the military services.[111]

The JSC has two other missions. First, it recommends and guides non-statutory changes to the Manual for Courts-Martial (MCM).[112] Second, it functions as an advisory body to the Code Committee.[113]

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[109] U.S. DEP'T OF DEF., DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE encl. 2, para. E2.4.1 (3 May 2003) [hereinafter DoDD 5500.17], *available at* http://www.dtic.mil/whs/directives/corres/pdf/550017p.pdf (certified current as of 31 Oct. 2006).
[110] *Id.* para. 3.
[111] U.S. DEP'T OF DEF., OFFICE OF THE GEN. COUNSEL, MILITARY JUSTICE FACT SHEETS 4, http://www.dod.gov/dodgc/images/mj_fact_sheet.pdf (last visited May 17, 2014) [hereinafter FACT SHEETS].
[112] DoDD 5500.17, *supra* note 109, para. 3.
[113] FACT SHEETS, *supra* note 111, at 4; *see* DoDD 5500.17, *supra* note 109, encl. 2, para. E2.1.3, E2.3.

Unlike the Code Committee, which includes two legally-trained members of the public, almost all of the members of the JSC are military personnel. The JSC is composed of a Voting Group and a Working Group. A member from each of the five military services composes the five-member Voting Group. The Working Group includes non-voting members from the five military services, and may include one representative each from the U.S. Court of Appeals for the Armed Forces (CAAF) and the Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff.[114]

Unfortunately, while the JSC's recommendations for reform to the MCM are a matter of public record via the *Federal Register*,[115] its recommendations regarding changes to the UCMJ are not.[116] Although some recommendations for change to the UCMJ may be presented to the Code Committee, and others are released or discovered,[117] the General Counsel for the Department of Defense makes the election of how and to whom such recommendations should be made, if they are to be made at all.[118] Except for those summarized in a Code Committee report or otherwise released or discovered, there is no public record of JSC-initiated and reviewed UCMJ-change recommendations. While such confidentiality may serve some purposes, it makes an evaluation of the JSC's effectiveness, as well as the perspective it takes in making UCMJ-reform recommendations, difficult to judge.

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[114] DoDD 5500.17, *supra* note 109, paras. 4.3–4.4.
[115] *Id.* encl. 2, para. E2.2.2.
[116] *Id.* encl. 2, para. E2.4.1.
[117] For an example of released or discovered JSC recommendation information, see Letter from Daniel J. Dell'Orto, Principal Deputy Gen. Counsel, U.S. Dep't of Def., to The Honorable John W. Warner, Chairman, Comm. on Armed Services, United States Senate (Apr. 7, 2005), *available at* http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf; Letter from Daniel J. Dell'Orto, Principal Deputy Gen. Counsel, U.S. Dep't of Def., to The Honorable Duncan Hunter, Chairman, Comm. on Armed Services, U.S. House of Representatives (Apr. 7, 2005), *available at* http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf; Memorandum from Colonel (COL) Michael J. Child, Exec. Chair, Joint Serv. Comm. on Military Justice, to Office of General Counsel, DoD, ATTN: Mr. Robert E. Reed (Feb. 18, 2005), *available at* http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf; Letter from Colonel Mark W. Harvey, Chair, Subcomm. to the Joint Serv. Comm., to Chair, Joint Serv. Comm. (Jan. 13, 2005), *available at* http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf.
[118] DoDD 5500.17, *supra* note 109, encl. 2, para. E2.3.

As was the case with Senator Ervin asking for Chief Judge Quinn's input in 1960,[119] Congress has reversed the flow of UCMJ recommendations by seeking, rather than receiving, information from the JSC. For example, the JSC satisfied a congressional requirement, pursuant to the 2005 NDAA, for DoD to provide

> a report for Congress with the objective of determining what changes are required to improve the ability of the military justice system to address issues relating to sexual assault and to conform the Uniform Code of Military Justice and the Manual for Courts-Martial more closely to other Federal laws and regulations that address such issues.[120]

In addition to or in conjunction with the JSC, such reports are often produced by ad hoc review panels. Fortunately for those looking to better understand UCMJ reform, numerous ad hoc review panels have published their findings, which typically demonstrate an inward-focused analytical approach.

3. Ad Hoc Review Panels

Numerous ad hoc review panels have studied the military justice system. Each has had a different sponsor, purpose, and methodology. Some of the reviews have examined a particular issue, such as sexual misconduct or the ability of the military justice system to function in a deployed environment, while others are more holistic in purpose. The simple fact that so many ad hoc review panels have been formed in recent years could be attributed to the Code Committee's refusal to recommend UCMJ reform and the JSC's relatively sheltered nature of conducting business. Regardless of the motivations for constituting each ad hoc review panel, an examination of a sampling of them demonstrates that to date, each has implemented a comfortable yet narrow-minded and legalistic method of UCMJ review.

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[119] 1962 CODE COMMITTEE REPORT, *supra* note 89, at 49–64.

[120] U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE §§ 3, 4 (Oct. 1, 2004–Sept.. 30, 2005) [hereinafter 2005 CODE COMMITTEE REPORT] (Report of The Judge Advocate General of the U.S. Army), *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY05AnnualReport.pdf; National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1920–1921 (2004).

i. Powell Report

One of the first purportedly comprehensive reviews, commonly known as the "*Powell Report*," was finalized in 1960.[121] The *Powell Report* perceived three potential problems with the UCMJ that required study. First, it examined "the effectiveness of the Uniform Code of Military Justice and its bearing on good order and discipline within the Army."[122] Second, it sought "[t]o analyze any inequities or injustices that accrue to the Government or to individuals from the application of the Code and judicial decisions stemming therefrom."[123] Third, it looked "[t]o inquire into improvements that should be made in the Code by legislation or otherwise."[124]

The methodology for collecting data against which to evaluate these potential problems and upon which to recommend solutions was focused inwardly on DoD. Despite the stated assumption that "[a]n effective system of military justice should promote the confidence of military personnel and the general public in the overall fairness of the system," the only surveys conducted were of military personnel, not people outside of the DoD establishment.[125] This disconnect can also be seen in some of the other assumptions under which this review operated.

A prime example of an operating assumption that clouded the *Powell Report*'s findings was its assumption that commanders must play a central role in the military justice system. The *Powell Report* states, "If we start with the truism, 'discipline is a function of command', we are at once at the core of one of the chief reasons for misunderstanding between civilians and servicemen concerning the needs and requirements of an effective system of military justice."[126] The *Powell Report* then

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[121] COMM. ON THE UNIFORM CODE OF MILITARY JUSTICE GOOD ORDER AND DISCIPLINE IN THE ARMY, REPORT TO HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY (Jan. 18, 1960) [hereinafter POWELL REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Powell_report.pdf.
[122] *Id.* at 1.
[123] *Id.*
[124] *Id.*
[125] *Id.* at 2–3 (describing the methodology, which included an extensive survey of a variety of military officers, yet no consideration of input from outside of the military).
[126] *Id.* at 11.

ably explains the exact justification that military leaders give today for command control of the military justice system, stating,

> Development of [discipline] among Soldiers is a command responsibility and a necessity. . . . Correction and discipline are command responsibilities in the broadest sense, but some types of corrective action are so severe that under time honored principles they are not entrusted solely to the discretion of a commander. At some point he must bring into play the judicial processes. . . . When the judicial process has concluded, a further opportunity is given the commander to exert his influence and leadership toward the establishment of discipline.[127]

The problem is that civilians have never viewed the phrase "discipline is a command function" as the same type of truism that military members have viewed it. During the 1949 congressional floor debate on the UCMJ, Representative Overton Brooks stated,

> Perhaps the most troublesome question which we have considered is the question of command control. . . . Able and sincere witnesses urged our committee to remove the authority to convene courts martial from command and place that authority in judge advocates or legal officers, or at least in a superior command.[128]

Similarly, in 2014, a *New York Times* editorial following the sexual assault-related court-martial of Brigadier General Jeffrey Sinclair, argued,

> The episode offers a textbook example of justice gone awry, providing yet another reason to overhaul the existing military justice system, which gives commanding officers built-in conflicts of interest—rather than trained and independent military prosecutors

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[127] *Id.* at 11–12.

[128] 1949 DEB., *supra* note 50. In 1991, Professor Schlueter wisely stated, "The process of scrutinizing the role of the commander must continue." Schlueter, *supra* note 30, at 23.

> outside the chain of command—the power to decide which sexual assault cases to try.[129]

Accordingly, the *Powell Report* did not properly examine the validity of this underlying assumption, thereby deepening the potential mistrust of the UCMJ. Other ad hoc reports have fallen prey to the same fallacies.

ii. Westmoreland Committee

In 1971, General William Westmoreland, Chief of Staff, U.S. Army, convened "The Committee for the Evaluation of the Effectiveness of the Administration of Military Justice."[130] Unlike the Powell Report, this review was more narrowly focused: "to assess the role of the administration of military justice as it pertains to the maintenance of morale and discipline at the small unit level, identifying problem areas encountered by the small unit commander, and suggest means of resolving or diminishing them."[131] This constrained, inward focus never once overtly considered congressional or public perception. Additionally, the "Method of Analysis" again focused completely on military personnel.[132]

In fact, the Westmoreland Committee was patently hostile to civilian input and thought even when it came from some of the most respected and revered legal minds in the world. In boldly and disrespectfully criticizing the Supreme Court's decision in *O'Callahan v. Parker*,[133] the Westmoreland Committee stated: "Comments such as these [referring to the majority opinion in *O'Callahan v. Parker*] indicate a lack of appreciation not only for the system of military justice but also for the

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[129] Editorial Board, *A Broken Military Justice System*, N.Y. TIMES, Mar. 18, 2014, at A22, *available at* http://www.nytimes.com/2014/03/18/opinion/a-broken-military-justice-system.html?_r=1.

[130] THE COMM. FOR EVALUATION OF THE EFFECTIVENESS OF THE ADMIN. OF MILITARY JUSTICE, REPORT TO GENERAL WILLIAM C. WESTMORELAND, CHIEF OF STAFF, U.S. ARMY (June 1, 1971) [hereinafter WESTMORELAND COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Report_General-Westmoreland.pdf. Interestingly, then-Major General Westmoreland, as Commander of the 101st Airborne Division, was a member of the 1960 Powell Committee. POWELL REPORT, *supra* note 121, at iii.

[131] WESTMORELAND COMMITTEE REPORT, *supra* note 130, at 3.

[132] *Id.* at 5.

[133] *See supra* notes 51–52 (briefly discussing *O'Callahan v. Parker*).

true meaning of the term 'discipline.'"[134] The Westmoreland Committee then cites the Powell Committee's discussion about the role of commanders to justify its position about discipline and the UCMJ.[135] After disrespecting the Supreme Court, the Westmoreland Committee simply stated, "To add to [the Powell Committee] would be a mere superfluity."[136]

The Westmoreland Committee made numerous recommendations for reform that were ultimately implemented, such as a "massive concerted effort on education and training in military justice. . . ."[137] The problem, nevertheless, was not the recommendations but rather how the committee arrived at them. While later reviews would not overtly exhibit disgust and contempt for the Supreme Court, they would continue the same inward orientation.

iii. Wartime Legislation Team (WALT)

In 1982, Major General Hugh J. Clausen, The Judge Advocate General, U.S. Army, commissioned WALT "to evaluate the military justice system and to make recommendations for improving its effectiveness in wartime."[138] Its main goal was to "ensure that the military justice system in an armed conflict would be able to function fairly and efficiently, without unduly burdening commanders, or unnecessarily utilizing resources."[139] It therefore decided to eschew the "thought-provoking concepts" that have arisen in recent years, such as "centralizing referral of cases in legal services agencies."[140]

The WALT's research methodology was, as was the case with the Westmoreland Committee, almost entirely military-focused. Most of the findings were based on historical analysis, interviews of military personnel, and data from a questionnaire provided to select current and

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[134] WESTMORELAND COMMITTEE REPORT, *supra* note 130, at 7.
[135] *Id.* at 7–8; *see supra* notes 126–127 and accompanying text.
[136] WESTMORELAND COMMITTEE REPORT, *supra* note 130, at 8.
[137] *Id.* at 56–59.
[138] Lieutenant Colonel E.A. Gates & Major Gary V. Casida, *Report to the Judge Advocate General by the Wartime Legislation Team*, 104 MIL. L. REV. 139, 141 (1984).
[139] *Id.*
[140] *Id.* at 142 (indicating that the commander's role in referring cases was yet again in question).

former military members.[141] As was also the case with prior reviews, the findings and recommendations were oriented towards minor, experience-based frustrations and issues, such as jurisdiction over civilians, non-judicial punishment, ministerial and procedural concerns, investigation of cases, and appellate review.[142] Although such modifications are critical to an effective UCMJ, subsequent reviews show that this approach is not enough.

iv. Process Action Team Joint Council For Sexual Misconduct Initiatives (PAT)

In 2000, Secretary of the Army Louis Caldera "established a multidisciplinary Process Action Team (PAT) Joint Council for Sexual Misconduct Initiatives to recommend improvements for investigating and prosecuting sexual offenses and for providing services to sexual offense victims."[143] Tellingly, this diverse group of "military and civilian experts from a variety of fields" was assembled "[a]t the request of Senator Paul Sarbanes," not at the request of one of the aforementioned institutions for UCMJ reform.[144] Many of PAT's recommendations, such as increased training and better victim care, were later implemented in some fashion, but none of the recommendations appear to have involved substantive UCMJ reform.[145] Additionally, this multi-disciplinary review of the UCMJ and military justice system, albeit an issue-focused review, would not be copied for over a decade.

v. 2004 Army Committee

In 2004, Major General Thomas Romig, The Judge Advocate General, U.S. Army, ordered senior Army judge advocates "to take a fresh look at the Uniform Code, the Manual for Courts-Martial, and military justice regulations and practices and to determine how the military justice system might be transformed to better serve the needs of

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141 *Id.* at 144–46.
142 *See id.* at 146–69.
143 U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE §§ 3, 4 (Oct. 1, 2000–Sept. 30, 2000) [hereinafter 2000 CODE COMMITTEE REPORT], *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY00Rept.htm (Report of The Judge Advocate General of the U.S. Army).
144 *Id.*
145 *Id.*

soldiers and commanders in a transformed Army."[146] The methodology that this committee, known as the Military Justice Review Committee, or "2004 Army Committee," used to accomplish this broad mission is all too familiar.

Yet again, it appears that this review panel did not incorporate a multi-disciplinary approach that included a variety of non-military perspectives. To be sure, in describing its "Background and Methodology," the 2004 Army Committee stated, "While the fairness of our system is paramount, the perception of fairness in the eyes of the public, Congress, and the military itself, was also a critical consideration."[147] Nonetheless, it does not appear that substantial public input was sought. It seems that the committee believed that "input from military justice practitioners from across the Army" would be adequate.[148] The 2004 Army Committee "read scholarly articles, studied court decisions, and reviewed proposals previously submitted to the Joint Service Committee."[149] They also looked at procedure rules for federal civilian courts and interviewed military justice practitioners.[150]

This review panel addressed many critical issues that are still debated today. Although the 2004 Army Committee made a variety of recommendations for minor modifications to procedure and punitive articles, to include updating "sexual assault statutes,"[151] it reaffirmed the central role of commanders, stating, "The commander must retain a high level of control over what charges a servicemember faces, how those charges are disposed of, and how and why clemency must be granted."[152] In so doing, the 2004 Army Committee's logic appears to be subject to the same tautologous formula that a commander's central role in enforcing discipline and his or her central role in the UCMJ are one and the same.[153]

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[146] ARMY MILITARY JUSTICE REVIEW COMM., MILITARY JUSTICE REVIEW EXECUTIVE SUMMARY 1 (2004), *available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140312_ROC/Materials/02_Army_MilJusticeReview2004_ExecutiveSummary.pdf.
[147] *Id.* at 2.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.* at 8.
[152] *Id.* at 3.
[153] *Id.* at 2.

While focusing internally on history, case law, and expertise is critical to a properly functioning UCMJ, it is not sufficient, as the best place to understand how to secure "fairness in the eyes of the public"[154] is from members of the public itself. The most recent ad hoc review panels are evidence that a broader approach is necessary.

vi. Response Systems to Adult Sexual Crimes Panel and Military Justice Review Group

In 2013, Congress yet again directed a review of the UCMJ.[155] In the 2013 NDAA, Congress ordered the Secretary of Defense to "establish a panel to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses. . . ."[156] This review explicitly included an examination of the UCMJ.[157]

In addition to instituting reviews of its own concerns and potential legislative changes, Congress again indicated that the practice of soliciting input primarily from military justice experts was not sufficient. As was the case with the congressionally-requested PAT in 2000, the membership of this new panel, known as the Response Systems to Adult Sexual Crimes Panel,[158] includes both military and civilian experts from multifarious backgrounds.[159]

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[154] *Id.*

[155] In 2009, the Defense Task Force on Sexual Assault in the Military Services recommended SVC-type representation for victims and expressed concern that the 2007 version of Article 120, UCMJ was "cumbersome and confusing," and potentially unconstitutional. *See* DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVS., REPORT OF THE DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES ES-5 69–70 (Dec. 2009), *available at* http://www.ncdsv.org/images/SAPR_DTFSAMS_Report_Dec_2009.pdf. The scope of this Task Force, however, was much broader than UCMJ reform, and it is therefore not included in this article as a separate ad hoc review.

[156] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112–213, § 576(a)(1), 127 Stat. 1758, *available at* http://responsesystemspanel.whs.mil/public/docs/FY13%20NDAA%20(Subtitle%20H,%20sec%20576).pdf.

[157] *Id.* The statute also directs a "review and assessment of judicial proceedings under the Uniform Code of Military Justice involving adult sexual assault and related offenses" since the 2012 NDAA. *Id.* § 576(a)(2).

[158] *Id*. § 576(b)(1)(A); *Home*, RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, http://responsesystemspanel.whs.mil/ (last visited May 14, 2014).

[159] For example, Ms. Mai Fernandez, the Executive Director of the National Center for

In October 2013, Secretary Hagel also created a panel known as the "Military Justice Review Group" to "conduct a comprehensive review of the Uniform Code of Military Justice (UCMJ) and the military justice system."[160] When discussing this new committee, Lieutenant Colonel J. Todd Breasseale, a DoD spokesman, confirmed the incomplete nature of the dozens of Code Committee, JSC, and ad hoc reviews by stating, "It's been over 30 years since the military code of justice was reviewed. It's simply time."[161] The Military Justice Review Group will consist of numerous military officials, but it will also be advised by a federal civilian appellate judge and former DoD General Counsel.[162] It will have 12 months to submit proposed UCMJ amendments, and another 6 months to submit non-statutory MCM amendments. It will study the entire UCMJ and military justice system, to include the manner in which sexual assaults are prosecuted.[163]

Yet again, though, these panels are reactive to congressional pressure. They are not proactive, internally-motivated, DoD-created institutions designed to properly shepherd the UCMJ and military justice system to greater fairness, efficiency, and effectiveness.[164] Senator Gillibrand is skeptical of the Military Justice Review Group, stating, "We can do review after review after review – and I have no doubt they are well-intentioned. But according to DOD's latest available numbers, 18 months is another estimated 39,000 cases of unwanted sexual contact that will occur."[165] How tolerant Congress will be for such reviews, particularly if the reviews are performed in the manner of dozens of prior

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Victims of Crime, is on the panel. Ms. Meg Garvin, Executive Director of the National Crime Victim Law Institute, is on the Panel's Victim Services Subcommittee. Ms. Joye Frost, Director of the Office for Victim's Counsel of the U.S. Department of Justice, is on the Panel's Role of the Commander Subcommittee. *Home*, RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, http://responsesystemspanel.whs.mil/ (last visited May 14, 2014) (follow "About" tab to find links to the Panel member biographies).

[160] Memorandum from Sec'y of Defense Chuck Hagel for Sec'ys of the Military Dep'ts et al., Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013) [hereinafter Hagel Memorandum], *available at* http://www.caaflog.com/wp-content/uploads/SECDEF-Memo-Comprehensive-Review-of-UCMJ.pdf.

[161] Timothy M. Phelps, *Pentagon Plans Major Review of the Military Justice System*, L.A. TIMES, April 15, 2014, http://www.latimes.com/nation/la-na-military-justice-20140416,0,2320223.story#axzz2zjgY68et.

[162] *Id.*

[163] *See* Hagel Memorandum, *supra* note 160.

[164] Phelps, *supra* note 161.

[165] *Id.*

annual and ad hoc reviews that failed to identify the sexual misconduct problem within the military as a challenge to the UCMJ, remains to be seen.

Accordingly, military leadership must supplement the method in which it reviews and recommends change to the UCMJ. While these ad hoc institutions are very good at recommending changes founded upon perceived suboptimal outcomes in individual cases or the frustrations of military justice practitioners, the perspectives of both Congress and the American public are missing from the current analytical method. The mere fact that Congress has repeatedly solicited rather than received information from the formal institutions for UCMJ reform indicates that those institutions are missing the mark. If military leaders want to better reform the UCMJ to ensure that it is fair and widely respected, the leaders must first understand the public's perceptions of it.

B. Public Calls for Change

Although many of the institutions outlined above include civilian representation, almost all of those civilians are either formally affiliated with the UCMJ or are experts in a particular field of study.[166] While the general public can be represented by such individuals, many citizens who are dissatisfied with the UCMJ may not have access to such institutions,[167] may not know about such institutions,[168] or may simply

[166] For example, the five judges of the U.S. Army Court of Appeals for the Armed Forces are technically civilians, but their entire practice centers around military law. The two civilians on the Code Committee are also required to be experts in "military justice or criminal law." *See supra* notes 83–84 and accompanying text.

[167] The Code Committee meetings are generally open to the public. Surprisingly, Major General (Ret.) Dunlap has lodged "a continuing objection to the Code Committee adjourning the meeting before all members could finish their comments." He also has criticized the summaries of the meeting, which included a mischaracterization of a civilian committee member's comment, "I wasn't able to finish my comments." Major General Dunlap advocates for independent verbatim transcription of Code Committee meetings. The civilian committee member was cut off despite the fact that the meeting was barely an hour old. Dunlap Letter, *supra* note 91, at 5.

[168] Salty Policy, Comment to *The Joint Service Committee on Military Justice (JSC)—Part I*, NIMJBLOG-CAAFLOG (June 23, 2012, 1:49 PM), http://www.caaflog.com/2012/06/19/the-joint-service-committee-on-military-justice-jsc-part-i/ ("No one is interested. At our public meeting last November to vet the current EO (MRE amendments), NOT ONE person showed up. At the Annual Code meeting, NOT ONE member of the public showed up. The JSC could probably be more transparent, but it seems to me that it would matter little. Only perception, or notions of perception, might

prefer to raise their issues directly to a member of Congress.[169] To date, the formal institutions outlined above have rarely addressed the public calls for change that members of Congress likely see on a regular basis.

A study of both media reports and congressional hearings demonstrates that the American public is most likely to voice displeasure in one of two ways. The first and most visible is voicing concern through media outlets. While articles raising concerns with the UCMJ are present in media of all forms, to include television,[170] radio,[171] internet,[172] and newsprint,[173] this article uses a comprehensive study of newsprint articles from the *Washington Post* and *New York Times* to demonstrate that the media has repeatedly voiced the public's concerns about the UCMJ.[174] The second vehicle through which the public voices displeasure is through members of Congress. This displeasure will sometimes result in congressional hearings[175] but may also be evident through formal inquiries,[176] requests for assistance,[177] or media stories.[178]

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be affected.").

[169] *See, e.g.*, David McCumber, *Military Sex Assault Survivors Speak Out for Gillibrand Reform Bill*, ALBANY TIMES UNION, Feb. 6, 2014, http://www.timesunion.com/news/article/Military-sex-assault-survivors-speak-out-for-5212624.php (describing a joint news conference with Senator Gillibrand and military sexual assault victims).

[170] *See, e.g.*, *Nightly News: Army's Top Sexual Assault Lawyer Suspended for Sexual Assault Claim* (NBC television broadcast Mar. 6, 2014), *available at* http://www.nbcnews.com/video/nightly-news/54599385#54599385.

[171] *See, e.g.*, Marisa Peñaloza & Quil Lawrence, *Morning Edition: For Veterans, 'Bad Paper' is a Catch-22* (NPR radio broadcast Dec. 10, 2013), *available at* http://www.npr.org/2013/12/10/249739845/for-veterans-bad-paper-is-a-catch-22-for-treatment.

[172] *See, e.g.*, *Statement, Protect Our Defenders, Protect Our Defenders Calls UCMJ Proposed Article 60 Reform Insufficient*, PROTECT OUR DEFENDERS (Apr. 9, 2013), http://www.protectourdefenders.com/statement-protect-our-defenders-calls-ucmj-proposed-article-60-reform-insufficient/ (last visited May 18, 2014).

[173] *See, e.g.*, David McCumber, *Political Victory Despite Demise of Bill; Gillibrand Took On Military Sex Crimes*, SAN ANTONIO EXPRESS-NEWS, Mar. 10, 2014, at 1.

[174] This article uses the *New York Times* and *Washington Post* as a primary representative data set because of the enduring nature of the printed medium, the ease of accessibility to archived articles, and their large readership.

[175] *See, e.g.*, 2013 *Hearing*, *supra* note 10.

[176] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1920–1921.

[177] *See supra* Part III.A.3.iv.

[178] *See*, *e.g.*, *Newshour: Gillibrand Calls to Remove Sexual Assault Cases from Chain of Command* (PBS television broadcast July 30, 2013), *available at* http://www.pbs.org/newshour/bb/politics-july-dec13-military_07-30/.

1. Through the Media

From before World War II through today, news media reports have outlined the public's concerns about the UCMJ. As famed playwright Arthur Miller stated in 1961, "A good newspaper, I suppose, is a nation talking to itself."[179] Surprisingly to many, the nation has had much internal dialogue about the UCMJ and military justice system. A small sampling of media criticisms demonstrates that calls for examination of or change to the UCMJ do not originate solely from the institutions designed to recommend such changes.

As an initial matter, print media criticism of the Articles of War likely contributed to the UCMJ's creation. Following World War II, many news articles were critical of the Articles of War and how commanders were able to squash due process rights. For example, a *Washington Post* article from August 14, 1946, addressed concerns about the speed with which soldiers in pretrial confinement were brought to trial. It stated, "Neither the seriousness of contemplated charges nor the difficulty of investigation justifies the denial of fundamental rights due every American citizen."[180] Another article from January 3, 1949 minces no words in asserting,

> The trouble with military justice, as it is viewed by many civilians, is that it has been more concerned with the military aspects of offenses than with dispassionate justice. The term "military justice" is in itself a contradiction, since true justice admits of no qualification. Nevertheless, the nature of the military service requires that some concession be made in the legal system to the needs of discipline.[181]

During the Vietnam War, the American public's continued concern about the UCMJ and military justice system's sensitivity to command influence and due process were also expressed through news media. The preferral of court-martial charges against First Lieutenant William L. Calley Jr. prompted a *Washington Post* article, which argued "the chief complaint made about military justice" is "the role of the commanding

[179] OXFORD DICTIONARY OF QUOTATIONS BY SUBJECT 336 (2010) (quoting Arthur Miller, in *Observer* (Nov. 26, 1961)).
[180] *Trial Delay*, WASH. POST, Aug. 14, 1946, at 6.
[181] *Military Justice*, WASH. POST, Jan. 3, 1949, at 6.

officer."[182] Law professors quoted in the article praise the procedural rights that accused servicemembers enjoy, but they also stated, "To be sure, weaknesses still persist in the military justice system. Command influence, for example, continues to be a problem."[183] In 1971, the *Washington Post* reported on a case in which the 7th Army commander, General Michael S. Davison, dismissed charges against 29 black soldiers charged with disobedience.[184] The article used interviews and statistical evidence to set forth the widespread concerns that the military justice system did not treat black soldiers fairly.[185] General Davison summed up his perception of these concerns, stating, "[A black man] feels it's a white man's system. He sees very few black lawyers around to defend him. He sees the Uniform Code of Military Justice as an example of laws written by white men to serve the white system in language that only whites understand."[186]

The public's use of the media to voice concern with the UCMJ and military justice system saw a dramatic uptick during the 1990s. Unlike prior decades in which the due process rights of accused servicemembers was the primary concern, the focus in the 1990s switched to the issues of sexual assault, sexual harassment, and the homosexual-conduct policy. In 1992, a *Washington Post* article entitled *In Military Sex Harassment Cases, His Word Often Outranks Hers* outlines three stories in which sexual assault and harassment victims complained about the military justice system. The story stated, "The circumstances differ, but each case contains a common thread. All three women described themselves as victims twice over: first of individual male colleagues, second of a military justice system that they and many other women in uniform believe is heavily weighted against them."[187]

A 1994 *Washington Post* article entitled *Military Injustice* also indicated public displeasure with the UCMJ and military justice system. After first describing a case in which an Air Force officer was sentenced to six months confinement for taking expired prescription medicine, the

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182 Richard Homan, *Army Seeking to Improve Its Court-Martial Image*, WASH. POST, Dec. 26, 1969, at A9.
183 *Id.* (quoting Grant S. Nelson & James E. Westbrook, law professors at the University of Missouri).
184 John M. Goshko, *Black Troops Distrust U.S. Military Justice*, WASH. POST, Oct. 31, 1971, at A1, A3.
185 *Id.*
186 *Id.* at A3.
187 Lancaster, *supra* note 1313.

article stated, "Many families who have had a taste of the system charge that it gives military commanders czar-like power." The article also cited Carolyn Dock, executive director of a group named "Members Opposed to the Maltreatment of Service Members," who stated that each day, up to six servicemember families relate "miscarriages of justice under military law" to her. The article finally quoted a retired U.S. Navy judge, who stated, "The problem is that the system is susceptible to abuse. I sat on a number of cases where [the commander's influence] was painfully obvious to me . . . improper command influence is possible and occurs with disturbing frequency when the commander gets interested in a case."[188]

After an eight-month investigation, a 1995 *Dayton Daily News* article reported that the newspaper "found that hundreds of people accused of rape, child molestation and other sexual assaults were allowed to resign and avoid trial, sent to misdemeanor courts or to administrative proceedings offering no possibility of prison."[189] This indicator is eerily prophetic given the mandatory minimums and sentencing rules enacted in the 2014 NDAA.[190]

A 1998 *New York Times* op-ed article again focused on sexual assault and sexual harassment, disparate punishment among ranks, and command influence, and it explicitly advocated for UCMJ reform. Author Joseph Finder argued,

> All these cases—and their resulting unfairness—can be traced to one larger problem. The Uniform Code of Military Justice, last overhauled in 1983, is outdated. In that time, many more women have joined the military, and yet the code doesn't even mention sexual harassment. Military prosecutors must improvise to fit sexual offenses into pre-existing rules.[191]

The news media's coverage of public concerns about the UCMJ and military justice system has continued. A March 2014 *Washington Post*

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[188] Anderson & Binstein, *supra* note 28.

[189] Russell Carollo, *Navy to Deny Public News of Courts-Martial*, DAYTON DAILY NEWS, Oct. 22, 1995, at 1A, *available at* http://nl.newsbank.com/nl-search/we/archives?p_action=doc&p_docid=0F51AECBA3FA23E8&p_docnum=1.

[190] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1705, 127 Stat. 959–60.

[191] Joseph Finder, Op-Ed., *The Army on Trial*, N.Y. TIMES, Feb. 17, 1998, at A19.

editorial discussing the intersection of the UCMJ and sexual assault stated,

> No one, as Ms. Gillibrand argued in support of her legislation, wants to see an innocent soldier going to jail or [a] . . . perpetrator going free. Sexual assault cases—be they in the military or civilian world—are often difficult to investigate and try. Lack of public confidence in how justice is dispensed compounds the problem, making victims fearful to come forward and others reluctant to cooperate. Congress needs to revisit this issue.[192]

As the next section demonstrates, Congress has often listened to the public and news media, and it has reflected the public's concerns in a variety of different ways.

2. Through Congress

Despite the formal institutions for UCMJ reform outlined above, Congress has frequently cited public criticism as the reason for initiating review of, and changes to, the UCMJ. For the entire existence of the UCMJ, Congress has held hearings, directed reviews, and changed statutes almost entirely as a response to public opinion, which, as shown above, is frequently reflected in media reports. A sample of such instances shows the ever-present power that public concern has over congressional opinion and action.

In 1946, the House Military Affairs Subcommittee reported "widespread miscarriages of justice" under the Articles of War.[193] The report (1946 Report) was based on a congressional investigation that, according to Representative Carl T. Durham, was undertaken because of "wide-spread complaints against both Army and Navy court martial proceedings."[194] The Army overtly resisted and disputed the results of

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[192] Editorial, *Justice, Maybe*, WASH. POST, Mar. 25, 2014, at A14.

[193] United Press, *Army Asserts Report on Courts-Martial Is 'Grossly Unfair'*, WASH. POST, Apr. 21, 1946, at M1; *see* H. COMM. ON MILITARY AFFAIRS, 79TH CONG., REP. ON H. RES. 20, A RESOLUTION AUTHORIZING THE COMMITTEE ON MILITARY AFFAIRS TO STUDY THE PROGRESS OF THE NATIONAL WAR EFFORT (Comm. Print 1946) [hereinafter 1946 REPORT].

[194] United Press, *supra* note 193, at M4.

the investigation before the final report was issued, but despite these objections, the report was finalized in June 1946.[195] These findings laid a portion of the foundation for the Elston Act of 1948 and the UCMJ's passage in 1950.[196]

Public opinion also motivated UCMJ reform-related congressional hearings during the Vietnam War. In 1962, Senator Sam Ervin initiated congressional studies and hearings about "the protection of the constitutional rights of service personnel" because he perceived "an enhanced recognition of the constitutional rights of the serviceman . . . ."[197] Senator Ervin also believed that an increase in the military's size "signifies that the rights of service personnel will have great importance to an ever-growing number of American citizens."[198] Based on these initial concerns, congressional discussion, debate, and hearings ensued for the following six years, ultimately leading to the passage of the Military Justice Act of 1968.[199]

Congressional concerns about the military justice system's ability to handle sexual assault cases dates as far back as the early 1990s and the Tailhook scandal.[200] In 1992, after the *Washington Post* reported that many sexual assault victims believed that the military justice system victimized them a second time and is "heavily weighted against them,"[201] military leaders "scrambled . . . to reassure Congress and the public that it takes these matters seriously, and there is ample evidence that, at least at senior levels, 'We get it,' as acting Navy Secretary Sean C. O'Keefe put it recently."[202] Military leaders even stated that they were "considering revisions to the Uniform Code of Military Justice that would tighten definitions of sexual harassment and would modernize military rape laws."[203]

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[195] 1946 REPORT, *supra* note 193.
[196] Military Selective Service Act of 1948, Pub. L. No. 80-759, §§ 201-46, 62 Stat. 604, 627–44 (1948); UCMJ (1951).
[197] 1962 CODE COMMITTEE REPORT, *supra* note 89, at 50.
[198] *Id.*
[199] *See, e.g.*, 1962 *Hearings*, *supra* note 54; 1963 *Hearings*, *supra* note 56; 1966 *Hearings*, *supra* note 58; Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).
[200] For a detailed discussion of the 1991 Tailhook scandal, see WILLIAM H. MCMICHAEL, THE MOTHER OF ALL HOOKS: THE STORY OF THE U.S. NAVY'S TAILHOOK SCANDAL (1997).
[201] Lancaster, *supra* note 13.
[202] *Id.*
[203] *Id.*

Congress's subsequent actions, however, indicate that military leaders did not "get it" to a degree that satisfied Congress. As discussed above, PAT, which formed in 2000, was assembled "[a]t the request of Senator Paul Sarbanes."[204] Additionally, in 2004, a member of the House of Representatives again took action that indicated a dissatisfaction with how the UCMJ handles sexual assault cases. A 2004 *Washington Post* article states,

> Although the Pentagon said it has initiated reforms, House Democrats led by Rep. Loretta Sanchez (Calif.) have been pushing for an update of sexual assault provisions in the Uniform Code of Military Justice, enacted by Congress in 1950. Their aim is to bring the code in line with a law adopted at the federal level and by 38 states, which expands the definition of sexual abuse and gives added protection for victims' rights.[205]

Additionally, Representative Ellen Tauscher also requested an oversight hearing,[206] and Representative Louise Slaughter, Co-Chairwoman of the Congressional Caucus for Women's Issues, stated,

> [DoD] report[s] that they don't have this and that in place, but they never create things. Not only have they not come to terms with simple definitions, they have not come to terms with what to do, period. This calls out for legislation and that is what we have to do.[207]

The amendments to Article 120, UCMJ, that took effect in October, 2007 can be attributed to public interest expressed through Congress. The 2005 NDAA ordered the Secretary of Defense to

> review the Uniform Code of Military Justice and the Manual for Courts-Martial with the objective of determining what changes are required to improve the

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[204] *See* 2000 CODE COMMITTEE REPORT, *supra* note 143, §§ 3, 4 (Report of The Judge Advocate General of the U.S. Army).
[205] R. Jeffrey Smith, *Sexual Assaults In Army On Rise; Report Blames Poor Oversight and Training*, WASH. POST, June 3, 2004, at A1.
[206] *Id.*
[207] Lynette Clemetson, *Report Calls for Accountability and Services to Deal With Sexual Assaults in Military*, N.Y. TIMES, May 14, 2004, at A23.

> ability of the military justice system to address issues relating to sexual assault and to conform the Uniform Code of Military Justice and Manual for Courts-Martial more closely to other Federal laws and regulations that address such issues.[208]

The JSC formed a subcommittee to complete this mission.[209] Despite over a decade's worth of congressional concern about how the UCMJ handles sexual assault, to include the specific mandate in the 2005 NDAA, a JSC subcommittee recommended "no change," arguing, "The subcommittee members were unable to identify any sexual conduct (that the military had an interest in prosecuting) that cannot be prosecuted under the current UCMJ and MCM."[210]

Contrary to the JSC subcommittee's recommendation, the 2006 NDAA enacted a completely new Article 120, UCMJ, to handle sexual assault cases in the military.[211] This new law was not only "cumbersome and confusing,"[212] but a major tenet of the law, which was to shift the burden of proving consent to the accused, was found to be unconstitutional.[213] While some military leaders point to unsolicited "rapid changes" as potentially troublesome,[214] Congress's willingness to enact them despite the JSC's explicit recommendations against doing so evinces a troubling disconnect between the UCMJ's formal institutions

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[208] National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571(a), 118 Stat. 1920–21.

[209] Patrick D. Pflaum, *The Continuous Evolution of Military Sexual Assault Law*, A.B.A. L. & TRENDS PRACTICE AREA NEWSLETTER, vol. 7, no. 2 (Winter 2011) (quoting Letter from Colonel Mark W. Harvey, *supra* note 117). The JSC suggested several changes, which are outlined, but not discussed in depth, in letters from the DoD Principal Deputy General Counsel to the HASC and SASC. Letter from Daniel J. Dell'Orto, to The Honorable John W. Warner, *supra* note 117; Letter from Daniel J. Dell'Orto, to The Honorable Duncan Hunter, *supra* note 117.

[210] Letter from Colonel Mark W. Harvey, *supra* note 117. The JSC ultimately included six options for UCMJ reform. "Option 5" of those six options was "the basis for the new legislation." Lieutenant Colonel Mark L. Johnson, *Forks in the Road: Recent Developments in Substantive Criminal Law*, ARMY LAW., June 2006, at 23, 27.

[211] National Defense Authorization Act for Fiscal Year 2006 (NDAA), Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256–63 (codified at 10 U.S.C. § 920 (2006)). For a good summary of the history of this legislation, see Johnson, *supra* note 210, at 26–29.

[212] DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES, *supra* note 155, at ES-5.

[213] United States v. Prather, 69 M.J. 338, 340 (C.A.A.F. 2011).

[214] Gross Statement, *supra* note 11, at 2.

for change and other voices to which Congress often listens and upon whose advice Congress has demonstrated a willingness to act.

IV. A Congressional Action Framework

With the 2014 NDAA, Congress passed a major reform of the UCMJ for the first time since the Military Justice Act of 1968. Unlike the Military Justice Act of 1968, the Code Committee and DoD were not a driving force for that change. Using the medical analogy, if these leaders, the "expert physicians," were prescribing the conventionally acceptable medicine, why did their patient—the UCMJ—get so sick and need major surgery, at least in the eyes of the Congress? Unfortunately, military leaders did not listen to the advice of others that the UCMJ was sick. Military leaders also failed to remember that Congress determines both whether a disease exists and when that disease has progressed to a point where it must prescribe powerful drugs.

Since Congress is a political institution whose members are elected by the American voters, an objectively perfect military justice system is subject to change if Congress and the American public do not perceive it to be effective. A major problem with the UCMJ is whatever Congress says it is. The standard is subjective. Congress has demonstrated that it will not hesitate to exercise its constitutional authority to reform the UCMJ, even if military leaders believe that the UCMJ is adequately serving its stated purposes.[215] The failure of institutions such as the Code Committee, JSC, and the many ad hoc review panels to factor in the outward appearance of the UCMJ when recommending reforms likely explains why Congress and the American public, rather than DoD, has been the driving force behind the reforms in the 2014 NDAA.

This article focuses on major problems with the UCMJ and major reforms to cure those problems. Military leaders could also use this framework "off-label,"[216] borrowing a medical term, to inform them

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[215] While the purpose of the UCMJ is not set forth in statutory law, the Preamble to the Rules for Court-Martial states, "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." MCM, *supra* note 26, pt. I, ¶ 3.

[216] "Off-label" use of medicine means that "it is being used in a manner not specified in the [Federal Drug Administration's] packaging label, or insert." Kelli Miller, *Off-Label Drug Use: What You Need to Know*, WEB MD, http://www.webmd.com/a-to-z-

when an issue might present a minor change to the UCMJ. Typically, minor changes can be fixed by the approaches to reform already in place.[217]

In every case, understanding the picture of the UCMJ that Congress sees can help military leaders better identify both actual and perceived flaws with the UCMJ. What motivates Congress to make unsolicited major UCMJ reform is ripe for study, and luckily, a detailed understanding of politics, psychology, and law is not required. This article employs a comparative, epidemiological analysis of multiple quantitative and qualitative inputs to identify six variables that are typically present when Congress makes unsolicited UCMJ reform.[218]

The simultaneous presence of six different, yet interrelated, variables appear to be predictive of what constitutes a major disease with the UCMJ that, if left untreated, will lead to unsolicited major UCMJ reform. The six variables are: (1) a large victim group; (2) victim links with a well-established advocacy institution; (3) media coverage; (4) criticism that is contemporaneous with or immediately following a protracted conflict; (5) prolonged congressional attention and advocacy; and (6) a strategic case. Despite decades of effort to identify specific flaws with the UCMJ's punitive articles,[219] when it comes to major changes, Congress does not appear concerned with objective analyses of whether the UCMJ's rules serve the stated purposes. This makes sense given that Congress literally makes the rules and determines the objectives for the UCMJ, and members of Congress are not required to explain their beliefs or motives when they act. Military leaders must understand these six variables in order to better understand what might constitute a problem with the UCMJ, as well as when Congress may take unsolicited action.

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guides/features/off-label-drug-use-what-you-need-to-know (last visited May 12, 2014).

[217] *See supra* Part III.A.

[218] Dr. John Snow, a British physician, is widely considered the founder of modern epidemiology because of his work on cholera. Even though medical science did not yet understand how microbes caused disease, Dr. Snow, through a comparative analysis of a variety of available evidence, was able to convincingly prove that tainted water was the cause for the spread of cholera. By studying the patterns of historical and newly-contracted cases of cholera, Dr. Snow was able to pinpoint the primary source of the cholera to a single water pump on London's Broad Street. SANDRA HEMPEL, THE STRANGE CASE OF THE BROAD STREET PUMP (2007). This article employs a similar methodology by comparing available historical and newly-emerging evidence to identify critical variables, even if the underlying causes of those variables, like the microbial cause of cholera, are not yet completely understood.

[219] *See supra* Part III.A.

Each variable is explained in the subsections below. Comparing the cases in which Congress made unsolicited UCMJ changes helps to identify the six variables. Contrasting these cases with other times in which Congress did not change the UCMJ, when possible, helps to prove that these six variables are each relatively equal in power.

A. Large Victim Group

The first variable in this framework is that Congress must perceive a sufficiently large victim group. For the purposes of this part, "victim" is defined as a person who is actually, potentially, or perceived to be actually or potentially aggrieved because of flaws with the UCMJ. At first glance, one may think that this variable is subsumed within the category of "major reform," as any reform that affected a small victim group would be, almost by definition, a "minor reform." The size of a victim group and the magnitude of reform, however, are separate and distinct variables.

Legislatures often enact major reforms regardless of the size of the perceived victim group. For example, Florida's stand-your-ground statute, which was a major revision to the Florida law of self-defense and criminal procedure, was based on the Florida legislature's desire to protect a largely theoretical and unidentified group of people who, the legislature believed, needed the explicit right to not retreat if confronted by deadly force.[220] Florida legislators repeatedly pointed to and distorted one anecdotal case to justify the law's passage.[221] Another example is the reform of eyewitness identification statutes. North Carolina's Eyewitness Identification Reform Act sets forth suspect lineup

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[220] Florida's stand-your-ground statute is found at FLA. STAT. § 776.013(3) (2013).

[221] *See* Ben Montgomery, *Florida's 'Stand Your Ground Law' Was Born of 2004 Case, But Story Has Been Distorted*, TAMPA BAY TIMES, Apr. 14, 2012, http://www.tampabay.com/news/publicsafety/floridas-stand-your-ground-law-was-born-of-2004-case-but-story-has-been/1225164. For a good discussion of additional data used to justify and refute stand-your-ground statutes, see Andrew Jay McClurg, *Firearms Policy and the Black Community: Rejecting the "Wouldn't You Want A Gun If Attacked?" Argument*, 45 CONN. L. REV. 1773, 1790–98 (2013). While flawed studies may inflate the number of perceived victims who would benefit from stand-your-ground statutes, such inflated numbers are controversial. *Id.* In the first roughly seven years of the law's existence, it was successfully invoked 74 times. *See* Ben Montgomery & Connie Humburg, *Shaky Ground*, TAMPA BAY TIMES, Mar. 23, 2012, at 1A.

identification procedures designed to prevent misidentifications.[222] The motivation for this law, in large measure, was the case of Ronald Cotton, who served over a decade in prison because of a rape victim's well-intentioned, but mistaken, identification of Ronald Cotton as the perpetrator.[223] This major reform to criminal investigations is designed to protect a relatively small, yet understandably vulnerable number of citizens.

While it is likely impossible to quantifiably and definitively determine what size of group creates a critical mass for major UCMJ reform, Congress has demonstrated that it is less likely to pass major UCMJ reform if only a small number of people are aggrieved. This is for two reasons. First and foremost, despite the numerous calls for change during the sixty-three year history of the UCMJ, Congress has never made a major change without a large victim group. Second, an issue that satisfied all the other variables of this framework for over twenty-two years never generated unsolicited UCMJ reform.

All three major UCMJ reforms were passed to protect a quantifiably large victim group. In 1950, the UCMJ's very creation was designed to protect individual servicemembers, a group that between 1945 and 1955 ranged in size from approximately 1,500,000 to approximately 12,000,000.[224] While not all servicemembers committed crimes during World War II, over 1.7 million courts-martial were tried during the war, resulting in over 100 executions and 45,000 confined servicemembers.[225] The Military Justice Act of 1968 was also designed to protect the due process rights of all servicemembers.[226] While the number of courts-martial was reduced with the advent of non-judicial punishment and administrative action,[227] 73,169 courts-martial were held between July 1,

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[222] N.C. GEN. STAT. 15A-284.52 (2007).

[223] The Ronald Cotton case is fascinating and has been turned into a *New York Times* best-seller. Ronald Cotton and Jennifer Thompson-Cannino, the rape victim who misidentified Ronald Cotton, are now close friends and tour the country discussing their case and the dynamics of misidentification. For a detailed account, see JENNIFER THOMPSON-CANNINO, RONALD COTTON, & ERIN TORNEO, PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION (2010).

[224] *Active Duty Military Personnel, 1940-2011,* http://www.infoplease.com/ipa/A0004598.html (last visited May 14, 2014) (quoting U.S. Department of Defense).

[225] *See supra* note 43 and accompanying text.

[226] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968); McCoy, *supra* note 61.

[227] UCMJ art. 15 (1951); 1962 *Hearings*, *supra* note 54, at 2 ("The unusual increase in the use of the administrative discharge since the code became a fixture has led to the

1964 and June 30, 1965.[228] By 1967, the last year for which Congress had court-martial data prior to passing the Military Justice Act of 1968, the number of courts-martial had increased to 84,764.[229] In the third major UCMJ reform, Congress passed the 2014 NDAA to protect victims of sexual misconduct. Estimates place the number of unwanted sexual contact victims at 34,200 for 2006, 19,300 for 2010, and 26,000 for 2012.[230] Senator Gillibrand posited that waiting 18 months for the Military Justice Review Group to conduct its comprehensive review of the UCMJ "is another estimated 39,000 cases of unwanted sexual contact."[231] Accordingly, each of the three major UCMJ reforms had tens of thousands of perceived victims.

Congress's long-time refusal to repeal the prohibition against consensual sodomy in Article 125, UCMJ, indicates that a large victim group is typically required for unsolicited statutory reform.[232] Although the repeal of a rarely enforced punitive article would typically be a minor change, making this an imperfect comparison, the repeal of the consensual sodomy provisions in Article 125 is unique, as it was interlaced with the large policy issue of homosexual service in the military. As such, the data is worthy of analysis.

Whether homosexual servicemembers, heterosexual servicemembers, or both are perceived as the victim group, the numbers

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suspicion that the services were resorting to that means of circumventing the requirements of the code."); *see* LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 134–35 (2010) (describing the proliferation of nonjudicial punishment and administrative actions).

[228] 1965 CODE COMMITTEE REPORT, *supra* note 90, at 7. In the Army, there were 43,456 courts-martial, with an average Army strength of 1,016,832 soldiers. *Id* at 25.

[229] 1967 CODE COMMITTEE REPORT, *supra* note 102, at 4. In the Army, there were 49,943 courts-martial, with an average Army strength of 1,430,000 soldiers. *Id.* In contrast, in 2013, the entire U.S. military tried 2,600 courts-martial. U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE (Oct. 1, 2012–Sept. 30, 2013), *available at* http://www.armfor.uscourts.gov/newcaaf/annual/
FY13AnnualReport.pdf (adding the total number of courts-martial for each service).

[230] U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 13 (2012), *available at* http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.n

[231] Phelps, *supra* note 161.

[232] UCMJ art. 125 (2012). The 2003 Supreme Court case of *Lawrence v. Texas* barred the prosecution of most acts of consensual sodomy. *See* Lawrence v. Texas, 539 U.S. 558 (2003). But the Congress did not repeal the Article 125, UCMJ statutory prohibition against consensual sodomy until December 2013. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1707, 127 Stat. 961.

of servicemembers prosecuted under Article 125 for consensual sodomy was very small. While yearly specific data for Article 125 cases is not available, "there were only four" prosecutions for heterosexual sodomy during Operation Desert Storm/Desert Shield, three of which involved consenting adults.[233] In 1992, there were 276 prosecutions military-wide prosecutions for sodomy-related offenses, although this data does not give specifics regarding the nature of the offenses charged.[234] Since the 2003 Supreme Court case of *Lawrence v. Texas*,[235] the number has fallen to almost nothing.[236] In other words, there were simply not enough victims, as all five other variables in this framework were present.

First, advocacy groups from every angle have been calling for the repeal of the laws against consensual sodomy for decades. Gay rights advocacy organizations have openly and continually campaigned against the law since at least 1993.[237] In 2001, the Cox Commission, a UCMJ review and reform effort by the National Institute on Military Justice,[238] stated, "The commission concurs . . . in recommending that consensual sodomy . . . be eliminated as separate offenses in the UCMJ and Manual for Courts-Martial."[239] A second Cox Commission iterated this recommendation in 2009.[240] The American Civil Liberties Union

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[233] Jeff Stein, *Gays in the Gulf; They Were Far Better Behaved Than the Straights*, WASH. POST, Nov. 22, 1992, at C1.

[234] Eric Schmitt, *Military's Zeal Decried in Sodomy Case*, N.Y. TIMES, June 21, 1993, at A15. This data does not distinguish whether the charge involved forcible or consensual sodomy, nor does it distinguish whether or not it was between homosexuals or heterosexuals. *Id.*

[235] *Lawrence*, 539 U.S. 558.

[236] This assertion is based on the author's professional experiences as a U.S. Army judge advocate since 2003 [hereinafter Professional Experiences].

[237] *See* Joyce Murdoch, *Laws Against Sodomy Survive in 24 States; As District Attempts Repeal, Maryland and Virginia Statutes Remain on the Books*, WASH. POST, Apr. 11, 1993, at A20; Servicemembers Legal Defense Network (SLDN), *Cox Commission Recommends Repeal of Military Sodomy Statute; Military Watchdog Group Hails Recommendation to Pentagon*, GAY & LESBIAN ARCHIVES OF THE PAC. NW., http://www.glapn.org/sodomylaws/usa/military/milnewsm08.htm (last visited May 14, 2014).

[238] COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (THE COX COMMISSION), REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001) [hereinafter 2001 COX COMMISSION], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Cox-Commission-Report-2001.pdf. The National Institute on Military Justice (NIMJ) is "a private non-profit organization dedicated to the fair administration of military justice. . . ." *Id.* at 2.

[239] *Id.* at 11.

[240] COMMISSION ON MILITARY JUSTICE (THE COX COMMISSION), REPORT OF THE COMMISSION ON MILITARY JUSTICE 4 (2009) [hereinafter 2009 COX COMMISSION],

(ACLU) also advocated for the repeal, evidenced in part by its letter to the JSC in 2003.[241] In 2004, the JSC even recommended revision of Article 125.[242]

Much of the support for repealing the prohibition against consensual sodomy was also contemporaneous with either the conflict in Iraq or Afghanistan, or both. The ACLU advocated for reform in 2003.[243] In 2004, the JSC recommended revision of Article 125. And finally, the 2009 Cox Commission report was released at the height of the Operation Iraqi Freedom and Operation Enduring Freedom.[244]

There was also significant media attention on this issue since 1992. A representative sampling from the *Washington Post* and *New York Times* illustrates this. During the heart of the "Don't Ask, Don't Tell" debate between 1990 and 1994, at least twenty articles discussed the UCMJ's ban against consensual sodomy.[245] The coverage continued into the next decade. A 2003 *Washington Post* article provided a detailed account of the arguments against the ban on consensual sodomy.[246] A 2004 *Washington Post* article rehashed the issue when the Army Court of Criminal Appeals issued a ruling that "is believed to be the first time that a military court has upheld the right of consenting adults to engage in oral sex in private."[247] A 2005 *New York Times* article discussed the DoD General Counsel's proposal to repeal the ban on consensual sodomy.[248]

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available at http://responsesystemspanel.whs.mil/public/docs/meetings/20140130/Materials_To_Members/24_CoxCommissionReport_2009.pdf.

[241] Letter from American Civil Liberties Union et al. for Captain Kenneth R. Bryant, JAGC, USN, Chairman, Joint Services Committee on Military Justice (Oct. 31, 2003), *available at* https://www.aclu.org/lgbt-rights-hiv-aids/coalition-letter-joint-services-committee-military-justice-urging-revision-arti.

[242] U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE § 1, 1 (Oct. 1, 2003–Sept. 30, 2004), *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY04AnnualReport.pdf.

[243] *See* Letter from American Civil Liberties Union, *supra* note 241.

[244] 2009 Cox Commission, *supra* note 240.

[245] *See, e.g.*, John Lancaster, *Navy Presses Relentless Search for Gays; Tough Tactics Cause Sailors to Acknowledge Sexual Encounters*, WASH. POST, June 14, 1992, at A1. This statistic was obtained using a Westlaw Search using the terms "military justice" and "sodomy."

[246] Charles Lane, *Sodomy Ruling Spurs Challenges to Military's Policy on Gays*, WASH. POST, Aug. 4, 2003, at A1.

[247] Michael Dobbs, *Some Believe Ruling Undercuts 'Don't Ask'; Military Appeals Court Overturned Conviction of Soldier on Sodomy Charge*, WASH. POST, Dec. 8, 2004, at A11.

[248] John Files, *Pentagon Considers Changing The Legal Definition of Sodomy*, N.Y.

The issue also had a history of congressional attention. Following President Bill Clinton's assumption of office in 1992, the issue of the UCMJ's ban against consensual sodomy was a facet of the congressional debates on the military's homosexual conduct policy.[249] During a Senate debate that brought laughter from the gallery, Senator Strom Thurmond stated, "Heterosexuals don't practice sodomy."[250] Senator John Kerry disagreed, and asked Senator Thurmond if he would want homosexuals working in Congress arrested for sodomy.[251] Senator Thurmond replied, "Sodomy is against the law. Why shouldn't they be arrested?"[252] Congressional debate again flared in 2010, with the repeal of the "Don't Ask, Don't Tell" policy.[253]

While the concept of a strategic case is discussed in greater detail below,[254] the repeal of the "Don't Ask, Don't Tell" policy was a strategic case for the repeal of the prohibition on consensual sodomy. The national attention was already squarely focused on the issue of homosexual conduct in the military, which by its very nature includes the prohibition on consensual sodomy. Nonetheless, Article 125's ban on consensual sodomy remained unchanged until the 2014 NDAA.

The consistent presence of a large victim group in all major UCMJ reforms, along with a high-profile case of where the lack of a large victim group may have stifled UCMJ reform, indicate that Congress is more likely to act if a victim group is large. Victims, nonetheless, often have difficulty finding a platform on which to be heard, or a voice to persuade Congress and the public to act. Accordingly, the presence of established advocacy groups appears to be another requisite element for major UCMJ reform.

TIMES, Apr. 21, 2005, at A18.

[249] *See* 139 CONG. REC. S11157-04, 11182-184 (1994).

[250] *Senators Loudly Debate Gay Ban*, N.Y. TIMES, May 8, 1993, at 19 (quoting Sen. Strom Thurmond).

[251] *Id.* (quoting Sen. John Kerry).

[252] *Id.* (quoting Sen. Strom Thurmond).

[253] For a good summary of the congressional debates surrounding this issue, see Adam Serwer, *Why the Military Still Bans Sodomy*, MSNBC (Sep. 13, 2013, 8:47AM), http://www.msnbc.com/msnbc/why-the-military-still-bans-sodomy.

[254] *See infra* Part IV.F.

B. The Presence of Established Advocacy Groups

An advocacy group provides the organization, resources, and, therefore, voice that a large victim group needs to motivate congressional change in "collective action problems."[255] For this article, an advocacy group is defined as "[a] group of people who work to support an issue or protect and defend a group of people."[256] While defining what makes an advocacy group "established" is imprecise, the hallmarks are name recognition, organizational structure, historical success, and access to both media and decision-makers. Although a congressional-lobbying campaign is often a part of an established advocacy group's strategy, such groups may engage in other efforts, such as public awareness campaigns, providing legal advice to individual servicemembers, or representing individual servicemembers' or the victim group's interests at various proceedings.[257]

For a myriad of reasons, advocacy groups are powerful advocates for legislative reform, to include access, experience, and expertise. Lanny Davis, who served in both the Bill Clinton and George W. Bush administrations, explains, "[L]obbyists spend much of their time with members of Congress and their staffs providing factual and expert information about legislation that affects their clients. Their clients are companies that employ people, real people, sometimes hundreds of thousands of people who deserve to be considered when laws are made."[258]

As is the case with many other statutory reforms, advocacy groups have played a significant role during all three major changes to the UCMJ. Some evidence of their impact is located in the *Congressional Record*. During the five-week long congressional floor debates on the UCMJ in 1949, twenty-eight witnesses testified, including

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[255] A "collective action problem," also known as a "collective action situation," "occurs whenever a desired joint outcome requires the input of several individuals." CLARK C. GIBSON ET AL., THE SAMARITAN'S DILEMMA: THE POLITICAL ECONOMY OF DEVELOPMENT AID 15 (2005).

[256] *Advocacy group*, MACMILLAN DICTIONARY http://www.macmillandictionary..com/us/dictionary/american/advocacy-group (last visited May 14, 2014).

[257] Out-Serve-SLDN is an advocacy group that provides a variety of advocacy services for "actively serving LGBT military personnel and veterans. OUTSERVE-SLDN, http://www.sldn.org/pages/about-sldn (last visited May 18, 2014).

[258] Lanny Davis, *Lobbyists are Good People, Too*, WASH. TIMES, Nov. 17, 2008, at A4, *available at* http://www.washingtontimes.com/news/2008/nov/17/lobbyists-are-good-people-too/?page=all.

"representatives from the four major veterans' organizations, four bar associations, including the American Bar Association (ABA), the Reserve Officers Association, the National Guard Bureau and the National Guard Association. . . ."[259] At a congressional hearing in 1962 the American Legion stated, "The membership of The American Legion can take great pride in the fact that it was greatly instrumental in the drafting and in securing the enactment of the Code which has contributed substantially to the elimination of many former vicious practices."[260] Prior to the passage of the Military Justice Act of 1968, many advocacy groups, to include the ACLU and the ABA, testified before Congress in support of most of the protections ultimately included in the Military Justice Act of 1968.[261] The power of advocacy groups within the halls of Congress continued with the 2014 NDAA. In March 2013, representatives from Protect Our Defenders and the Service Women's Action Network, two advocacy groups for victims of military sexual trauma, testified at the same Senate hearing as the service Judge Advocates General.[262]

Advocacy groups may now have an even greater voice. With the growth of the continuous news cycle, internet, and social media networks, advocacy groups have increased their effectiveness by diversifying their methods to include a variety of public-relations tactics.[263] This is evident in the powerful impact that advocacy groups have had in shaping the 2014 NDAA and advocating for the proposed Military Justice Improvement Act.[264] A list of groups that continue to advocate for the Military Justice Improvement Act and advocated for many of the major UCMJ reforms found in the 2014 NDAA include Protect our Defenders, Service Women's Action Network, Iraq and Afghanistan Veterans of America, and Vietnam Veterans of America.[265] Senator Gillibrand has created a separate page that lists the support she

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[259] 95 CONG. REC. pt. 3, 4120 (Apr. 7, 1949), at 4–5. Scholars also tout the role that advocacy groups played in the UCMJ's creation. Powerful "organized pressure groups," such as bar associations and veteran's groups, were a significant driving force for change. GENEROUS, *supra* note 37, at 23–24.

[260] 1962 *Hearings*, *supra* note 54, at 412.

[261] 1966 *Hearings*, *supra* note 58, *passim*.

[262] 2013 *Hearing*, *supra* note 10, *passim*.

[263] *See, e.g.*, Jonathan A. Obar et al., *Advocacy 2.0: An Analysis of How Advocacy Groups in the United States Perceive and Use Social Media as Tools for Facilitating Civic Engagement and Collective Action*, 2 J. OF INFO. POL'Y 1 (2012).

[264] Military Justice Improvement Act, S. 1752, 113th Cong. (2013).

[265] Letter from Anu Bhagwati et al. for Senators, *available at* http://www.vva.org/MJIA/Documents/MJIA-Open-Letter.pdf.

has received on this issue from dozens of advocacy groups.[266] The newer tactics were evident in the lead up to the filibuster against the MJIA.[267] One news report indicated, "Protect our Defenders, a group of such victims that backs Gillibrand's approach, is targeting McCaskill as part of a pressure campaign—including social media and newspaper ads—to recruit senators to its side before the full Senate votes on the issue, probably in September."[268]

It is evident that Congress values the expertise, perspective, and assistance that advocacy groups can provide, particularly when they represent a large victim group. Without more, however, Congress is unlikely to enact major reform of the UCMJ. Another required element is that the calls for reform must be contemporaneous with or immediately following a protracted armed conflict.

C. Following a Period of Protracted Armed Conflict

In a 1994 *Washington Post* article that discusses the UCMJ and unlawful command influence, lighter sentences for officers, and sexual misconduct, Carolyn Dock, Executive Director of Members Opposed to Maltreatment of Service Members, stated, "Congress does nothing. I cannot quite figure it out."[269] Unbeknownst to Ms. Dock, one factor that appears to account for her confusion is the timing of her calls for major UCMJ reform. Regardless of the objective need for major UCMJ reform, Congress appears to be much more willing to enact it following a period of protracted armed conflict.

Congress passed and the President signed all three major UCMJ reforms following periods of protracted armed conflict. Professor David A. Schlueter noted this phenomenon in 1991, noting, "It is important to remember that the greatest time of change in the military justice system

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[266] *Veteran & Women's Groups Supporting the Military Justice Improvement Act*, U.S. SENATE, http://www.gillibrand.senate.gov/mjia/veteran-and-womens-groups (last visited May 18, 2014).

[267] *See* Helene Cooper, *Senate Rejects Blocking Military Commanders from Sex Assault Cases*, N.Y. TIMES, Mar. 7, 2014, at A18 (discussing the filibuster of the MJIA).

[268] Robert Koenig, *McCaskill Takes Issue with Rival Approach to Deter Military Sexual Assaults*, ST. LOUIS BEACON, July 26, 2013, https://www.stlbeacon.org/#!/content/32065/mccaskill_military_assault_072513.

[269] Anderson & Binstein, *supra* note 28.

usually has occurred immediately following a major war or conflict."[270] As discussed above, the UCMJ, which was passed in 1950 just prior to the Korean War and enacted in 1951, was Congress's remedy for the failures of the Articles of War during World War II.[271] The Military Justice Act of 1968 was passed and signed into law at the height of the Vietnam War in 1968, after thirteen years of American presence in the country and over 20,000 American servicemember deaths.[272] The 2014 NDAA was also debated, passed, and signed into law shortly following the end of Operation Iraqi Freedom and after over twelve years of Operation Enduring Freedom (OEF).[273] Since its enactment, Congress has never passed a major UCMJ reform during peacetime or following a shorter conflict, such as Grenada, Panama, or Operation Desert Storm/Desert Shield. This congressional inaction, however, was not due to a lack of contemporaneous calls for UCMJ reform.

Congress's failure to enact UCMJ reform is as telling as the timing of the major reforms. Calls for UCMJ reform regarding sexual assault and sexual harassment began over a decade prior to the 2006 major modification of Article 120.[274] In 1988, the Pentagon commissioned a study of servicemembers that provided troubling statistics regarding sexual harassment in the military.[275] Five percent of the respondents reported being victims of "actual or attempted rape or sexual assault over the past year alone," and sixty-four percent reported being victims of sexual harassment.[276] The U.S. Navy's Tailhook scandal and its relationship with military justice was mentioned or discussed in at least forty-two *Washington Post* and *New York Times* articles prior to

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[270] Schlueter, *supra* note 30, at 9. Lawrence J. Morris, a noted military justice scholar and retired Army judge advocate, notes, "Both of the two great changes to the military justice system of the last half of the 20th century occurred just before or during periods of great operational stress for the military." MORRIS, *supra* note 227, at 122.

[271] While the UCMJ took effect on May 31, 1951, President Truman signed it into law on June 25, 1950, over one month prior to the outbreak of the Korean War. *See id.* Accordingly, the potential Korean conflict was, at most, a tertiary consideration for the UCMJ's passage.

[272] The Military Justice Act of 1968 was enacted on October 24, 1968. Pub. L. No. 90-632, 82 Stat. 1335 (1968); *Statistical Information About Casualties of the Vietnam War*, U.S. NAT'L ARCHIVES, http://www.archives.gov/research/military/vietnam-war/casualty-statistics.html (last visited May 18, 2014).

[273] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, §§ 531, 652, 1701–1753, 127 Stat. 759, 788, 952–85.

[274] *See, e.g.*, Lancaster, *supra* note 13.

[275] *Id.*

[276] *Id.*

September 11, 2001.[277] And as noted above, in 1992, the *Washington Post* highlighted a perceived failure of the UCMJ to handle these cases in an article entitled *In Military Sex Harassment Cases, His Word Often Outranks Hers*.[278] In other words, during the 1990s, the military justice system's ability to handle sexual assault cases was already being called into question. Why, then, did Congress not reform the UCMJ?

By applying this framework to the issue of military sexual assault in the 1990s, the lack of a protracted conflict appears to explain Congress's inaction. Sexual assault victims were a large victim group that was aligned with an established advocacy group.[279] There was significant media attention,[280] a history, albeit short, of congressional attention,[281] and multiple precursor strategic cases.[282] Then, again, members of Congress surely do not intentionally ignore or choose not to act on potentially legitimate concerns simply because there has not been a sufficiently protracted armed conflict. If one accepts this assumption, there is a causal mechanism that this framework does not explain. Why does it appear that some form of protracted conflict is required to motivate change?

Unfortunately, a host of reasons are possible. For instance, some argue that Congress defers to the military in certain situations. After *Operation Desert Storm/Desert Shield*, "[t]here was a great deference among lawmakers from that point for senior uniformed leaders. You hadn't seen it to that extent before."[283] Following this logic, because the UCMJ reviews in the 1990s never once mentioned sexual assault as a potential crisis, statutory UCMJ reform to address the sexual assault-related complaints of the 1990s was not likely. While such may be true, how do we explain the lack of congressional action during the first parts of a conflict?

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[277] This statistic was obtained by a Westlaw searching articles between 1990 and September 10, 2001, using the terms "tailhook" & "military justice."
[278] Lancaster, *supra* note 13.
[279] *See supra* notes 264–268 and accompanying text.
[280] *See supra* note 277 and accompanying text; *infra* notes 381, 382, 407 and accompanying text.
[281] H. Con. Res. 359, 102d Congress (1991-1992).
[282] *See, e.g.*, Lancaster, *supra* note 13.
[283] John T. Bennett, *20 Years After Desert Storm, Congress Defers to the Pentagon on Budgets*, THE HILL (Jan. 24, 2011), http://thehill.com/news-by-subject/defense-homeland-security/139551-in-20-years-since-desert-storm-congress-defers-to-the-pentagon (quoting Nathan Freier, Senior Fellow, Center for Strategic and International Studies).

Congressional deference to military leaders may continue during conflict. Mackenzie Eaglen, a Heritage Foundation analyst and former Senate defense aide states, "For many years after 2001, Congress was absent conducting oversight and mostly took the Pentagon at its word even when analysis was grossly lacking to justify strategy, budget or even base closure decisions."[284] In an article supporting the MJIA, Yale Law School lecturer and noted military justice expert Eugene R. Fidell stated that the MJIA's opponents are relying on "an insistence that 'we'—the military—'know best.' This reflects an assumption that Congress should defer to the military, rather than the other way around."[285] Mr. Fidell's observation appears keen given the insular nature of prior DoD-initiated studies and reviews of the UCMJ.[286] Why Congress may defer to the military presents yet another difficult and so far unanswered causation question.[287] The fact that Article 120, UCMJ, was not reformed until five years following the start of OEF supports this theory of congressional deference to the military during times of conflict.[288] Regardless of the cause, protracted armed conflict is a precursor to major congressional UCMJ reform. Such has proven true even when military leaders, civilians, and some members of Congress form a united front on proposed UCMJ reform.

Despite many fundamental differences from the other major UCMJ reforms and the fact that the Vietnam War produced "in midconflict a reaction that America's earlier wars have generated only after the

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[284] *Id.*

[285] Eugene R. Fidell, *Goodbye to George III: The Fight Over Prosecuting Sexual Assault in the Military is Really Over an Antiquated Model of Commander Control*, SLATE (Dec. 6, 2013, 11:46AM), http://www.slate.com/artilces/news_and_politics/jurisprudence/2013/12/sexual_assault_in_the_military_commanders_shouldn_t_be_the_prosecutors.html.

[286] *See infra* Part III.A.3.

[287] There appears to be very little to no scholarship that focuses on congressional deference to the military, particularly as it pertains to the UCMJ. When it comes to technological innovation, some argue, "[w]hen the threat level is high, Congress tends to defer to the military's professional expertise. . . . When the nation is under serious external threat, no politician wants to face the argument that he undercut the military's ability to provide for the common defense by ignoring expert military advice." PETER DOMBROWSKI & EUGENE GOLS, BUYING MILITARY TRAN$FORMATION: TECHNOLOGICAL INNOVATION AND THE DEFENSE INDUSTRY 22 (2006). For a good explanation of the judicial military deference doctrine, see John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000).

[288] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256–63 (codified at 10 U.S.C. § 920 (2006)).

shooting stopped—a reform in military justice,"[289] the Military Justice Act of 1968 was also not passed until a period of protracted armed conflict had elapsed. In the 1960s, Senator Sam Ervin began crusading for UCMJ reform in 1962, six full years prior to the Military Justice Act of 1968.[290] Unlike the 2006 modification to Article 120 and the 2014 NDAA reforms, the due process-related reforms of the Military Justice Act of 1968 enjoyed widespread public, congressional, and Code Committee support.[291] During the period from 1962 to 1968, Congress did not defer to the military and its views on the UCMJ, as military leaders had been recommending many of the statutory changes since 1962.[292]

As was the case with sexual assault in the 1990s, all other elements of this framework appear to have been present from 1962 to 1968. The large victim group was aligned with large, established advocacy groups.[293] There was media attention[294] and a history of congressional attention.[295] There was also a "strategic case."[296] Nonetheless, Congress did not take action until 1968.

In addition to research and scholarship on congressional deference to the military, a more detailed comparative analysis between public support for a protracted conflict and UCMJ reform may be warranted, as it appears that there may be a link between the popularity of a conflict and Congress's willingness to enact major reform to the UCMJ. Upon enactment of the Military Justice Act of 1968, public support for the Vietnam War had fallen to thirty-seven percent.[297] In December 2013,

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[289] Fred P. Graham, *Reforms Sought in Military Code, Senators Push for Further Safeguards at Trials*, N.Y. TIMES, May 18, 1967, at 3.
[290] 1962 *Hearings*, *supra* note 54.
[291] *See supra* notes 90, 104. The senior judge advocates from each service are members of the Code Committee. UCMJ art. 146(b) (2012).
[292] For a sampling of some of the recommendations, see *supra* notes 88–90 and accompanying text.
[293] *Supra* notes 260–261 and accompanying text.
[294] *Infra* notes 309–313 and accompanying text.
[295] 1962 CODE COMMITTEE REPORT, *supra* note 89, at 49–64; *infra* notes 331–333 and accompanying text.
[296] *Infra* notes 377–379 and accompanying text.
[297] *Digital History, Public Opinion and the Vietnam War*, UNIV. OF HOUSTON, http://www.digitalhistory.uh.edu/active_learning/explorations/vietnam/vietnam_pubopinion.cfm (last visited May 18, 2014).

the month in which the 2014 NDAA was signed into law, American public support for OEF had fallen to 17%.[298]

The fact that every major UCMJ reform has followed a protracted armed conflict, despite fundamental differences in the reasons for and nature of each major UCMJ reform, indicates that protracted armed conflict has an impact on Congress's willingness to modify the UCMJ. While this article does not research the underlying causal mechanisms for such behavior, understanding this consistent phenomenon will serve to assist military leaders in better shepherding the UCMJ, and it may motivate additional research to provide a clearer picture of why Congress acts.

D. Media Attention

Each of the three major UCMJ reforms has also been precipitated by media attention. While the "information era" and "24-hour news cycle" have only served to magnify the amount of information available on almost every topic imaginable, the consistent presence of media attention prior to all three major UCMJ reforms and the nature of the attention indicate two things about the impact that the media has on UCMJ reform. First, as discussed above, the American public voices its concerns about the UCMJ through the media.[299] Second, when the media persistently reports and comments about a perceived problem with the UCMJ, members of Congress listen.

Prior to the UCMJ's passage in 1950, the print media focused on the issue of improving due process rights under the Articles of War. For instance, between the end of World War II and the UCMJ's enactment, over fifty articles in the *Washington Post* and over 100 in the *New York Times* were related, in varying degrees, to military justice.[300] While some articles were news reports about specific cases,[301] others were

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[298] CNN Political Unit, *CNN Poll: Afghanistan War Arguably Most Unpopular in U.S. History*, CNN (Dec. 30, 2013), http://politicalticker.blogs.cnn.com/2013/12/30/cnn-poll-afghanistan-war-most-unpopular-in-u-s-history/.

[299] *See supra* Part II.B.1.

[300] This figure was obtained by entering the dates August 9, 1945 and May 31, 1951 and the term "military justice" into a *Washington Post* Archives search function. *ProQuest Archiver*, WASH. POST (Apr. 29, 2014), https://secure.pqarchiver.com/washingtonpost_historical/advancedsearch.html. The same terms and dates were entered into a *New York Times* Archives search function. *Search*, N.Y. TIMES (Apr. 29, 2014), http://query.nytimes.com/search/sitesearch/#//.

[301] *See, e.g.*, *2 U.S. Officers Face Trial for Misconduct*, WASH. POST, Oct. 25, 1946, at 4

highly critical of the Articles of War. As early as 1946, the *Washington Post* stated,

> We are glad to hear that Senator McCarran intends to demand a congressional investigation into the Army's administration of martial law and into its conduct of courts-martial throughout the war just ended. We have heard a great many stories indicating that in more than a few instances Army officers grossly abused the powers placed in their hands, exercising them with arrogance and without discretion and sometimes without the slightest respect for the most elementary conceptions of justice.[302]

The *Washington Post* persisted with additional critical articles in 1946.[303]

The criticism continued until the UCMJ was enacted. As an example, a 1949 *Washington Post* article began, "The trouble with military justice, as it is viewed by many civilians, is that it has been more concerned with the military aspects of offenses than with dispassionate justice."[304]

Reports on specific cases and the criticisms of the system as a whole made an impact on Congress. As far as reports about specific cases, a 1946 house report openly advocated for the news media's role in the court-martial process. When discussing public trials, the report stated,

> Sometimes [the details of cases] are printed in the newspapers; the details are not always elevating, but the fact that decisions are openly arrived at and openly rendered is more than wholesome; it is vital. The experience of mankind has shown that it is a necessary element of justice. It is one of the freedoms for which we fought. Army justice is not fashioned on this model."[305]

(describing the trials of two officers for "misconduct in office").

[302] *Military Justice Again*, WASH. POST, Jan. 5, 1946, at 6.

[303] *See, e.g.*, United Press, *supra* note 193, at M1, M4; *Trial Delay*, *supra* note 180.

[304] *Military Justice*, *supra* note 181, at 6.

[305] 1946 REPORT, *supra* note 193, at 39.

The report also mentioned four separate cases where the news media had a positive impact on the case, including one that was "so fortunate as to get correction by means of newspaper publicity."[306]

Members of Congress plainly admitted the impact of media coverage had on creation of the UCMJ. During a 1947 congressional hearing (1947 Hearings), a survey of news reports and editorials from newspapers across the United States that were critical of the Articles of War and military justice system were simply inserted into the *Congressional Record*.[307] During the 1949 congressional floor debate on the UCMJ (1949 Debates), Representative Durham explicitly outlined the impact of media criticism by discussing the genesis of the Vanderbilt Committee, the 1946 ad hoc committee whose military justice reform recommendations served as a foundation for the UCMJ's enactment.[308] Representative Durham stated that criticism of the military justice system, "both through the press and over the radio . . . became so bad that we had to pay some attention to it, and General Eisenhower himself appointed the first committee to go into this matter, and later Secretary Patterson, and later Secretary Royall." In other words, but for the media criticism of the military justice system, the UCMJ may have been fundamentally different.

Media criticism also played a role, albeit much more limited, in the lead-up to the Military Justice Act of 1968. Between November 1, 1955 and October 24, 1968,[309] approximately seventy articles in the *Washington Post* and 200 articles in the *New York Times* were related, in varying degrees, to military justice.[310] Only a handful, however, voiced

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[306] *Id.* at 47.

[307] *Subcommittee Hearings on H.R. 2575 Before the H. Comm. on Armed Services, Subcomm. No 11 Legal*, 80th Cong. 1903, 2166–175 (1947) [hereinafter 1947 *Hearings*]. Reports or editorials from the *Pittsburgh Post-Gazette*, *Shreveport Times*, *Mobile Register* (Ala.), *Kansas City Star*, *Philadelphia Bulletin*, *New York Times*, *St. Louis Post-Dispatch*, *El Paso Times*, *Johnstown Tribune* (Pa.), *Tampa Tribune*, *Lynchburg News* (Va.), *Lancaster Intelligence Journal* (Pa.), *Chicago Tribune*, *Los Angeles News*, *Grand Junction Sentinel* (Colo.), and *Brooklyn Eagle* were all included. *Id.*

[308] 1949 DEB., *supra* note 50, 21–22 (statement of Rep. Carl T. Durham).

[309] These are the official U.S.-Government recognized dates of the Vietnam War. *See* U.S. Dep't of Def., *Name of Technical Sergeant Richard B. Fitzgibbon to be Added to the Vietnam Veterans Memorial*, Release No. 581-98 (Nov. 6, 1998), *available at* http://www.defense.gov/releases/release.aspx?releaseid=1902.

[310] This figure was obtained by entering the dates November 1, 1955 and October 24, 1968 and the terms "military justice" and "Uniform Code of Military Justice" into a *Washington Post* Archives search function. *ProQuest Archiver*, WASH. POST, (Apr. 29, 2014), https://secure.pqarchiver.com/washingtonpost_historical/advancedsearch.html.

any true, pointed criticism, such as that from dissents of the Court of Military Appeals.[311] The reduction in media vitriol could be explained by many things. For instance, the increased due process protections that the UCMJ afforded compared to the Articles of War and the unified and repeated calls for due process reform for which the Code Committee advocated in the 1960s[312] could both explain why the media did not target military justice reform as it had following World War II. In addition, the relatively few military casualties between the end of the Korean War in 1953 and the ramp-up of the Vietnam War in 1964 could also play a role. Nonetheless, a May 18, 1967 *New York Times* article outlines most positions leading up to the passage of the Military Justice Act of 1968.[313]

Compared to the prior major UCMJ reforms, the media attention surrounding the 2014 NDAA reforms has been staggering. Since September 11, 2001, the *Washington Post* and *New York Times* have published approximately seventy articles each that discuss military justice and sexual misconduct.[314] All but nine of these articles were published after the 2005 NDAA modified Article 120, UCMJ,[315] indicating that punitive article reform, which appears to be the sole focus of the JSC, is not enough.

Similar to the calls for change prior to the UCMJ's enactment, prior to the 2014 NDAA, the news media overtly called for major changes to the UCMJ. In addition to detailed coverage about specific cases,[316] since

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The same terms and dates were entered into a *New York Times* Archives search function. *Search*, N.Y. TIMES (Apr. 29, 2014), http://query.nytimes.com/search/sitesearch/#//.

[311] *See, e.g.*, *Military Justice Said to Disregard Rights of Accused*, WASH. POST, June 3, 1967, at A5.

[312] *See supra* notes 90, 104 and accompanying text.

[313] Graham, *supra* note 289.

[314] This figure was obtained by entering the terms "military justice" and ("sexual assault" or "sexual harassment") into a Westlaw search function.

[315] President Bush signed the 2005 NDAA into law on October 28, 2004. National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1920–1921.

[316] *E.g.* Craig Whitlock, *Air Force General To Retire After Criticism For Handling of Sexual-Assault Case*, WASH. POST, Jan. 9, 2014, http://www.washingtonpost.com/world/national-security/air-force-general-criticized-for-handling-of-sexual-assault-cases-to-retire/2014/01/08/9942df96-787d-11e3-b1c5-739e63e9c9a7_story.html (discussing Lieutenant General Craig Franklin's decision to overturn a sexual assault conviction); Annys Shin, *Academy Rape Case Hearing Concludes*, WASH. POST, Sept. 4, 2013, at B1 (discussing sexual assault charges against Naval Academy midshipmen); Craig Whitlock, *Disgraced Army General Gets Fine, No Jail Time*, WASH. POST, Mar. 21, 2014, at A3

May 2013, both the *Washington Post* and *New York Times* have dedicated at least eight editorials to the topic.[317] In a July 30, 2013 editorial entitled *An Escalating Fight Over Military Justice*, the *New York Times* Editorial Board openly advocates for the MJIA, stating, "Americans . . . [who are] fed up with the broken promises of zero tolerance for such behavior over way too many years should be rooting for Ms. Gillibrand and her bipartisan coalition to succeed."[318] Following shortly thereafter, an October 9, 2013 editorial entitled *Broken Military Justice* argues that Senator Carl Levin and opponents of the MJIA "look increasingly behind the curve."[319]

This media coverage has made a tangible impact on Congress in three ways. First, the increased amount of media attention itself has an effect. During a discussion with Senator Tim Kaine during the March 2013 congressional hearings on sexual assault in the military, Ms. Rebekah Havrilla, a former Army noncommissioned officer, stated,

> One of the things that really has made a huge impact over the last 2 years is the constant media attention around these issues. . . . There has been a shift in momentum over the last 2 years. There has been a shift forward. There have been many baby steps made through legislation in the NDAA. There has been some positive progress. That's what I want to hold onto.[320]

Second, the increased reporting on specific cases can shape policy maker's opinions. During 2013 congressional hearings on sexual assault in the military, Senator Mazie Hirono pointed to a newspaper article she read about the case in Aviano, Italy, in which Lieutenant General Craig Franklin overturned a sexual assault conviction as a reason to support the MJIA's proposal to remove the chain of command from prosecutorial decisions.[321] Third, the power of the specific calls for change impact

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(discussing the Brigadier General Jeffrey Sinclair case).

[317] These editorials began on May 10, 2013. Editorial, *Disorder in the Ranks*, WASH. POST, May 10, 2013, at A24. The last one was published on October 9, 2013. Editorial, *Broken Military Justice*, N.Y. TIMES, Oct. 9, 2013, at A28. This statistic was obtained using a Westlaw search for the relevant time period using the terms "military justice" and "editorial."

[318] Editorial, *An Escalating Fight Over Military Justice*, N.Y. TIMES, Oct. 9, 2013, at A18.

[319] Editorial, *Broken Military Justice*, *supra* note 317, at A28.

[320] 2013 *Hearing*, *supra* note 10, at 36.

[321] *Id.* at 27–28.

individual congressional members. On her website, Senator Gillibrand has a page dedicated to listing "Editorials and Op-Eds in Support of the Military Justice Improvement Act."[322] Senator Claire McCaskill's website also lists media reports and editorials that support her position on UCMJ reform.[323] Additionally, the mere fact that both senators have authored opinion pieces to advocate their positions on UCMJ reform indicates the value and impact of the media on Congress.[324]

Nonetheless, understanding that media attention appears to be a prerequisite to UCMJ reform is only half of the picture. Military leaders who wish to better shepherd the UCMJ and military justice system must understand how to read and act upon information in the media. Part V.A below explains how to use media reports to more accurately diagnose and treat actual and potential UCMJ problems. There are, however, two more variables that must be present for Congress to enact major UCMJ reform. The next, which is prolonged congressional attention and advocacy, is often interconnected to the media attention variable but is separate and distinct.

E. Prolonged Congressional Attention and Advocacy

In addition to the four variables set forth above, each of the three major UCMJ reforms has been preceded by a prolonged history of congressional attention and advocacy. For this article, the term "congressional attention and advocacy" means either formal or informal action by at least one member of Congress that either explores an issue or specifically calls for change. These actions often take the form, but are not limited to, congressional hearings, news interviews, or other forms of issue-specific advocacy. In each case, a specific member of Congress has identified the potential problem with the UCMJ or military justice system and has doggedly advocated for change for several years

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[322] *Editorials & OpEds In Support of the Military Justice Improvement Act*, U.S. SENATE, http://www.gillibrand.senate.gov/mjia/editorials/ (last visited May 15, 2014).

[323] *Curbing Sexual Assaults in the Military*, U.S. SENATE http://www.mccaskill.senate.gov/MilitaryJustice/ (last visted May 14, 2014).

[324] *See* Kirsten Gillibrand, *Sexual Assaults and American Betrayal: The Fight for Fundamental Reform Continues*, N.Y. DAILY NEWS, Mar. 14, 2014, http://www.nydailynews.com/opinion/sexual-assaults-american-betrayal-article-1.1721007; Claire McCaskill & Loretta Sanchez, *Military Commanders Must Fight Sexual Assault in Military*, USA TODAY, Aug. 29, 2013, http://www.usatoday.com/story/opinion/2013/08/29/women-congress-sexual-assault-column/2725081/.

prior to reform. Other variables in this framework may motivate this intra-congressional advocate, but his or her advocacy itself appears to be an essential prerequisite for UCMJ reform.

Following World War II, Representatives Charles H. Elston and Carl T. Durham were staunch advocates for military justice reform. During the 1947 Hearings, as chair of a Legal Subcommittee of the House Committee on Armed Services, Representative Elston conducted a detailed investigation of the military justice system.[325] Military leaders, advocacy group representatives, and other congressmen, to include Representative Durham, either testified or commented during a comprehensive hearing on two proposals for reform, one championed by Representative Elston and the other proposed by Representative Durham.[326] Representative Elston and his committee ultimately recommended and passed many reforms, and more importantly, supported each recommendation with detailed and persuasive evidence.[327] The Senate then relied on Elston's detailed work to pass the same reforms.[328] As a result, the 1948 reforms to the Articles of War are commonly referred to as the "Elston Act."[329] Elston's impact did not end there. The Elston Act also:

> [S]et the table for the [UCMJ] in two important ways: (1) The Elston Act gathered data and perspective on the World War II experience close in time to the war, and (2) it tackled some of the most significant reforms and sparked discussion of the others, meaning that the "battlefield was prepared" for the debates and exchanges that led to the 1950 act.[330]

Without Representatives Elston's and Durham's advocacy within the House of Representatives, the UCMJ would likely not have been passed as quickly or with as many substantive reforms.

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[325] 1947 *Hearings*, *supra* note 307. For a detailed history of the Elston Act's genesis, see GENEROUS, *supra* note 37, ch. 3.
[326] 1947 *Hearings*, *supra* note 307.
[327] *Id. passim.*
[328] S. COMM. ON ARMED SERVICES, 80TH CONG., COURTS MARTIAL LEGISLATION: A STUDY OF THE PROPOSED LEGISLATION TO AMEND THE ARTICLES OF WAR (H.R. 2575); AND TO AMEND THE ARTICLES FOR THE GOVERNMENT OF THE NAVY (H.R. 3687; S1338) 1 (Comm. Print 1948).
[329] Military Selective Service Act of 1948, Pub. L. No. 80-759, §§ 201–46, 62 Stat. 604, 627-44 (1948); *see* MORRIS, *supra* note 227, at 125.
[330] MORRIS, *supra* note 227, at 125.

Senator Sam Ervin was the dogged advocate for the Military Justice Act of 1968. In 1962, Senator Ervin convened the first congressional hearing "on the [c]onstitutional rights of military personnel, in which he focused on command control of courts-martial, the right to legally trained defense counsel, differences in military justice amongst the services, and the effectiveness of military due process."[331] Senator Ervin again held hearings in 1963 and 1966.[332] Reform was ultimately passed in 1968, but only after six years of painstaking investigation and advocacy within the halls of Congress.[333]

For the 2014 NDAA, Senators Gillibrand and McCaskill have been the visible and vocal champions for major UCMJ reform.[334] Most of their ardent advocacy occurred in 2013, immediately before the 2014 NDAA changes. Indeed this recent wave of attention made some military leaders feel like reform was being rushed. In a September 25, 2013 statement to the Systems Response Panel in which he calls for "successful reform through a measured approach,"[335] Brigadier General Richard Gross stated, "Previous rapid changes, such as those made in 2007 to Article 120, resulted in provisions being held unconstitutional, increasing the potential for overturned convictions."[336] Brigadier General Gross's perspective concerning the relative speed of the 2005 NDAA changes to Article 120 is understandable given the military leadership's heretofore inward focus on UCMJ reform, which includes the JSC subcommittee's recommendation against such a course of action.[337] Brigadier General Gross's statement, however, persuasively illustrates why this framework and proposal for a new approach to UCMJ reform is needed, as the aforementioned change was not "rapid."

The sexual misconduct-related reforms have been the slowest developing UCMJ reform of all, as members of Congress have been contemplating the issue since at least 1992. In 1992, along with 21 co-sponsors, Representative Patricia Schroeder introduced a congressional

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[331] *Id.* at 135 (citing GENEROUS, *supra* note 37, at 187–89).
[332] 1963 *Hearings*, *supra* note 56; 1966 *Hearings*, *supra* note 58.
[333] For a detailed, first-hand account of the background and legislative history behind the Military Justice Act of 1968, see Sam J. Ervin, Jr., *The Military Justice Act of 1968*, 45 MIL. L. REV. 77, 78–82 (1969).
[334] *See supra* notes 318–319, 324 and accompanying text.
[335] Gross Statement, *supra* note 11, at 2.
[336] *Id.*
[337] *See supra* notes 208–210 and accompanying text.

resolution entitled *Expressing the Sense of Congress Regarding the Elimination of Sexual Harassment and Sexual Assault in the Military*. After first "[e]xpressing the sense of Congress regarding the elimination of sexual harassment and sexual assault in the Armed Forces," the resolution specifically finds that "the Armed Forces have not adequately responded to reports of sexual harassment and sexual assault of female members of the Armed Forces."[338]

The 1992 resolution specifically addressed UCMJ reform. First the resolution then calls on the "Secretaries of the military departments" to take on many of the precise reforms subsequently enacted, including data collection, victim assistance and counseling availability, and educational campaigns.[339] Second, the resolution called for the Secretaries to "reevaluate their existing methods of investigating and processing sexual harassment and sexual assault complaints involving members of the Armed Forces and consider alternative methods to provide effective enforcement."[340] This demonstrates members of Congress had at least discussed potential Article 120 reform thirteen years prior to passing the 2005 reforms, the very reforms that Brigadier General Gross cites as "rapid."[341] In addition, the NDAA's changes to Article 32, UCMJ, are an example of a recommendation becoming law over twenty-one years after Congress first contemplated it.[342]

The 1992 resolution also charges the Secretaries to "reevaluate their existing sanctions against those members of the Armed Forces who commit sexual harassment or sexual assault to determine whether the sanctions serve as an effective deterrent."[343] The recently enacted mandatory general court-martial referral and mandatory minimum sentences for certain sex-related offenses is Congress's embodiment of another recommendation over twenty-one years after this issue was first raised.[344] In yet another prescient charge, the resolution asks the Secretaries "to determine whether adequate protections exist to ensure that members of the Armed Forces who report sexual harassment or

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[338] H. Con. Res. 359, 102d Congress (1991-1992).
[339] *Id.*
[340] *Id.*
[341] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256–63 (codified at 10 U.S.C. § 920 (2006)).
[342] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 954–57.
[343] H. Con. Res. 359, 102d Congress (1991-1992).
[344] National Defense Authorization Act for Fiscal Year 2014 § 1705, 127 Stat. 959–60.

sexual assault do not experience retaliation for making such a report and, if not, develop effective protections."[345] The 2014 NDAA explicitly criminalizes retribution.[346] These resolutions were therefore not a one-time congressional glance at sex-related offenses and the military.

In many ways, members of Congress were screaming for reform, and had been doing so for quite some time. In 1992, Representative Schroeder again discussed sexual assault during a hearing on "Gender Discrimination in the Military."[347] In March 1994, the House Armed Services Committee held hearings on sexual harassment in the military and discussed "[DoD]'s commitment to ensuring that there are effective procedures to deal with sexual harassment and the protection of the victims of sexual harassment from further victimization."[348] The Senate's first proposed version of the 2000 NDAA tackled the issue of confidentiality of communications between a sexual assault or sexual harassment victim and those charged with providing assistance,[349] yet another issue that Congress again addressed in 2013.[350] In 2000, Senator Paul Sarbanes was the driving force behind the PAT.[351] In 2004, Representatives Loretta Sanchez, Ellen Tauscher, and Louise Slaughter also drew attention to sexual assault in the military.[352] In the 2005 NDAA, Congress explicitly charged the military with studying the UCMJ and its effectiveness as related to sexual assault offenses.[353]

While Patricia Schroeder was one of the first congressional advocates for the issue of sexual assault in the military, many others continued to effort. While all six elements of this framework typically must be present for Congress to pass UCMJ reform legislation, it is also worthy of looking at what specifically may have motivated congressional advocates to begin their often long and laborious calls for reform. A

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345 H. Con. Res. 359, 102d Congress (1991-1992).

346 National Defense Authorization Act for Fiscal Year 2014 § 1709, 127 Stat. 962.

347 *Gender Discrimination in the Military: Hearings Before the Military Personnel and Compensation Subcomm. and Defense Policy Panel of the H. Comm. on Armed Services*, 102d Cong. 3 (1992) [hereinafter 1992 *Hearings*] (statement of Rep. Patricia Schroeder), *available at* http://www.dtic.mil/dtfs/doc_research/p18_3.pdf.

348 H.R. REP. 103-881, Report of the Activities of the Committee on Armed Services for the 103d Congress, H.R. REP. No. 881, 2d Sess. 1995, 1994 WL 731770, at *52.

349 S. REP. 106-50, § 1026 (1994).

350 National Defense Authorization Act for Fiscal Year 2014 § 1716(c), 127 Stat. 968.

351 *See supra* Part III.A.3.iv.

352 *See supra* notes 205–207 and accompanying text.

353 *See supra* notes 208–210 and accompanying text.

strategic case is often the spark that motivates congressional attention and advocacy, as well as actual "yes" votes for UCMJ reform.

F. Multiple "Strategic Cases"

Since the dawn of time, people have been motivated by stories of other people. Members of Congress are no different. The concept of the "strategic case" accounts for this.

For the purposes of this framework, a "strategic case" is a narrative about a victim or victim group that motivates action. Strategic cases can work as a precursor or a catalyst, or both. Precursor strategic cases are ones that create prime conditions for the other variables in this framework to either be born or to grow. Catalytic strategic cases are figurative sparks that ignite a potent and present, yet previously dormant, mixture of the five variables discussed above. In other words, they turn potential energy into kinetic energy, which precursor strategic cases may have created. The distinction between precursor and catalytic strategic cases, although interesting, is not significant, as the critical function for both is to motivate action. Precursor strategic cases can morph into catalytic strategic cases. Strategic cases are powerful forces for action because they put a proverbial "face" on an issue or a problem. While the concept of precursor strategic cases versus catalytic strategic cases may be worthy of additional study, for the purposes of this article, it simply highlights the fact that strategic cases can either create a call for reform or foment an already existing debate. Breaking apart the three elements of a strategic case helps to better explain the concept.

Unlike the "strategic corporal," which is a concept that "refers to the devolution of command responsibility to lower rank levels in an era of instant communications and pervasive media images,"[354] the first element of a "strategic case" is that it be an actual story—an account of specific events involving at least one member of the victim group. Persuasive statistics are not strategic cases, as they are aggregate data. Statistics, however, are often powerfully used in conjunction with a strategic case to bolster a point.[355]

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[354] Major Lynda Liddy, *The Strategic Corporal: Some Requirements in Training and Education*, 2 AUSTRL. ARMY J., no. 2, 139, SMALL WARS J. (Oct. 21, 2010), *available at* http://smallwarsjournal.com/documents/liddy.pdf.

[355] For a fascinating discussion of the differences between stories and statistics, as well

The second element is that it must be related to a victim group. As a result, strategic cases and high-profile cases are not the same thing. A strategic case may not be high profile. For example, if a sexual assault victim who was wronged by her chain of command described her ordeal to a member of Congress and that member of Congress was motivated to act because of the story, it would constitute a strategic case. On the other hand, a high-profile case may not be strategic. For example, the 2008 Army general court-martial of Staff Sergeant Alberto V. Martinez, who was accused of killing two other soldiers, was high-profile but not strategic, as there were no issues in his case aligned with calls for major UCMJ reform.[356]

For a story to be a strategic case, it must also motivate action. While this basic definition of a strategic case is applicable to any situation, because this framework focuses on UCMJ reform, the story must motivate a member of Congress to act. The action, nevertheless, can be anything, such as the actions listed in Part IV.E above, to include speaking with the media to advocate for a position, passing a formal resolution, convening congressional hearings, or actually voting for reform.[357]

There is no limit to the manner in which the narrative that constitutes a strategic case can be told or distributed to an audience. It can be partially or wholly factual, or it could be fictional. It can be intentionally designed to spur action, or it may unintentionally do so. It can be transmitted via any format or combination thereof, to include word-of-mouth, news media, and artistic mediums, such as film. Additionally, individual stories, which in and of themselves may not motivate action, may be joined together to form a "collective strategic case."

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as a discussion of the tensions between the two, see John Allen Paulos, *Stories vs. Statistics*, N.Y. TIMES, Oct. 24, 2010, http://opinionator.blogs.nytimes.com/2010/10/24/stories-vs-statistics/.

[356] In 2008, Staff Sergeant (SSG) Martinez faced a capitally-referred general court-martial for the premeditated murder of two other Soldiers. In 2006, Staff Sergeant Martinez offered to plead guilty in exchange for a sentence of either life in confinement or life in confinement without the possibility of parole. Lieutenant General John N. Vines, the convening authority, rejected the offer to plead guilty. A panel later acquitted SSG Martinez of the murders. *See* Paul von Zielbauer, *After Guilty Plea Offer, G.I. Cleared of Iraq Deaths*, N.Y. TIMES, Feb. 20, 2009, http://www.nytimes.com/2009/02/21/nyregion/21frag.html?pagewanted=all&_r=0.

[357] *See supra* Part IV.E.

An examination of the three major UCMJ reforms indicates that multiple strategic cases are necessary to motivate Congress to reform the UCMJ. The strategic cases that appear to have played into the NDAA 2014 provide the primary data set for this conclusion. The creation of the UCMJ and Military Justice Act of 1968 also provide useful support.

Multiple strategic cases impacted the creation of the UCMJ. The 1946 Report, which examined the Articles of War, is replete with pages upon pages of specific accounts of due process violation victims.[358] For example, a 1944 case against Sergeant Odus West, who "was accused of brutality to prisoners in the stockade,"[359] was cited three different times to highlight the issues of improper investigation,[360] improper court membership,[361] and improper denial of defense witnesses.[362]

Another strategic case that motivated the UCMJ's creation was that of First Lieutenant (1LT) Sidney Shapiro, U.S. Army.[363] Lieutenant Shapiro, who was a law student at the time of his commissioning, was assigned to defend a soldier charged with "assault with intent to rape."[364] Convinced of both his client's innocence and an impending improper identification of his client during the court-martial, 1LT Shapiro replaced the accused at the defense table with another soldier "who had no connection to the case."[365] After three separate witnesses positively identified the impostor, 1LT Shapiro revealed the switch.[366] After a mistrial was declared, 1LT Shapiro's actual client was identified by the same witnesses during a second trial, and was convicted and sentenced to five years imprisonment.[367] Congress cited this case to highlight its belief that "[m]ilitary courts have been very careless, perhaps because unskilled," with identifications.[368] Captivatingly, Congress was not done with the Shapiro case.

As the 1946 Report discusses, 1LT Shapiro was subsequently tried by court-martial for wrongful and willful delay and obstruction of "the

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358 1946 REPORT, *supra* note 193, *passim*.
359 *Id.* at 17.
360 *Id.*
361 *Id.* at 18–19.
362 *Id.* at 20.
363 *Id.* at 21 (calling the *Shapiro* case a "cause célèbre").
364 *Id.* at 21–22.
365 *Id.* at 22.
366 *Id.*.
367 *Id.*
368 *Id.* at 21.

orderly administration of justice before the aforesaid court-martial, to the prejudice of good order and discipline."[369] After the investigation against 1LT Shapiro was finished "at 11 a. m. on September 3, 1943," 1LT Shapiro was "charged, arraigned, tried, convicted, and sentenced to dishonorable dismissal from the service" in less than 5 hours.[370] Congress used the court-martial of 1LT Shapiro to illustrate multiple due process concerns with the Articles of War and how they were applied.[371] The 1946 Report also detailed more horror stories of unlawful command influence,[372] "secrecy and anonymity" of proceedings and decisions,[373] and "excessive and disparate sentences."[374] The 1949 debates also repeatedly explain how members of Congress received volumes of complaints about the Articles of War and the military justice system.[375] Given the staggering military justice statistics of World War II, such as the trial of 1.7 million courts-martial,[376] the fact that Congress relied so heavily on stories of individuals to justify reforming the Articles of War and creating the UCMJ demonstrates the power of strategic cases.

A "collective strategic case" was present for the Military Justice Act of 1968. Although no one single story appeared to motivate action, a large number of stories coalesced to motivate Senator Sam Ervin into action. In his 1969 Military Law Review Article, Senator Ervin explained that his subcommittee began investigating the UCMJ and due process concerns "following hundreds of complaints from servicemen and their families and an intense field investigation."[377] In 1962 congressional hearings, when discussing less than honorable discharges, Senator Clyde Doyle stated, "we have received hundreds of letters from men with families who received such discharges."[378] The fact that a group of similarly situated complaints self-organized to form a collective

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[369] *Id* at 23.
[370] *Id.* The 1949 congressional floor debate on the Uniform Code of Military Justice took the unusual step to provide an update the Shapiro case. The record states, "Subsequently, Shapiro brought suit in the Court of Claims for his back pay, contending that his conviction was void and his dismissal illegal. He won—scant compensation for the former officer for the disgrace and chagrin he had suffered." 1949 DEB., *supra* note 50, at 278.
[371] 1946 REPORT, *supra* note 193, at 23–24.
[372] *Id.* at 35–39.
[373] *Id.* at 39–40.
[374] *Id.* at 40–45.
[375] 1949 DEB., *supra* note 50, *passim.*
[376] LURIE, *supra* note 41.
[377] Ervin, *supra* note 333, at 78.
[378] 1962 *Hearings*, *supra* note 54, at 317 (statement of Sen. Clyde Doyle).

precursor strategic case for UCMJ reform should give hope to individuals that their recommendations for UCMJ reform may be powerful.[379] Such collective precursor strategic cases were also a part of the 2014 NDAA reform, as were many others.

The 2014 NDAA was motivated by strategic cases of every form. Several precursor strategic cases brought initial attention to the issue. In 1992, the U.S. Navy's Tailhook scandal served as a high-profile, precursor strategic case, as it motivated Representative Schroeder into action.[380] The alleged sexual assaults in 1997 at Aberdeen Proving Ground resulted in congressional hearings about sexual misconduct in the military.[381] Ironically, another high-profile strategic case, the case against Sergeant Major of the Army Gene McKinney, became public the day before those hearings.[382]

All of these strategic cases functioned as precursors, as they brought the issue of sex-related crime in the military to the forefront and started the process for UCMJ reform that has culminated, to date, in the 2014 NDAA UCMJ reforms. Specifically, while Congress chose not to make a major modification to the UCMJ in the 2006 NDAA, its modifications to Article 120, UCMJ, indicate that all variables of this framework were present. By 2005, victims of military sexual trauma were a well-defined, large victim group that was aligned with established advocacy groups.[383] The 2006 NDAA followed nearly four years of conflict. In addition, both the media Congress had already demonstrated repeated interest in the topic.[384] Because the 2006 NDAA Article 120 reforms did not properly address the issue, all variables of this framework remained

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[379] Political theorist William Connolly defines self-organization as "a process by which, say, a simple organism relentlessly *seeks* a new resting point upon encountering a shock or disturbance. Such activity may periodically help to bring something new into the world." WILLIAM E. CONNOLLY, THE FRAGILITY OF THINGS 8 (2013).

[380] 1992 *Hearings*, *supra* note 347, at 3; John Lancaster, *Jury is Still Out on Tailhook Scandal's Effect on Navy Attitudes*, WASH. POST, Feb. 17, 1994, at A10.

[381] *Army Sexual Harassment Incidents at Aberdeen Proving Ground and Sexual Harassment Policies Within the Department of Defense: Hearing Before the Committee on Armed Services*, 105th Cong. (1997).

[382] Jamie McIntyre, *Army's Highest Ranking Enlisted Soldier Accused of Assault, Harassment: Top Brass Reports to Congress on Tuesday*, CNN (Feb. 3, 1997, 10:45 PM), http://www.cnn.com/US/9702/03/pentagon.miseries/.

[383] The group was aligned with advocacy groups as early as 1992. *See* Lancaster, *supra* note 13 (interviewing a representative from the National Women's Law Center, "a nonprofit advocacy group").

[384] *See infra* notes 406–411 and accompanying text; *supra* notes 380–381 and accompanying text.

present, yet dormant. Unlike the Military Justice Act of 1968, which needed only a collective precursor strategic case, multiple high-profile catalytic strategic cases provided the necessary spark to ignite the 2014 NDAA UCMJ reforms.

The Invisible War,[385] a documentary film about sexual assault in the military, was a collective strategic case for the 2014 NDAA UCMJ reforms, as it brought together numerous individual stories to develop a powerful narrative that motivated action. In a 2013 interview, Senator Kirsten Gillibrand explained how *The Invisible War* motivated her to take action.

> One of the reasons why *The Invisible War* was so effective: It put a face on the issue. Those were real victims telling their stories. And that's why, as Chairwoman of the Personnel Subcommittee on the Armed Services Committee, my first hearing was on sexual assault and rape in the military, and I had the victims testify first to tell their stories.[386]

As Senator Gillibrand recognizes, the power of an individual case can give life to other data. During that March 2013 congressional hearing, Senator Gillibrand invited four victims of sexual harassment or sexual assault to testify at the same hearing as all of the service Judge Advocates General.[387] All four victims then used statistics to bolster their personal stories to prove that their experiences were commonplace.[388] Senator Gillibrand did not stop using the power of strategic cases at that hearing. To garner support for the MJIA, she passed out copies of *The Invisible War* to other senators.[389]

Senator Gillibrand's actions also demonstrate that providing a platform for a story can turn it into a strategic case, which in turn can help push the desired reform. Senator Gillibrand is effectively doing this

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[385] THE INVISIBLE WAR (Chain Camera Pictures 2012).
[386] Rebecca Huval, *Sen. Gillibrand Credits The Invisible War with Shaping New Bill*, INDEPENDENT LENS BLOG (May 10, 2013), http://www.pbs.org/independentlens/blog/sen-gillibrand-credits-the-invisible-war-in-shaping-new-bill.
[387] 2013 *Hearing*, *supra* note 10, at 7–37.
[388] *Id.*
[389] Kristina Peterson, *Senate Clears Way for McCaskill's Military Sex-Assault Bill*, WALL ST. J., Mar. 6, 2014, http://online.wsj.com/news/articles/SB10001424052702303369904579423000447800282.

in many ways. For example, she has posted videos of victims sharing their stories on her website.[390] She has also told their stories on the floor of the Senate[391] and has held press conferences with them.[392] The fact that a bipartisan bloc of fifty-five senators has publicly supported the MJIA alone indicates the potential for future use of this strategy.

The aforementioned strategic cases are almost assuredly not the only ones present in each of the major reforms. Nonetheless, stories are always there. Military leaders must seek out, understand, and incorporate those stories into efforts to shepherd the UCMJ.

This framework sets forth a list of variables that, when present simultaneously, create an environment in which the odds of major UCMJ reform are likely even if such reform is contrary to DoD's recommendations. Accordingly, military leaders who internalize this framework will better understand when Congress thinks an issue is a problem and when Congress will be motivated to enact major reforms to the UCMJ. Unfortunately, military leaders who want to enact more effective and just UCMJ reform need more.

Without better tools to make an earlier diagnosis of a potential problem with the UCMJ, military leaders would be in the same position as a physician who correctly understands and identifies a cancer but does so too late for the most effective remedy to be prescribed. The next section provides military leaders with the diagnostic tools that they need to make the early diagnoses needed to most effectively cure future problems with the UCMJ.

V. The Early Indicators

Understanding when Congress will likely implement major reforms to the UCMJ is useful for two reasons. First, when advocating for UCMJ

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[390] Kirsten Gillibrand, *Comprehensive Resource Ctr. for the Military Justice Improvement Act*, U.S. SENATE, http://www.gillibrand.senate.gov/mjia (last visited May 15, 2014).

[391] Kirsten E. Gillibrand, *Gillibrand: Military Sexual Assault Survivor Voices Will be Heard*, YOUTUBE (Nov. 15, 2013), http://www.youtube.com/watch?v=HA74W32WGbQ.

[392] Kirsten E. Gillibrand, *Gillibrand, Ret. Generals, Survivors, Veterans Keep up Fight for Independent Military Justice System*, YOUTUBE (Nov. 19, 2013), http://www.youtube.com/watch?v=_rJivXHJqdU#t=15.

reform, military leaders will understand how to package the proposed reforms to make passage more likely. Second, military leaders can prevent the unintended consequences of reform that is motivated, drafted, and passed by citizens and lawmakers. Both, however, are useful only if military leaders are able to accurately identify a potential problem with the UCMJ before it reaches the critical mass of congressional action.

Revisiting the medical analogy, the current methodology that DoD uses to diagnose problems with the UCMJ identifies the problems at such a late stage that the cure, at best, has undesirable side effects or, at worst, kills the patient. A physician who understands and identifies the early warning signs of a disease in his or her patient is better off than one who does not. Many diseases have early "warning signs" or symptoms that, if identified, provide a better opportunity for a cure or effective treatment. These warning signs are often discovered through research and scholarship. This section applies the same character of research and scholarship to the UCMJ. If military leaders, who are in the same position as the physician, are equipped with a better understanding of how to spot a problem with the UCMJ at an earlier point, actual problems have a better chance of being effectively cured.

In their infancy, potential problems with the UCMJ manifest themselves in one of four ways. Media reports are indicators. Legislative actions also provide indicators. Judicial actions are a third source of indicators. Finally scholarship can indicate problems. Military leaders see these indicators almost every day but have never implemented them as tools to diagnose potential problems with the UCMJ.

One may notice that these four factors are closely related to many of the variables listed in the congressional-action framework. This is true and understandable. Because Congress both controls the UCMJ and represents the American people, Congress, to a practical extent, defines what is and is not a problem with the UCMJ. In conjunction with the congressional-action framework, this part provides a way for military leaders to improve the UCMJ regardless of Congress's motivations, thoughts, or psyche. This section challenges military leaders to look at this readily available information in a new way and with an open mind. To date, military leaders have either not paid attention to this information, or if they have, have not incorporated it into reviews of the

UCMJ.[393] Military leaders who value what the American public says about the UCMJ via the media, legislators, case law, and scholarship, will then be able to apply the new approach for problem solving set forth in Part VI. First, an exploration of each of the early indicators is necessary.

A. Media Reports

The first signs of potential UCMJ problems are often found in media reports. Media reports can come in any form. For example, media reports can be newspaper editorials, radio reports, internet blogs, or anything similar. The important function that the media plays in reflecting public calls for UCMJ is outlined above,[394] as is the powerful impact of the media on Congress in terms of UCMJ reform.[395] Comparing these two roles with the timing and content of media reports prior to each major UCMJ reform shows that media reports are the first place that military leaders should look to identify potential problems with the UCMJ.

Prior to any congressional investigation or legislation, a series of *Washington Post* editorials from 1945 are prime examples of early indicators that the Articles of War had problems. A *Washington Post* editorial from April 22, 1945 stated, "All in all, the details of [the case outlined in the editorial], as far as they are known, are not likely to strengthen faith among those who have kindred in the services that military justice is always intelligently and impartially administered."[396] Interestingly, this editorial explains that it is intentionally serving as an early indicator of a problem. It concluded,

> It is probable that the publicity given to these cases is not altogether pleasing to the Army. But it will be valuable and salutary if it leads to a more careful scrutiny of courts-martial records, and perhaps to some curbing by the Judge Advocate General of officers

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[393] *See supra* Part III.A.
[394] *See supra* Part III.B.1.
[395] *See supra* Part IV.D.
[396] *Military Justice*, WASH. POST, Apr. 22, 1945, at B4.

> whose authority and zeal for making examples exceeds their intelligence and discretion.[397]

The editorials and articles continued. A May 30, 1945 article begins, "So many instances of capricious and unintelligent conduct by Army courts-martial have come to light of late, it would seem that the whole administration of military justice might bear a little investigation."[398] Another July 8, 1945 article outlined that in the prior year, 18,000 soldiers were convicted at general courts-martial, 33,519 were confined, and 102 had been executed.[399]

Military leadership was initially resistant to change. In the same July 8, 1945 article, Undersecretary of War Robert Patterson explained that the court-martial system "operates according to the highest standards of justice and is fair to both the accused and to the Army."[400] In 1945, Army officials even considered "the use of a misleading press release . . . to whitewash the court-martial system, then receiving a great deal of unfavorable publicity."[401]

These articles preceded the first congressional attention to the Articles of War. A *Washington Post* article from April 21, 1945, indicated that a Representative Durham-led congressional committee "quietly" began investigating in late 1945, culminating with the 1946 Report.[402] On March 25, General of the Army Dwight D. Eisenhower formed the Vanderbilt Committee.[403]

Continued media attention may also provide an earlier indication of the severity of the problem. Despite the fact that Congress was already investigating the issue and the Vanderbilt Committee had begun its study, a *Washington Post* editorial from August 14, 1946 begins, "Along with the stench raised by the Lichfield trials comes another unsavory indication of inattention on the part of certain authorities in Europe to the

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[397] *Id.*
[398] *Military Justice*, WASH. POST, May 30, 1945, at 6.
[399] James Chinn, *U.S. Convicted 18,000 Soldiers In Past Year*, WASH. POST, July 8, 1945, at M4.
[400] *Id.*
[401] GENEROUS, *supra* note 37, at 20.
[402] United Press, *supra* note 193, at M4.
[403] U.S. WAR DEP'T, REPORT OF THE WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 1 (13 Dec. 1946) [hereinafter VANDERBILT COMMITTEE REPORT].

workings of military justice in their bailiwick."[404] After describing horrific substantive and procedural due process rights violations of soldiers in pretrial confinement, the article concludes,

> It would be an obvious mistake to allow the gross remissness which this incident displays to reflect on Army justice as a whole. Nevertheless, it is the excesses that stigmatize any system. Abuses such as this tend to confirm the impression that the Army is exceedingly free with other people's time and that the individual becomes just a cog in a machine who can easily be forgotten. This sort of thing makes the public—especially prospective enlistees—lose confidence in the Army. . . . Several reports are now pending on reforms in military justice procedure. Doubtless they will contain many valuable suggestions. But the travesty [of the cases described in the editorial] indicates that it is not the system so much as the execution that is primarily at fault. By assuring merely that the rules now in effect are rigidly adhered to, the Army would meet much of the unfavorable criticism that has arisen over its court-martial policy.[405]

An even better example of media attention providing an early warning is found prior to the 2014 NDAA. Media reports indicated concerns about the UCMJ's effectiveness in prosecuting sex-related offenses as early as 1992.[406] The media reports continued for the next twenty-one years until passage of the 2014 NDAA. Between 1992 and September 11, 2001, the *New York Times* and *Washington Post* combined to publish approximately 100 articles that, to varying extents, discussed the military justice system and sexual misconduct.[407]

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[404] *Trial Delay*, *supra* note 180. For more information on the Lichfield trials, see JACK GIECK, THE U.S. ARMY ON TRIAL (1997).

[405] *Trial Delay*, *supra* note 180.

[406] *See* Lancaster, *supra* note 13. One could persuasively argue that the media reports began in 1990. A front page story in the October 22, 1990 *Washington Post* stated, "The Navy has a serious problem with rapes sexual assaults and violations of 'fraternization' rules at its sprawling training center in Orlando, Fla., but often has failed to seek appropriate punishment for the offenders, according to a Pentagon investigation." Molly Moore, *Navy Failed to Prosecute In 6 Rapes; Probe Finds Laxity on Sex Offenses at Florida Base*, WASH. POST, Oct. 22, 1990, at A1.

[407] *See, e.g.*, Anderson & Binstein, *supra* note 28; John Eisenhower, Op-Ed., *The Military's Moment of Truth*, N.Y. TIMES, Nov. 16, 1996, at 23; Dana Priest, *Abuse In*

Following September 11, 2001, each paper published approximately seventy articles on the same topic.[408] Other than the articles discussing the military's ban against homosexual conduct, no other issue related to military justice was more prevalent in these papers than sexual misconduct.[409] While most of these articles did not criticize the UCMJ's handling of sexual misconduct, the simple fact that so many articles discussed this topic demonstrates that the issue of the UCMJ's relationship with sexual misconduct should have been studied in greater depth.

Some of the articles in the 1990s, on the other hand, identified specific concerns about the UCMJ's ability to properly handle sexual misconduct. In a 1996 *New York Times* Op-Ed piece, John Eisenhower explicitly called for UCMJ reform, arguing, "It is time for another Doolittle Board, this one to address sexual harassment throughout the armed forces."[410] In a 1997 *New York Times* article that focused on a case centered on Air Force rules fraternization rules, Representative Carolyn B. Maloney stated that the case is "just one more example of a lopsided, unfair operation known to some as the 'military justice system.' I really wish there was as much energy focused on real cases of sexual assault, harassment and rape."[411]

Luckily, the explosion of newer media formats over the past two decades, such as the internet and the twenty-four-hour news cycle, makes it even easier to spot potential challenges to the UCMJ. In other words, the very same media that has created the "strategic corporal"

Army 'Not That Unusual'; Sexual Misconduct By Trainers Long-Standing Problem For Military, WASH. POST, Nov. 21, 1996, at A1; Eric Schmitt, *Army Unsure As Soldier In Sex Case Asks to Retire*, N.Y. TIMES, June 5, 1997, at B14; Elaine Sciolino, *Air Force Chief Delays Decision in Sex Case*, N.Y. TIMES, July 4, 1997, at A10; Editorial, *The McKinney Verdict*, WASH. POST, Mar. 18, 1998, at A20; Rene Sanchez, *General's Case May Put Military on Trial*, WASH. POST, Mar. 16, 1999, at A2; Thomas E. Ricks, *Drugs, Sex & Recommendations*, WASH. POST, July 17, 2001, at A15. This statistic was obtained by using a Westlaw search using combinations of the terms "military justice," "sex!," "assault," "harass!," and "misconduct."

[408] *See supra* note 314 and accompanying text.

[409] This data is based on a multitude of Westlaw searches. The statistics are on file with the author.

[410] Eisenhower, *supra* note 407. Despite his use of the term "sexual harassment" in his call for reform, in the first paragraph of the article, Eisenhower uses the terms "sexual harassment," "sexual assault," and "sexual misconduct." The Doolittle Board was one of many groups that examined the Articles of War immediately following World War II. GENEROUS, *supra* note 37, at 16.

[411] Sciolino, *supra* note 407 (quoting Rep. Carolyn B. Maloney).

phenomenon can be used constructively to better understand potential problems with the UCMJ. The efforts to pass the 2014 NDAA and the MJIA provide a telling example.

The 24-hour news and internet have exponentially increased the amount of information available to both military leaders and the public. Almost every single major newspaper article ever written is available online.[412] Cable television is full of hundreds of channels, to include multiple stations that carry nothing but news-related programming.[413] The key is to look for the right information. In modern times, relevant information is often located in places other than newspapers.

Military leaders looking to make an earlier diagnosis of potential problems with the UCMJ should look to social media.[414] During the 2013 Hearings, Ms. Brigette McCoy, a sexual assault victim who testified at the hearing, explained to Senator Tim Kaine the power of social media in calling for UCMJ reform.

> Well, from my perspective, I come to this—I started a social media project that basically I just wanted to connect with other people who had been through the same things that I had been through. And so I perceive that social media and grassroots community activism has been the single most thing that brought people together to help solidify the groups of different, varying issues and brought all these people together to say, hey, we have an issue, let's work together to get something done in a positive direction.[415]

There is nothing preventing military leaders from accessing the publicly available websites and social media sites of the various advocacy groups aligned with a victim group. Obviously such visits

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[412] *See, e.g.*, *ProQuest Archiver*, WASH. POST (Apr. 29, 2014), https://secure.pqarchiver.com/washingtonpost_historical/advancedsearch.html; *Search*, N.Y. TIMES (Apr. 29, 2014), http://query.nytimes.com/search/sitesearch/#//.

[413] *See* Justin Bachman, *The Ugly Numbers Behind Unbundled Cable TV*, BLOOMBERG BUSINESSWEEK, Dec. 6, 2013, http://www.businessweek.com/articles/2013-12-06/the-ugly-numbers-behind-unbundled-cable-tv (stating that the average cable television consumer has access to approximately 180 channels).

[414] For an article outlining the political power of social media, see Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, FOREIGN AFF., Jan./Feb. 2011.

[415] 2013 *Hearing*, *supra* note 10, at 36.

should be solely for the purpose of better understanding the group's perspective on what is wrong with the UCMJ. Part VI contains additional recommendation on how to use this information to create positive change.[416]

Many military leaders may have read many of the articles and media stories outlined above but, apparently, did not understand the value of the words they were reading. Given the military's nearly complete resistance to or disregard of the media attention outlined above,[417] it could appear that military leaders have so far agreed with Oscar Wilde, who famously quipped, "By giving us the opinions of the uneducated, [journalism] keeps us in touch with the ignorance of the community."[418] As demonstrated above, that public perception of the UCMJ, even if ignorant, is a powerful motivator for reform.[419] There is no reason that military leaders should not seek it out, and the best place to do so is through the media. Another place to look is to the people's elected representatives.

B. Legislative Indicators

Elected representatives at every level of government often indicate potential problems with the UCMJ well before formal legislation is proposed and debated. There are two common indicators. First, members of Congress often directly voice their concerns on a particular topic directly with military leaders, such as via legislation, congressional hearings, letters, or meetings. Second, members of Congress may voice their concerns in a more indirect manner, such as through legislation that does not pass, media interviews, or on websites. While each indicator individually may not be cause for concern, an aggregation of similarly-focused legislative indicators can serve as an early indicator that something is wrong.

Surprisingly, it appears that the most obvious early indicators, which are direct communications from one or more members of Congress, are frequently ignored or misunderstood. Such examples include

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[416] *See infra* Part VI.
[417] *See supra* Part III.A.
[418] OSCAR WILDE, *The Critic As Artist*, *in* INTENTIONS 74 (1891).
[419] *See supra* Part IV; Schlueter, *supra* note 30, at 10 ("You are not entirely separate from society simply because you wear a uniform.").

Representative Schroeder's 1992 letter to then-Secretary of Defense Richard Cheney requesting that DoD "create a special civilian office to investigate charges that the military for years had covered up rapes and sexual assaults."[420] Given Secretary Cheney's refusal of the request and the absence of a UCMJ review, it is doubtful that he considered the request as an early indicator of the exact perceived problems with the UCMJ that the 2014 NDAA is designed to address.

Another example of a direct-communication indicator is when Congress asks or directs the military study an issue. These patent indicators of a potential problem often occur years before any actual reform. Examples include when Senator Sarbanes requested the PAT in 2000,[421] the 2005 NDAA's directive to the JSC to study sexual misconduct and the UCMJ,[422] and the 2013 NDAA-directed review of the UCMJ.[423] Even though direct communications are obvious indicators of a potential problem, the JSC subcommittee's 2006 recommendation to not reform the UCMJ indicate that military leaders and institutions for UCMJ reform may not have adequately weighted these concerns.

One more illustration of a direct legislative early indicator is when military leaders are called to testify at congressional hearings that predate formal legislative debate. For example, The Judge Advocate General, U.S. Army, has repeatedly testified at congressional hearings about military justice matters.[424] In 1962, Senator Ervin also asked for Chief Judge Robert Quinn to testify at congressional hearings regarding the due process rights of servicemembers.[425] In 2004, during a Senate Armed Services Committee panel, multiple senators "made it clear that they were not satisfied with either the level of misconduct that persists or

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[420] JOAN A. LOWY, PAT SCHROEDER: A WOMAN OF THE HOUSE 163 (2003).

[421] *See supra* Part III.A.3.iv.

[422] National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1920–921.

[423] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112–213, § 576, 127 Stat. 1758, *available at* http://responsesystemspanel.whs.mil/public/docs/FY13%20NDAA%20(Subtitle%20H,%20sec%20576).pdf.

[424] *See, e.g.*, 1947 *Hearings*, *supra* note 307, at 1926 (testimony of Major General Thomas H. Green); 2013 *Hearing*, *supra* note 10, *passim* (testimony of Lieutenant General Dana K. Chipman).

[425] 1962 CODE COMMITTEE REPORT, *supra* note 89, at 49–64. Robert Quinn was a civilian, and therefore not a military leader. He was, however, the Chief Judge of the Court of Military Appeals and led the Code Committee, which included all of the service Judge Advocates General. *See supra* note 83 and accompanying text.

existing measures for treating victims of assault."[426] At this hearing, Senator Susan Collins opined that soldiers have "more to fear from fellow soldiers than from the enemy."[427] This comment implicates the UCMJ, as it is what is used to discipline soldiers. Senator John Warner presciently warned, "This committee is prepared to back the U.S. military to achieve zero tolerance," but "if you don't carry it out, we're going to take over."[428] Notably, military leaders did not see this direct attack on the UCMJ as troublesome, as the JSC subcommittee recommended no reform to the UCMJ in its report pursuant to the 2005 NDAA.[429] The 2006 NDAA and the 2014 NDAA demonstrates that Senator Warner's warning was accurate.

This article does not argue that military leaders should honor each direct request for action. To the contrary, many requests are either improper or unripe for direct action. The fact that a communication occurred, however, has value. Military leaders should amalgamate the information learned during these direct expressions of concern with more indirectly voiced concerns as an indicator that something might be amiss.

Members of Congress are also adept at more indirect indications of a problem. Legislation that fails to pass provides a perfect example. Such legislation may be doomed from the start, but it is still brought to send a message. Despite assured failure in the Senate, in the four years since the passage of the Affordable Care Act, the Republican-controlled U.S. House of Representatives has passed fifty-four bills that would "undo, revamp, or tweak" the health care bill.[430] Representative Tim Huelskamp stated that one of the votes was held "to send a message to our base."[431] Similarly, in 1992, Representative Schroeder and twenty-one co-sponsors sent a message with their resolution that raised many of the exact same concerns that the 2014 NDAA was passed to address.[432] The

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[426] Bradley Graham, *Military Scolded on Assaults; Senators Seek More Protection for Female Soldiers*, WASH. POST, Mar. 11, 2011, at A19.
[427] *Id.*
[428] *Id.*
[429] *See supra* notes 117, 209–210 and accompanying text.
[430] Ed O'Keefe, *The House Has Voted 54 Times*, WASH. POST, Mar. 21, 2014, http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list/.
[431] Russell Berman, *House Conservatives Call for New Vote to Repeal Obamacare*, THE HILL (Apr. 24, 2013, 5:49 PM), http://thehill.com/policy/healthcare/295887-house-conservatives-call-for-new-vote-to-repeal-obamacare.
[432] *See supra* note 339–345 and accompanying text.

problem is that military leaders never looked for, received, or understood that message.

Indirect legislative indicators also come in the form of media interviews. For example, in May 2004, a full decade before the 2014 NDAA, Representative Louise Slaughter explicitly called for many of the exact changes found in the 2014 NDAA, such as a more precise definition of sexual assault, defined roles for victim advocates, and rules surrounding confidentiality.[433] During a June 2004 interview, Representative Loretta Sanchez, who was advocating for a reform of Article 120, UCMJ, stated, "There are some basic flaws that haven't been addressed."[434]

Congressional member websites are yet another location where indirect legislative indicators are located. For example, both Senators Gillibrand and McCaskill have websites dedicated to specific issues about which they are concerned,[435] to include UCMJ reform.[436] The fact that two senators have websites dedicated to a high-profile issue about which they care is not surprising. Unfortunately now that sexual assault in the military is a front-and-center issue, websites on the topic no longer offer any early warning.

Issue specific websites, however, can act as early indicators for future challenges to the UCMJ even if the websites do not specifically mention the UCMJ or military justice system. For example, both Senators Gillibrand and McCaskill have specific websites dedicated to veterans' issues.[437] On her website, Senator Gillibrand discusses her interest in ensuring that "fewer veterans fall through the bureaucratic cracks" by forcing the Department of Veterans Affairs (VA) to "pro-

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[433] *See* Clemetson, *supra* note 207; National Defense Authorization Act for Fiscal Year 2014 § 1716, 127 Stat. 966–69.

[434] Smith, *supra* note 205 (quoting Rep. Loretta Sanchez).

[435] *Kirsten Gillibrand, United States Senator for New York*, U.S. SENATE, http://www.gillibrand.senate.gov/ (last visited May 15, 2014) (follow "Issues" tab); Claire McCaskill, *Missouri's Senator Claire McCaskill*, U.S. SENATE, http://www.mccaskill.senate.gov/ (last visited May 15, 2014) (follow "Issues" tab).

[436] Gillibrand, *supra* note 390; Claire McCaskill, *Curbing Sexual Assaults in the Military*, U.S. SENATE, http://www.mccaskill.senate.gov/militaryjustice (last visited May 15, 2014).

[437] Kirsten Gillbrand, *Veterans*, U.S. SENATE, http://www.gillibrand.senate.gov/issues/veterans (last visited May 15, 2014); Claire McCaskill, *Delivering for Veterans*, U.S. SENATE, http://www.mccaskill.senate.gov/?p=issue&id=380 (last visited May 15, 2014).

actively reach out to veterans and inform them of the benefits that should be available to them."[438] She also wants to "ensure that exiting veterans are automatically enrolled in the VA health care they are entitled to when they exit the military service."[439] Similarly, Senator McCaskill is interested in "improving access to treatment for mental health issues, including post-traumatic stress disorder and traumatic brain injury," and "combat[ing] homelessness by safeguarding vulnerable veterans."[440] Part VI will show how this legislative interest in veterans issues, indicated indirectly via a website, can combined with other early indicators to identify a potential problem with the UCMJ because of its inflexibility when it comes to dealing with wounded warriors.[441]

One more potential indirect legislative indicator is a statutory trend. Detecting a legislative trend on a particular issue is laborious and difficult to discern because of the fifty-seven federal, state, and territorial jurisdictions that serve under as many constitutions. Even so, there is at least one instance in which a legislative trend was applicable to the UCMJ. Between 1962 and 2003, 24 states repealed laws forbidding sodomy.[442] Article 125's ban on consensual sodomy, nonetheless, was in effect, at least technically, until the 2014 NDAA.[443] Although sometimes difficult to detect, legislative indicators are, nevertheless, potential early indicators that military leaders should explore.

While these indirect legislative indicators are not as pointed as direct ones, most are not difficult to locate. When the legislative indicators are then combined with direct ones, a more vivid picture of an actual or perceived problem with the UCMJ that would otherwise not be seen will emerge. The next early indicators to help such a picture emerge are case law indicators.

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[438] Gillibrand, *supra* note 437.
[439] *Id.*
[440] McCaskill, *supra* note 437.
[441] *See infra* Part VI.
[442] While neither scholarly nor scientific, Wikipedia's page on *Sodomy Laws in the United States* is helpful, as it is the most accurate and well-organized summary that is easily available to the public. *Sodomy Laws in the United States*, WIKIPEDIA, http://en.wikipedia.org/wiki/Sodomy_laws_in_the_United_States (last visited May 15, 2014).
[443] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1707, 127 Stat. 961.

C. Case Law Indicators

In addition to legislators, judges and courts often provide early indicators that the UCMJ needs reform. Each day, appellate judges in federal and state jurisdictions interpret and apply laws using a variety of interpretive methods, theories, and philosophies.[444] As with everyone's decisions, these judges' opinions are shaped by experience, education, and heuristics.[445] Extensive quantitative and qualitative social science and legal research indicates that public opinion does impact judicial opinions.[446] For example, a modern accepted societal norm is that the Fifth and Sixth Amendments to the Constitution guarantees most persons who are accused of a criminal offense the effective assistance of counsel, which must be paid for by the government if necessary.[447] Such, however, was not the case as recent as 1963.[448]

Recognizing that these opinions serve as barometers of public opinion and thought, military leaders can look to them to understand trends in the law and, as a result, use them as a tool to spot potential problems with the UCMJ. One indicator may motivate a minor change to the UCMJ. An amalgam of judicial indicators could indicate the need for a major reform. The Supreme Court, federal appellate courts, and state courts provide valuable evidence.

The first place that military leaders should look is to the Supreme Court. Surprisingly, the Supreme Court's decisions are not always automatically applicable in military courts. The Supreme Court is established under Article III of the Constitution,[449] but the military, and therefore its courts, are established under Article I.[450] Further, the

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[444] Appellate opinions are preferable over trial court opinions because of their accessibility and precedential nature.

[445] *See generally* JUDGMENT UNDER UNCERTAINTY: HEURISTICS & BIASES (Daniel Kahneman et al. eds., 1982); *see infra* Part VI.B.1.i.

[446] For a synopsis of the varying arguments of the role that public opinion has on judicial opinions, see Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2010).

[447] U.S. CONST. amends. V, VI.

[448] Gideon v. Wainwright, 372 U.S. 335 (1963).

[449] *Id.* art. III.

[450] For a synopsis of the relationship between the Supreme Court and military courts, see ANNA C. HENNING, CONG. RES. SERV., RL34697, SUPREME COURT APPELLATE JURISDICTION OVER MILITARY JUSTICE CASES 5 (Mar. 5, 2009), *available at* http://www.fas.org/sgp/crs/misc/RL34697.pdf, ("[L]egal interpretations of Article III

Supreme Court almost always exerts appellate, rather than original, jurisdiction.[451] The fact that the Supreme Court hears a case at all inherently indicates a potential shift in public opinion, as a widely-held, uncontroversial belief is less likely to generate a grant of certiorari. As a result, non-binding Supreme Court decisions are a counterintuitive, yet powerful, source to which military leaders should consult to diagnose potential problems with the UCMJ.

A bevy of Supreme Court decisions prior to the Military Justice Act of 1968 indicated that many Americans valued increased due process rights for those suspected or accused of committing crimes. Many refer to the period of time in which Earl Warren served as the Chief Justice of the Supreme Court (Warren Court) as the "Due Process Revolution" because, during that time, the Court greatly expanded "the meaning and scope of constitutional rights."[452] Because many military leaders supported the reforms of the Military Justice Act of 1968,[453] they were understandably not looking for these signs. They were nonetheless present.

One well-known example of a judicial indicator is the 1963 Supreme Court case of *Gideon v. Wainwright*.[454] In *Gideon*, the Court, for the first time, guaranteed all indigent defendants the right to counsel.[455] In justifying the decision, the Court states,

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every

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courts do not necessarily create binding precedent for Article I courts, and vice versa. . . . [M]ilitary courts sometimes reject even Supreme Court precedent as inapplicable in the military context."). A good example of a constitutional protection that the Supreme Court has clarified for civilians, but remains unclear for the military, is the right to counsel of choice. *Compare* Brooker, *supra* note 41, at 8–11, *with* Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957).

[451] U.S. CONST. art. III, §§ 1, 2; Thomas E. Baker, *A Primer on Supreme Court Procedures*, A.B.A. PREVIEW OF U.S. S. CT. CASES, 475, 479 (2004), *available at* http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_scprimer.authcheckdam.pdf (explaining how original jurisdiction "is exercised rarely").

[452] GEORGE COLE & CHRISTOPHER SMITH, CRIMINAL JUSTICE IN AMERICA 78 (2008).

[453] *See supra* note 104 and accompanying text.

[454] Gideon v. Wainwright, 372 U.S. 335 (1963).

[455] *Id.*

> defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[456]

Even after *Gideon*, a military accused whose case was referred to a special court-martial did not have the right to legally-trained counsel despite the fact that a conviction carried the potential sentence of six months confinement and forfeiture of pay.[457] During the 1966 Senate hearings, Senator Ervin and two other witnesses mentioned the *Gideon* case as a reason to modify the UCMJ.[458] The Military Justice Act of 1968 finally gave an accused at a special court-martial the right to such counsel.[459] With *Gideon*, the proverbial "writing was on the wall" for over five years.

A second popular example of a judicial indicator is the 1966 Supreme Court case of *Miranda v. Arizona*.[460] In 1966, the Court found that a suspect in "custodial interrogation" must be "effectively apprised of his rights,"[461] which are that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[462] At that time, Article 31, UCMJ guaranteed only the right to remain silent, not the right to counsel during custodial interrogation.[463] *Miranda* was a powerful early indicator that military leaders should consider extending the right to counsel to earlier stages in the military justice process.[464] But *Miranda* neither explicitly nor implicitly applied to the military until the U.S. Court of Military Appeals decided *U.S. v. Tempia* in 1967 – four years later.[465]

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[456] *Id.* at 344.
[457] McCoy, *supra* note 61, at 70–75 (discussing the right to counsel at special court-martial and citing UCMJ art. 27(c) (1964) and UCMJ art. 27(c), 10 U.S.C.A. § 827(c) (Supp. Feb. 1969)); UCMJ art. 19 (1951) (stating the jurisdictional maximum punishment at a special court-martial).
[458] 1966 *Hearings*, *supra* note 58, at 428, 440, 452.
[459] McCoy, *supra* note 61, at 70–75.
[460] Miranda v. Arizona, 384 U.S. 436 (1966).
[461] *Id.* at 444, 498.
[462] *Id.* at 444.
[463] UCMJ art. 31 (1951).
[464] Davis v. United States, 512 U.S. 452, 457 n.* (1994) (noting that the President extended the protection of the self-incrimination clause to servicemembers).
[465] United States v. Tempia, 16 U.S.C.M.A. 629 (1967); *see* Gaylord L. Finch, *Military Law and the Miranda Requirements*, 17 CLEV.-MARSHALL L. REV. 537 (1968), *available at* http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=2928&context=clevstlrev.

Much like strategic cases, military leaders will realize the true power of these indicators if they amalgamate them to show either a trend or critical mass. If multiple opinions impact an area of law pertinent to the UCMJ, military leaders should look to see if the cases indicate a trend or critical mass that is worth further exploration or action. If a trend or critical mass for change exists, a major reform is more likely. The Warren Court's "Due Process Revolution," which include *Gideon* and *Miranda*, is a perfect example. While not every "Due Process Revolution" case dealt with an issue directly applicable or relatable to the UCMJ, the trend of expanding due process rights, and how such a trend might impact the UCMJ, was ripe for research and study. Fortunately, the Supreme Court is not the only source of judicial indicators.

Federal circuit courts of appeal are another source of judicial indicators. A current example is a relatively recent case from the 9th Circuit Court of Appeals. In its initial *Veterans for Common Sense v. Shinseki* opinion, the court severely criticized the VA disability claims appeal process, expressing severe outrage at the VA.[466]

> Veterans who return home from war suffering from psychological maladies are entitled by law to disability benefits to sustain themselves and their families as they regain their health. Yet it takes an average of more than four years for a veteran to fully adjudicate a claim for benefits. During that time many claims are mooted by deaths. The delays have worsened in recent years, as the influx of injured troops returning from deployment has placed an unprecedented strain on the VA, and has overwhelmed the system that it employs to provide medical care to veterans and to process their disability benefits claims. For veterans and their families, such delays cause unnecessary grief and privation. And for some veterans, most notably those suffering from combat-derived mental illnesses such as PTSD, these

[466] Veterans for Common Sense v. Shinseki, 644 F.3d 845, 850 (9th Cir. 2011), *vacated by* Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1016 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 840, 81 U.S.L.W. 3130568 (U.S. Jan. 7, 2012) (No. 12-296).

> delays may make the difference between life and death.[467]

To be sure, even to trained military justice practitioners, this case would seem to have very little to do with the UCMJ. For one, the court's criticism is squarely focused on VA. Secondly, an en banc court vacated the initial judgment that was favorable to the plaintiff. Third, the statement above is dicta.

But despite those facts, the case remains a prime judicial indicator of a potential problem with the UCMJ. As will be discussed in Parts V.D and VI below, several scholars have researched the impact that the UCMJ plays in creating the exact situation that the court laments in the passage above.[468] How this judicial indicator meshes with many others to diagnose the UCMJ's potential problem with wounded warriors is set forth in Part VI.[469]

One more source of judicial indicators is from state and territorial courts. While the sheer magnitude of state and territorial court appellate opinions and the more than fifty different sets of rules can make an examination of state court opinions seem like a daunting task, indicators sometimes have a high-profile character. Further, most criminal actions and all family law actions are tried originally in state courts, and these types of cases may be among the best judicial indicators.

State court decisions that invalidated laws against consensual adult sodomy offer a prime example. As late as 1962, consensual adult sodomy was illegal in all fifty states,[470] while Article 125, UCMJ, criminalized consensual sodomy in the military.[471] Starting in 1974 with the Massachusetts case of *Commonwealth v. Balthazar*,[472] state supreme

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[467] *Id.*
[468] *See, e.g.*, Major John W. Brooker et al., *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1 (2012); Major Evan. R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1 (2011); Major Tiffany M. Chapman, *Leave No Soldier Behind: Ensuring Access to Health Care for PTSD-Afflicted Veterans*, 204 MIL. L. REV. 1 (2010).
[469] *See supra* Part VI.
[470] *See supra* note 442.
[471] UCMJ art. 125 (1951).
[472] Commonwealth v. Balthazar, 318 N.E.2d 478 (1974).

courts began invalidating statutes that made consensual adult sodomy a crime. Between 1980 and 2003, appellate courts in nine other states followed.[473] If military leaders had been examining state court opinions for a trend, they would have seen that laws against sodomy were falling out of favor throughout the country and that, therefore, a reexamination of Article 125, which was not repealed until the 2014 NDAA, would have been appropriate.

Unlike the broad issue judicial indicators that signaled due process and veterans benefits concerns, judicial indicators on narrow issues such as a law against sodomy may only indicate the need for a minor UCMJ reform. Minor reform, however, often reverberates into larger change. Article 125's ban on consensual sodomy was inextricably linked with the larger policy issue of homosexuality in the military. With the repeal of "Don't Ask, Don't Tell" and overturning of the Defense of Marriage Act,[474] the judicial indicators regarding the legalization of sodomy were an early indicator of something even greater.

Judicial indicators will not likely be the first available indicator of a potential problem with the UCMJ. Media articles questioning Article 125's ban on consensual sodomy date as far back as 1983.[475] They do, nonetheless, lend significant weight and gravitas to other indicators, as they come from those educated and trained in the law. Fortunately, judicial indicators are not the only ones that emanate from learned legal professionals. Scholarly articles are another source of early indicators.

D. Research and Scholarship

Many scholars have not worn the same proverbial blinders as some military leaders and institutions seem to have worn when it comes to the UCMJ. Accordingly, some of the best and most explicit early indicators

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[473] *See* People v. Onofre, 415 N.E.2d 936 (N.Y. 1980); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980); Newsom v. State, 763 P.2d 135 (Okla. 1988); Schochet v. State, 320 Md. 714 (Md. Ct. App. 1990); Kentucky v. Wasson, 842 S.W.2d 487 (Ky. 1992); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. 1996); Gryczan v. State, 942 P.2d 112 (Mont. 1997); Powell v. Georgia, 510 S.E.2d 18 (Ga. 1998); Doe v. Ventura, 2001 WL 543734; Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002).

[474] Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515–17; United States v. Windsor, 570 U.S. 12 (2013) (holding aspects of the Defense of Marriage Act, Pub. L. 104–199, 110 Stat. 2419 (1996), unconstitutional).

[475] Colman McCarthy, *Justice for a Lieutenant*, WASH. POST, Jan. 9, 1983, at M4.

of potential problems with the UCMJ are scholarly articles. This should be of no surprise to military leaders, as they have long demonstrated an institutional commitment to research, scholarship, and reflection.[476] The major problem with scholarly articles, though, is that very few people read them.[477] Military leaders who want to shepherd the UCMJ must not fall into this trap. Scholars are both powerful and cheap. They are highly trained in a particular discipline or profession, yet perform much of the "grunt work" for little to no additional cost to the government. Their research can be leveraged in useful ways. The value of scholarship as an early indicator is best shown by the events leading to the 2014 NDAA, as scholars have been discussing the main issues that motivated this major UCMJ reform for over two decades.

A limited amount of scholarship preceded both the UCMJ's enactment and the Military Justice Act of 1968. In 1948, a *Yale Law Journal* article discussing collateral attacks on the Articles of War in civilian courts is one example,[478] as is a 1950 *Stanford Law Review* article entitled, *Can Military Trials Be Fair? Command Influence Over Courts-Martial*.[479] Prior to the Military Justice Act of 1968, many military justice-related articles mentioned due process but few openly advocated for change.[480]

Scholarship can be valuable for three reasons. First, articles often consolidate other sources that can also serve as early indicators. Second, the mere fact that an issue is debated in a scholarly arena for an extended time indicates that it is worthy of additional formal study. Third,

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[476] Examples include the Judge Advocate General's Graduate Course at The Judge Advocate General's School, U.S. Army, in Charlottesville, Virginia, and the Command and General Staff Officers' Course. *See, e.g.*, Fred L. Borch III, *Master of Laws in Military Law: The Story Behind the LL.M. Awarded by The Judge Advocate General's School*, ARMY LAW., Aug. 2010, at 2 (explaining the history of the Graduate Course); U.S. Army Combined Arms Center, *CGSC Command and General Staff Officers' Course*, http://www.cgsc.edu/ile/courses.asp (last visited May 15, 2014) (describing the Command and General Staff Officers' Course).

[477] Daniel Luzer, *No One Really Reads Academic Papers*, WASH. MONTHLY, Feb. 19, 2013, http://www.washingtonmonthly.com/college_guide/blog/academics_do_a_lot_of.php.

[478] *Collateral Attacks on Courts-Martial In the Federal Courts*, 57 YALE L. J. 483 (1948).

[479] *Can Military Trials Be Fair? Command Influence Over Courts-Martial*, 2 STAN. L. REV. 547 (Apr. 1950).

[480] *See, e.g.*, WILLIAM B. AYCOCK & SEYMOUR W. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE (1955); Lieutenant Colonel Charles G. Reid, *Some Aspects of "Military Due Process,"* 8 A.F. L. REV. 17 (1966).

scholarship often provides recommendations or proposed solutions that those who are charged to study a particular issue should consider. Scholarship prior to the 2014 NDAA could have served these valuable purposes. Examining each purpose in turn will show how.

First, published scholarship tends to consolidate and highlight other early indicators that military leaders may otherwise not see. Examples are plentiful. A 1993 *Military Law Review* article not only discussed the prosecution of sexual assault and sexual harassment in the military but also cited to a *Washington Post* article from 1990 about the Navy's failure to properly handle six rape cases.[481] A 1996 *Duke Law Journal* article focuses on a *Dayton Daily News* newspaper report that outlined an "eight-month examination of sexual assaults in the military."[482] If a military leader was not from Dayton or was not otherwise informed of this study, it is unlikely that he or she would have ever heard about this information. Another 1996 *Duke Law Journal* article entitled *By Force of Arms: Rape, War and Military Culture* provides an impressive array of sources, ranging from congressional hearings, other scholarly articles, and empirical, qualitative social science research.[483]

Second, published scholarship is no different than the other early indicators in that if an increasing amount of it relates to a particular potential problem with the UCMJ, additional study of that issue is wise, regardless of the specific arguments made in the articles. In the 1990s, the legal scholarship related to sexual misconduct in the military was extensive, and was published in some of the most highly regarded legal journals. To illustrate, in 1992 and 1993, articles were published in the *University of Missouri at Kansas City Law Review*,[484] the *Military Law Review*,[485] and the *California Western Law Review*.[486] The *Air Force*

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[481] Moore, *supra* note 406.

[482] Christopher P. Beall, *The Exaltation of Privacy Doctrines Over Public Information Law*, 45 DUKE L.J. 1249, 1249–52 (discussing Carollo, *supra* note 189). Ironically, this article was focused on the Freedom of Information Act but was found during a Westlaw search for scholarship related to sexual assault and the military. *Id*.

[483] Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651, 683 (1996).

[484] Peter Nixen, *The Gay Blade Unsheathed: Unmasking the Morality of Military Manhood in the 1990s, An Examination of the U.S. Military Ban on Gays*, 62 UMKC L. REV. 715 (1992).

[485] Lieutenant Commander J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Assault in the Military*, 140 MIL. L. REV. 1 (1993).

[486] Douglas R. Kay, *Running A Gauntlet of Sexual Abuse: Sexual Harassment of Female Naval Personnel in the United States Navy*, 29 CAL. W. L. REV. 307 (1992).

Law Journal and *Duke Law Journal* published articles in 1996.[487] The *Minnesota Law Review* and *American University International Law Review* published articles in 1998,[488] and the *Yale Law Journal* published an article in 1999.[489] While the articles all took different positions about sexual misconduct and the UCMJ, the simple fact that the issue was so widely discussed well before any actual legislative reform demonstrates that scholarship can be a very powerful early indicator that change may be necessary.

Third, published scholarship can provide what may later seem to be clairvoyant recommendations. Elizabeth Hillman, an Air Force veteran who is now the Provost and Academic Dean at the University of California Hastings College of the Law, persuasively attacked the military's "good soldier defense" in her 1999 *Yale Law Journal* article *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*.[490] A full fifteen years prior to the passage of the 2015 NDAA, Hillman, as a law student, expertly outlined the argument against the admissibility of evidence of good military character in sexual misconduct cases.[491] Fifteen years later, the 2015 NDAA barred the admission of military character evidence "for the purpose of showing the probability of innocence of the accused" for a number of offenses.[492]

The 2002 book *Evolving Military Justice* demonstrates how one single work serves all three ends. First, it compiles the scholarly work product from a broad spectrum of the finest military scholars, to include academicians, jurists, and practitioners.[493] Second, this scholarship raises

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[487] Major Timothy W. Murphy, *A Matter of Force: The Redefinition of Rape*, 39 AIR FORCE L. REV. 19 (1996); Beall, *supra* note 482; Morris, *supra* note 483.

[488] Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305 (1998); Raymond J. Toney & Shazia N. Anwar, *International Human Rights Law and Military Personnel: A Look Behind the Barracks Walls*, 14 AM. U. INT'L L. REV. 519 (1998).

[489] Elizabeth Lutes Hillman, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L. J. 879 (1999).

[490] *Id.*

[491] *Id.* Dean Hillman has become one of the chief advocates for UCMJ reform. She is also a member of the Response Systems to Adult Sexual Crimes Panel. *Professor Elizabeth Hillman*, RESPONSE SYSTEMS TO ADULT SEXUAL CRIMES PANEL, http://responsesystemspanel.whs.mil/index.php/about/panel/hillman (last visited May 15, 2014).

[492] National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 536, 128 Stat. 3292 (2014).

[493] *See* EVOLVING MILITARY JUSTICE, *supra* note 19, at xi–xv (listing the qualifications of the contributors).

issues, such as unlawful command influence, that have been debated for decades.[494] In one prediction, John S. Cooke, a retired Brigadier General in the U.S. Army Judge Advocate General's Corps, stated, "Although I believe in the current system, I think command discretion and our power-down model will be points of criticism and vulnerability."[495] Third, it provides detailed recommendations that ultimately proved true. For example, Brigadier General Cooke recommended that all "[A]rticle 32 investigating officers be lawyers.[496] This recommendation predated the 2014 NDAA by over eleven years.[497]

Active duty military scholars also produced scholarship that served as an early indicator to the 2014 NDAA. In 2002, then-Major Eugene Baime, an active duty U.S. Army judge advocate, authored an article arguing that private adult consensual sodomy is constitutionally protected.[498] This article predated the landmark decision of *Lawrence v. Texas* by over a year and the repeal of Article 125's ban against consensual sodomy by over eleven years.[499] Admittedly, Article 125's ban against consensual sodomy was already controversial when Baime's article was published. In fact, the Cox Commission had already recommended its repeal.[500] Nonetheless, the mere presence of Baime's article, along with its detailed legal rationale and prescient recommendation that both the Supreme Court and Congress ultimately followed, shows the power of scholarly analysis in identifying potential problems with the UCMJ and recommending well-researched solutions long before the factors in Part IV motivate legislative reform.

Military leaders who fail to consult highly respected journals, particularly when those journals discuss the UCMJ, are willfully ignoring early indicators in plain sight. Not only can the mere presence of the scholarly discussion itself serve as an indicator; but the research behind the scholarship can act like a proverbial fishing net, bringing together

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[494] *Id. passim.*
[495] Cooke, *supra* note 20, at 184.
[496] *Id.* at 189.
[497] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 954–57.
[498] Eugene E. Baime, *Private Consensual Sodomy Should Be Constitutionally Protected in the Military By the Right to Privacy*, 171 MIL. L. REV. 91 (2002).
[499] Lawrence v. Texas, 539 U.S. 558 (2003); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1707, 127 Stat. 961.
[500] 2001 COX COMMISSION, *supra* note 238, at 11.

other relevant early indicators and recommendations for the way forward.

The examples of the early indicators discussed in this part show that there is typically a significant time gap measured in years, if not decades, between these early indicators and congressional action. Military leaders who understand these early indicators can prevent the unsolicited congressional action that typically takes place when the congressional action framework elements are simultaneously present. The point of understanding early indicators, however, is not to avoid unsolicited congressional action for the sake of maintaining the status quo. To the contrary, unsolicited congressional action is the ultimate measure of effectiveness of the military leadership's ability to properly shepherd the UCMJ in a constantly changing environment. Referring back to the medical analogy, if military leaders understand what constitutes a disease and effectively incorporate the diagnostic tools set forth in this part, more treatment options for the disease to the UCMJ are available. The next part provides the recommended new cure and how to administer it.

VI. The Way Forward

The framework in Part IV and early indicators in Part V are deceptively simple. Part IV includes six related variables that, individually, are rather intuitive. When all six variables imbricate, Congress is most likely to make major reforms to the UCMJ. Using the medical analysis, the simultaneous presence of all six variables is when Congress typically decides that the disease has progressed to the level where a powerful cure is required. Unfortunately, such a cure can have devastating unintended consequences, or using medical terminology, side effects. Accordingly, the best course of action is to not let the disease progress to that point. Part V sets forth four simple and readily available diagnosis tools to help military leaders better diagnose the problem at an earlier point.

A. Why a New Approach is Necessary

What can military leaders do when the potential problem—the potential disease—is diagnosed at an early stage? What can military leaders do to cure the problem at the earlier stage? What medicines are

available, and how should military leaders administer them? The systematic and repeated failures of the institutions currently charged to recommend UCMJ reform demonstrates that military leaders must fundamentally change their approach to UCMJ reform. Given that the Code Committee and military leaders have largely eschewed their prior efforts to shepherd the UCMJ, why should they start now?

While the professional ethic within both the profession of arms and profession of law requires self-policing,[501] military leaders must adopt a new approach for an operational reason. An enemy's goal is to weaken a military leader's unit. A weak UCMJ will do the exact same thing. Operational doctrine supports this article's approach to understanding and solving problems with the UCMJ. Joint Publication 3-0, *Joint Operations*[502] states,

> [T]ransition to a new phase is usually driven by events rather than by time. . . . Sometimes . . . the situation will undergo an unexpected change in conditions that is not necessarily associated with a planned transition, yet may require the JFC [Joint Forces Commander] to direct an abrupt shift in operations. Such a change in conditions will rarely be uniform in time and space across an operational area, but can represent a critical period in the course of operations. The JFC must be able to recognize this fundamental transition in the situation, and transition quickly and smoothly in response. Failure to do so can cause the joint force to lose momentum, miss an important opportunity, experience a significant setback, or even fail to accomplish the mission. Conversely, successful transition can allow the joint force to seize the initiative in a situation and garner disproportionately favorable results. The JFC must seek to anticipate potential situational transformations. . . .[503]

Parts IV and V help military leaders recognize "a fundamental transition" in the situation, and this part helps leaders understand how to "seize the initiative."

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[501] *See supra* notes 29–31 and accompanying text.
[502] JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS (11 Aug. 2011).
[503] *Id.* para. V.B.3.d.

While the Code Committee and JSC would be well-served to use the framework and tools that this article offers, this article purposefully does not advocate which body should lead the effort in UCMJ reform. While an enduring institution may be ideal, as issues that could impact the UCMJ will always arise, so long as someone with the ear of senior military leaders is performing the steps set forth below, it does not matter who does it. An explanation of this fundamentally different approach will reveal why.

B. A Four-Step Process

Using the information, framework, and logics set forth above, this part proposes a continuous, never-ending four-step method for shepherding the UCMJ. These four steps are presented in a logical sequential order, but they will often occur simultaneously or in a different order. There will also be many instances in which steps must be repeated. Such is the design of the approach.

First, military leaders must "seize the initiative" and identify potential problems. This step requires military leaders to fundamentally change their methodology for identifying such problems. Once a potential problem is identified, the second step is to study the problem and make an initial determination of the problem's possible root causes. Embracing complexity and understanding causation are prerequisites for success during this step. Third, based on the initial findings in the second step, military leaders must initiate an inclusive, interdisciplinary dialogue to evaluate the validity of their initial findings. If something was missed, this process can start anew from either step one or step two. If the root causes of the potential problem are identified, then step four is to implement a broadly informed and researched experimental intervention to solve the problem. Experimental interventions can range from education campaigns to soliciting Congress to pass major UCMJ reforms.

Using the medical analogy, military leaders, as physicians, will use step one to see potential symptoms of an illness with its patient, the UCMJ. In step two, military leaders will perform an initial assessment of the symptoms to identify the potential causes, as well as what team of specialists is needed to properly diagnose the illness. After repeating

each step as many times as is necessary, military leaders will apply the recommended cure to the UCMJ.

1. Identifying the Problem

Before military leaders can use the diagnostic tools set forth in Part V, they should change their method of thinking about how to approach UCMJ reform. In her book *The Trouble With the Congo*, Séverine Auteserre explains that despite her often pointed critiques, her new approach for peacebuilding in the Democratic Republic of the Congo should be seen as just that, and no more.

> [T]his book offers a new explanation for the failures of third-party intervenors. . . . [T]his book is not a criticism of the UN Mission in the Congo. . . . Rather, the goal of this book is to help policy makers further boost the positive aspects of international peacekeeping interventions. . . .[504]

This article adopts the same approach. While this article criticizes the methods that have been used in recent decades to examine the UCMJ, it does not question any person's motives or desire for a more effective and just UCMJ. Nonetheless, military leaders' thought process should change.

i. Heuristics

It appears that heuristics and misplaced logic have tainted most UCMJ reviews over the past four decades. Heuristics are "rules of thumb" that people use to make decisions.[505] Major Blair Williams, U.S. Army, persuasively argues, "For commanders and staff officers to willingly try new approaches and experiment on the spot in response to surprises, they must critically examine the heuristics (or 'rules of

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[504] SÉVERINE AUTESERRE, THE TROUBLE WITH THE CONGO 13–14 (2010).

[505] Major Blair S. Williams, *Heuristics and Biases in Military Decision Making*, MIL. REV., Sept.-Oct. 2010, at 40, *available at* http://www.au.af.mil/au/awc/awcgate/milreview/williams_bias_mil_d-m.pdf. Major Williams holds a Ph.D. in Public Policy from Harvard University. *Id.*; KAHNEMAN et al., *supra* note 445.

thumb') by which they make decisions and understand how they may lead to potential bias."[506]

A "search set bias" likely contributed to the incomplete methodologies that many ad hoc committees used to review the UCMJ. Williams explains the search set bias in operational terms, "As we face uncertainty in piecing together patterns of enemy activity, the effectiveness of our patterns of information retrieval constrain[s] our ability to coherently create a holistic appreciation of the situation."[507] Williams uses an operational example to illustrate this phenomenon:

> When observing IED [Improvised Explosive Device] strikes and ambushes along routes, we typically search those routes repeatedly for high-value targets, yet our operations rarely find them. Our search set is mentally constrained to the map of strikes we observe on the charts in our operations center. We should look for our adversaries in areas where there are no IEDs or ambushes.[508]

The Westmoreland Committee,[509] WALT,[510] and 2004 Army Committee[511] all fell victim to the search set bias. With potential problems to the UCMJ serving as the enemy, all three bodies were constrained by the search sets created by their prior operational and legal experience, training, and knowledge. By conducting similar surveys of the same military members and failing to sufficiently account for any other outside perspectives,[512] these bodies failed to identify problems with the UCMJ, much like those downrange failed to find IEDs. The bias simply caused them to not look everywhere that they needed to look.

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[506] Williams, *supra* note 505, at 40.
[507] *Id.* at 43.
[508] *Id.*
[509] *See supra* Part III.A.3.ii.
[510] *See supra* Part III.A.3.iii.
[511] *See supra* Part III.A.3.v.
[512] The Westmoreland Committee was overtly hostile to civilian input and even was disrespectful to the Supreme Court. *See supra* notes 134–136 and accompanying text. The WALT relied on interviews and questionnaires of military personnel. *See supra* notes 141–142 and accompanying text. While the 2004 Army Committee looked at some early indicators, such as scholarly articles, their focus appeared to have little to no civilian input. *See supra* notes 147–150 and accompanying text.

Similarly, the anchoring bias also appears to have influenced the JSC subcommittee's 2005 recommendation to not amend the UCMJ.[513] Williams succinctly explains the anchoring bias, "When facing a new problem, most people estimate an initial condition. As time unfolds, they adjust this original appraisal. Unfortunately, this adjustment is usually inadequate to match the true final condition."[514] Given the fact that every judge advocate on the JSC subcommittee had spent his or her entire career practicing under a largely unreformed UCMJ, the ultimate anchoring effect appeared to have occurred. The JSC subcommittee's sole justification for not recommending UCMJ reform was that they "were unable to identify any sexual misconduct that cannot be prosecuted under the current UCMJ and MCM."[515] The JSC subcommittee's viewpoint that a legal authority to prosecute was the only relevant factor demonstrates that these heuristics were present.

The potential impact of biases in the ongoing military sexual assault debate is almost limitless. For example, the "illusory correlation," a bias where "[p]eople often incorrectly conclude that two events are correlated due to their mentally available associative bond between similar events in the past,"[516] is arguably built into courts-martial with the "good soldier defense."[517] It is also possible that advocates on both sides of the debate are a victim to the "confirmation bias," which causes us to "actively pursue only the information that will validate the link between two events."[518] Senator McCaskill states,

> The victim community is not monolithic on this. We've had victims call our office, victims that have been featured in some of the documentaries about this subject that have said, we think your approach is better. They're feeling, I think, marginalized because—as sometimes we have sometimes felt marginalized, because the other side

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[513] *See supra* notes 209–210 and accompanying text.
[514] Williams, *supra* note 505, at 48.
[515] Letter from Colonel (COL) Michael J. Child, *supra* note 117.
[516] Williams, *supra* note 505, at 45.
[517] The "good soldier defense" allows an accused servicemember to introduce "evidence of good military character in order to convince a military judge or jury that the accused did not commit the offense charged." Hillman, *supra* note 489, at 882. The defense has arisen out of a mix of Military Rule for Evidence (MRE) 404(a)(1) and case law. *Id.*; MCM, *supra* note 26, MIL. R. EVID. 404(a)(1) (2012).
[518] Williams, *supra* note 505, at 45.

> wanted to make this argument about victims vs. uniforms.[519]

While heuristics are unavoidable, understanding their potential impact on decision-making and how to guard against their suboptimal effects is a powerful tool in better self-awareness. Williams provides a prescription that military leaders charged with shepherding the UCMJ should adopt. Williams recommends that organizations embrace "the concept of reflective practice," which is defined as "valuing the processes that challenge assimilative knowledge (i.e. continuous truth seeking) and by embracing the inevitable conflict associated with truth seeking."[520] This four-step process is an attempt to do just that.

ii. Applied Example

a. Early Indicators

Military leaders who adopt a reflective practice and look for the early indicators set forth in Part V will see another challenge to the UCMJ on the horizon. Many early indicators have pointed to a potential problem with the rather unforgiving manner in which the UCMJ handles cases of servicemembers who commit misconduct but whose misconduct is related, in some degree, to service-connected or wartime-related injuries. Many argue that the UCMJ, as applied, does not properly value the impact that the service-connected disability has on the misconduct. If a servicemember's misconduct leads to an other than honorable or punitive discharge, DoD and VA benefits, to include health care benefits for the service- or wartime-connected disability, are jeopardized. One may argue that other than honorable discharge issues are not related to the UCMJ, as they are administrative.[521] Such logic, however, is flawed, as

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[519] *See*, *e.g.*, *Newshour: Sens. McCaskill, Ayotte: Keep Military Sexual Assault Cases in Chain of Command* (PBS television broadcast Aug. 1, 2013), *available at* http://www.pbs.org/newshour/bb/politics-july-dec13-military_08-01/.

[520] Williams, *supra* note 505, at 50 (citing and quoting Christopher R. Paparone & George Reed, *The Reflective Military Practitioner: How Military Professionals Think in Action*, 88 MIL. REV., no. 2, 66-77 (2008)); *see* Schlueter, *supra* note 30, at 9–10 (providing reasons why military leaders should listen to critics of the UCMJ).

[521] U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES *passim* (12 Apr. 2006) (RAR 13 Sept. 2011); U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS *passim* (6 June 2005) (RAR 6 Sept. 2011); U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS *passim* (18 Mar. 2014).

many other than honorable discharges are given as a pseudo-plea bargain to avoid a trial by court-martial.[522]

The earliest indicators of this potential problem were media reports. A November 15, 2011 *Stars and Stripes* article entitled *Critics: Fort Carson Policy Targeted Troubled, Wounded Soldiers* discussed cases in which Soldiers were being tried by court-martial and separated with less than honorable discharges for drug offenses and other misconduct despite such misconduct being attributable to wartime-related disabilities.[523] Their less than honorable discharge characterizations, which were often granted pursuant to requests for discharge that soldiers submitted to avoid court-martial, stripped many former servicemembers of much needed DoD and VA benefits.[524]

The media stories have continued. A sample indicates the breadth of media attention. An August 11, 2012 *Seattle Times* article cites a Naval Research Health Center survey that found that a Marine with a PTSD diagnosis was "11 times more likely to receive a misconduct discharge" than a Marine who had not deployed and was not diagnosed with PTSD.[525] It also explains that "federal law draws a sharp dividing line between honorably discharged veterans, who are offered access to veterans health-care and disability compensation, and those whose misdeeds may put those benefits at risk."[526] A 2013 four-part *Colorado Springs Gazette* investigative series entitled *Other than Honorable* discusses the exact same issues as the above articles.[527] The individual articles in this series, which are paired with powerful pictures and videos, are entitled *Disposable: Surge in Discharges Includes Wounded Soldiers*,[528] *Left Behind: No Break for the Wounded*,[529] and *Locked*

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522 Professional Experiences, *supra* note 236; AR 635-200, *supra* note 521, ch. 10.
523 Bill Murphy Jr., *Critics: Fort Carson Policy Targeted Troubled, Wounded Soldiers*, STARS & STRIPES, Nov. 15, 2011, http://www.stripes.com/critics-fort-carson-policy-targeted-troubled-wounded-soldiers-1.160871.
524 *Id.*
525 Hal Bernton, *Troubled Veterans Left Without Health-Care Benefits*, SEATTLE TIMES, Aug. 11, 2012, http://seattletimes.com/html/localnews/2018894574_vets12m.html.
526 *Id.*
527 Dave Philipps, *Other than Honorable*, COLO. SPRINGS GAZETTE, http://cdn. http://cdn.csgazette.biz/soldiers/ (last visited Feb 2, 2015).
528 Dave Philipps, *Disposable: Surge in Discharges Includes Wounded Soldiers*, COLO. SPRINGS GAZETTE, May 19, 2013, http://cdn.csgazette.biz/soldiers/day1.html.
529 Dave Philipps, *Left Behind: No Break for the Wounded*, COLO. SPRINGS GAZETTE, May 20, 2013, http://cdn.csgazette.biz/soldiers/day2.html.

Away: Army Struggles with Wounded Soldiers.[530] In December 2013, National Public Radio ran a four-piece series on the *Morning Edition* radio program that highlighted the exact same issues.[531]

There also numerous direct and indirect legislative indicators that indicate that this issue may impact the UCMJ. A direct legislative indicator came on March 5, 2014. During a Senate Armed Services Committee hearing, Senator Richard Blumenthal "secured a commitment from U.S. Secretary of Defense Chuck Hagel to reconsider the cases of Vietnam Veterans who received other-than-honorable discharges due to symptoms associated with what would today be classified as Post-Traumatic Stress."[532] Another direct legislative indicator came in the 2015 NDAA, which tasks the Comptroller General of the United States with submitting "a report on the impact of mental and physical trauma . . . on the discharge of members of the Armed Forces from the Armed Forces for misconduct."[533] There are also numerous indirect legislative indicators. During a press conference, Senator Blumenthal stated that Vietnam War veterans who received "bad paper" discharges because of their PTSD "were wounded in war and then wounded again by their

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530 Dave Phillips, *Locked Away: Army Struggles With Wounded Soldiers*, COLO. SPRINGS GAZETTE, May 21, 2013, http://cdn.csgazette.biz/soldiers/day3.html.

531 Marisa Peñaloza & Quil Lawrence, *Morning Edition: Other-Than-Honorable Discharge Burdens Like a Scarlet Letter* (NPR radio broadcast Dec. 9, 2013), *available at* http://www.npr.org/2013/12/09/249342610/other-than-honorable-discharge-burdens-like-a-scarlet-letter; Peñaloza & Lawrence, *supra* note 171; Marisa Peñaloza & Quil Lawrence, *Path to Reclaiming Identity Steep for Vets with 'Bad Paper'* (NPR radio broadcast Dec. 11, 2013), *available at* http://www.npr.org/2013/12/11/249962933/path-to-reclaiming-identity-steep-for-vets-with-bad-paper; Marisa Peñaloza & Quil Lawrence, *Morning Edition: Filling the Gaps For Veterans With Bad Discharges* (NPR radio broadcast Dec. 12, 2013), *available at* http://www.npr.org/2013/12/12/250289588/filling-the-gaps-for-veterans-with-bad-discharges.

532 Press Release, Senator Richard Blumenthal, Blumenthal to Hagel: Review Vietnam Veterans' Bad Paper Discharges (Mar. 5, 2014), http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-to-hagel-review-vietnam-veterans-bad-paper-discharges. Secretary Hagel followed through on this commitment by issuing supplemental guidance to the Military Boards for Correction of Military/Naval Records designed to "ease the application process for veterans who are seeking redress and assist the Boards in reaching fair and consistent results in these difficult cases." Memorandum from Sec'y of Defense Chuck Hagel for Sec'ys of the Military Dep'ts, Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (Sep. 03, 2014), *available at* http://www.defense.gov/news/OSD009883-14.pdf.

533 National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 536, 128 Stat. 3292, § 588.

country."[534] In 2012, Senator Patty Murray stated to the *Seattle Times* that she was concerned for former servicemembers who are "outside of the VA looking in" and that the VA claims appeals process should be "vastly improved."[535] While one might argue that Senator Blumenthal's efforts are focused on Vietnam and not the present day, further study would reveal that the DoD discharge system and the VA claims evaluation system have not changed since Vietnam.[536]

There are also at least two judicial indicators even at this early stage. As discussed in Part V.C, the *Veterans for Common Sense v. Shinseki*[537] case is a judicial indicator for this very issue. Additionally, in March 2014, a conglomeration of former servicemembers and established advocacy groups

> filed a class action lawsuit in federal court . . . seeking relief for tens of thousands of Vietnam veterans who developed Post-Traumatic Stress Disorder (PTSD) during their military service and subsequently received an other than honorable discharge. The lawsuit challenges the Pentagon's refusal to recognize that injury led to "bad paper" discharges.[538]

Again, while this lawsuit focuses on Vietnam veterans, military leaders who blend their expertise with a reflective practice would see that the UCMJ and military justice system that led to these discharges have not changed. Additionally, in determining misconduct-based discharges today, many of those discharges still do not reflect any potential medical causes.[539]

Scholarship has also pointed to this problem. The *Seattle Times* article referred to above states, "In recent years, the federal law that guides veterans benefits has come under fire from a surprising source:

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[534] Yale Law School, *YLS Clinic Files Nationwide Class Action Lawsuit on Behalf of Vietnam Veterans with PTSD*, YALE UNIV. (Mar. 3, 2014), http://www.law.yale.edu/news/18096.htm.
[535] Bernton, *supra* note 525 (quoting Sen. Patty Murray).
[536] *See* Brooker et al., *supra* note 468.
[537] Veterans for Common Sense v. Shinseki, 644 F.3d 845, 850 (9th Cir. 2011), *vacated by* Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1016 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 840, 81 U.S.L.W. 3130568 (U.S. Jan. 7, 2012) (No. 12-296).
[538] Yale Law School, *supra* note 534.
[539] Professional Experiences, *supra* note 236.

some Army lawyers frustrated by the frequency with which troubled combat veterans are tossed out of the military without ready access to VA health care."[540] In fact, the Summer 2010 *Military Law Review* contained two articles related to this topic. In *Leave No Soldier Behind: Ensuring Access to Care for PTSD-Afflicted Veterans*, Major Tiffany Chapman, a U.S. Army judge advocate, argued for a change to a statute that bars servicemembers convicted of certain offenses from receiving VA health care benefits.[541] In *A "Catch-22" for Mentally-Ill Military Defendants: Plea-Bargaining away Mental Health Benefits*, Vanessa Baehr-Jones explains how sanity boards pursuant to Rule for Court-Martial (RCM) 706 can have an unintended impact on VA benefit eligibility.[542]

Two subsequent articles by U.S. Army judge advocates not only linked the problem to the UCMJ but also proposed solutions. In a 2011 *Military Law Review* article entitled *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, Major Evan Seamone accurately explains that when applying the UCMJ, "the prosecutor diminishes the wounded warrior's injuries and experiences in efforts to downplay the bases for mitigation and extenuation."[543] In a 2012 *Military Law Review* article entitled *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, Major Seamone, Ms. Leslie Rogall, and this author explain the problem and propose a method for military leaders to use the current system to better account for the medical causal mechanisms of misconduct.[544]

The power of an early indicator is often demonstrated by how interconnected it is with other early indicators. In the wounded warrior example, the newspaper articles cited the scholarship and vice versa. The judicial indicators cited the legislative indicators and vice versa. These imbrications can start a movement that ultimately results in congressional attention. Applying Part IV's framework to this wounded

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[540] Bernton, *supra* note 525.
[541] Chapman, *supra* note 468.
[542] Vanessa Baehr-Jones, *A "Catch-22" for Mentally-Ill Defendants: Plea-Bargaining away Mental Health Benefits*, 204 MIL. L. REV. 51 (2010).
[543] Seamone, *supra* note 468.
[544] Brooker et al., *supra* note 468.

warrior issue will demonstrate that if military leaders do not apply a cure to this problem, Congress may take control of the issue.

b. Congressional Action Framework

Applying the six-variable congressional action framework demonstrates that this is not only a potential problem with the UCMJ, but it is also one in need of immediate action. While all six variables are not yet satisfied, such could change quickly. Once all six variables are satisfied, unsolicited congressional reform is likely to ensue. A quick look at all six variables demonstrates how potentially close this issue is to exploding.

First and foremost, this victim group is large. During the Vietnam War, 255,800 servicemembers were given discharge characterizations that either legally or practically barred them from receipt of VA benefits. Between 2000 and 2005, 68,660 former servicemembers found themselves in the same position. Estimates for the years 2006–2011 indicate that roughly 30,000 more former servicemembers joined this victim group.[545] When combined with the increasingly understood link between PTSD and misconduct,[546] the VA estimates that thirty-one percent of Vietnam War veterans, twenty percent of Operation Iraqi Freedom (OIF) veterans, and eleven percent of OEF veterans are afflicted with PTSD,[547] indicating that this victim group is made of tens of thousands of veterans.

Second, established veterans groups have recently shown interest in the issue. The Vietnam Veterans of America, the Vietnam Veterans of America Connecticut State Council, and the National Veterans Council for Legal Redress are parties to the Yale class action lawsuit outlined above.[548] There are also forty-six congressionally chartered Veterans Service Organizations (VSOs), many of which employ powerful

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[545] Brooker et al., *supra* note 468, at 17 (citing Lawrence M. Baskir & William A. Strauss, Chance and Circumstance: The Draft, The War, and the Vietnam Generation 155 fig. 6 (1978)).
[546] *See* Brooker et al., *supra* note 468, at app. I.
[547] *PTSD: A Growing Epidemic,* NIH MEDLINEPLUS (Winter 2009), *available at* http://www.nlm.nih.gov/medlineplus/magazine/issues/winter09/articles/winter09pg10-14.html.
[548] Yale Law School, *supra* note 534.

lobbying efforts.[549] If those lobbying efforts decide to advocate for UCMJ reform as it relates to wounded warriors, the impact could be substantial.

Third, this issue is not only coming on the heels of a protracted armed conflict but is directly attributable to it. Fourth, the increasing media attention on the problem is outlined above.[550] Fifth, while the congressional attention and advocacy on this issue is not yet protracted, Senator Blumenthal's recent comments and the 2015 NDAA indicate that it is increasing.[551] A cogent argument can also be made that the congressional attention and advocacy on the UCMJ as it relates to sexual assault could serve as the protracted congressional attention necessary to bring this issue to the forefront. In other words, the protracted congressional attention and advocacy may not have to be issue specific. Given that Congress has, for the first time in sixty-five years, indicated a fundamental distrust of commanders and their ability to implement the UCMJ,[552] the protracted attention about sexual assault could easily serve as a proxy for the UCMJ's difficulty in dealing with wounded warrior cases.

Finally, there has not yet been a catalytic strategic case. While dozens of precursor strategic cases are outlined in the early indicators set forth above, nothing similar to *The Invisible War* has yet come along to bring this issue to the doorstep of every Senator. That case could come along at any point and could come in any variety of forms.

This wounded warrior issue is just one example of many potential challenges to the UCMJ that are possibly self-organizing at this very moment. Military leaders who want to properly correct any problems with the UCMJ must first understand if the UCMJ is a part of the problem. The only way to do that is to study any potential issue in a more detailed manner to understand the causes of the problem in

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[549] House Comm. on Veterans Affairs, *Veterans Service Organizations*, U.S. HOUSE, http://veterans.house.gov/citizens/resources (last visited May 18, 2014); *see, e.g.*, John D. McKinnon & Siobhan Hughes, *Rapid Deployment Quashed Cut in Military Pensions*, WALL ST. J., Feb. 14, 2014, http://online.wsj.com/news/articles/ SB10001424052702304703804579383400581084332 (describing the lobbying power of VSOs).
[550] *See supra* notes 523–532 and accompanying text.
[551] *See supra* notes 532–534 and accompanying text.
[552] While members of Congress have consistently expressed some reservations about command control and unlawful command influence, the last time that the distrust was so profound appears to have been in 1949. *See* 1949 DEB., *supra* note 50, at 10.

granular detail, and embracing the fact that these causes will almost assuredly be complex.

2. Embracing Complexity and Examining Causation

i. Complexity

Military leaders deal with complex situations every day. In an unconventional way, an April 26, 2010 *New York Times* article about PowerPoint best illustrates this point.[553] The caption to a fascinatingly busy PowerPoint slide, which the author states "looked . . . like a bowl of spaghetti," reads, "A PowerPoint diagram meant to portray the complexity of American strategy in Afghanistan certainly succeeded in that aim."[554] When presented with the slide, General Stanley McChrystal, the senior ranking officer in Afghanistan, commented, "When we understand that slide, we will have won the war."[555] While the article and General McChrystal were taking a jab at PowerPoint and how the military uses it, the substance of the caption and General McChrystal's comment could not have been more correct. Instead of making fun of complexity, military leaders must now embrace it when it comes to UCMJ reform, as most challenges to the UCMJ are unquestionably complex, consisting of interacting and imbricating open systems.[556] The recent sexual misconduct-motivated major UCMJ reform provides a perfect example.

The issue of military sexual assault, as well as the UCMJ's role in it, is almost unanimously recognized as complex. Joyce Grover, executive director of the Kansas Coalition Against Sexual and Domestic Violence, states, "Sexual assault in the military is a complex problem. . . ."[557] In a written submission to The United States Commission on Civil Rights, Lieutenant General Dana K. Chipman, The Judge Advocate General,

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[553] Elisabeth Bumiller, *We Have Met the Enemy and He Is PowerPoint*, N.Y. TIMES, Apr. 27, 2010, at A1, *available at* http://www.nytimes.com/2010/04/27/world/27powerpoint.html?_r=0.
[554] *Id.*
[555] *Id.*
[556] For a provoking, yet persuasive discussion of open systems and self-organization, see CONNOLLY, *supra* note 379, *passim*.
[557] Ann Marie Bush, *Consultant Speaks About Sexual Assault in the Military*, TOPEKA CAPITAL-J., Feb. 12, 2014, http://cjonline.com/news/2014-02-12/consultant-speaks-about-sexual-assault-military (quoting Joyce Grover).

U.S. Army, stated, "Sexual assault and special victim cases are complex, and difficult to prosecute and defend."[558] More broadly, Secretary Hagel, in discussing the complexity of military sexual assault, stated, "There are so many dimensions to this that I don't think you can come at it in one simple way."[559]

Widely accepted scholarship confirms the belief that the relationship between the UCMJ and military sexual assault is a complex problem. When evaluating a complex problem, the Cynefin framework is a widely-used and useful tool. Published in the Harvard Business Review, the Cynefin framework, which is named after the Welsh word "that signifies the multiple factors in our environment and our experience that influence us in ways we can never understand," "allows executives to see things from new viewpoints, assimilate complex concepts, and address real-world problems and opportunities."[560] Some of the characteristics of a complex problem are that there is "flux and unpredictability," "many competing ideas," and "a need for creative and innovative approaches."[561]

The Cynefin framework also succinctly explains why the simple acts of recognizing and understanding complexity are important. It predicts that many leaders who face complex problems are susceptible to "fall back into habitual, command-and-control mode," "look for facts instead of patterns," and seek an "accelerated resolution of problems or exploitation of opportunities."[562] Given the military culture's emphasis on command and control and doctrinal support for maintaining an offensive posture and exploiting opportunities,[563] as well as the legal profession's focus on facts versus patterns, changing the entire approach to UCMJ reform will take serious effort and command emphasis.

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[558] Written Submission from Lieutenant General Dana K. Chipman, The Judge Advocate General, U.S. Army, to The U.S. Commission on Civil Rights 9 (Jan. 11, 2013), *available at* http://www.eusccr.com/Chipman,%20Army%20WrittenStatement_USCCR.pdf.

[559] Karen Parrish, Am. Forces Press Serv., *Hagel: Solving Sexual Assault Crisis will Take "All of Us"*, U.S. DEP'T OF DEF. (May 17, 2013), http://www.defense.gov/news/newsarticle.aspx?id=120082.

[560] David J. Snowden & Mary E. Boone, *A Leader's Framework for Decision Making*, HARV. BUS. REV., Nov. 2007, at 70.

[561] *Id.* at 73.

[562] *Id.*

[563] *See* U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUB. 3-90, OFFENSE AND DEFENSE (Aug. 2012).

Recent DoD-initiated attempts at studying the UCMJ, such as the PAT and 2004 Army Committee, failed recognize the complexity of a major UCMJ reform, as they failed to identify that a potentially complex problem was already infecting the UCMJ. Complex problems are understandably difficult to solve. The Cynefin framework recommends that military leaders facing complex problems "increase levels of interaction and communication."[564] Given that problems with the UCMJ often involve areas with which military leaders and their reform institutions are unfamiliar, military leaders must first try to identify with whom the increased communication should begin.

ii. Causation

When reflecting on Iraq, General Odierno stated,

> You know, one of the things we've learned over the last 10 or 12 years is not what happened, but why something happened. And as you figure out—so we're trying to—as we train our leaders, it's about training them to figure out, why is this happening? Then, what's the right tool to fix it?[565]

Military leaders must take the same approach with problems involving the UCMJ.

The previous ad hoc committees did not take the approach General Odierno advocates. They employed methodologies more appropriate for simple problems. They failed to implement "extensive interactive communication" and focused their review on "ensur[ing] that proper processes are in place."[566] Such an approach is no longer viable. Military leaders understand that "common leadership approaches that work well in one set of circumstances [may] fall short in others."[567] The only way to understand what approach is required is to understand causation.

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[564] Snowden & Boone, *supra* note 560, at 73.
[565] *Amid Tighter Budgets, U.S. Army Rebalancing and Refocusing: A Conversation with Raymond T. Odierno*, COUNCIL ON FOREIGN RELATIONS (Feb. 11, 2014), http://www.cfr.org/united-states/amid-tighter-budgets-us-army-rebalancing-refocusing/p32373.
[566] *Id.* at 73.
[567] *Id.* at 70.

Once military leaders embrace that major reform-producing problems with UCMJ often include "unknown unknowns,"[568] military leaders must use their experience, education, and open minds in a preliminary attempt at understanding some of the causes of the criticism. A clearer understanding of causation sets up the remaining steps of this process, as without it, it is impossible to understand with whom to discuss the problem and how to craft a solution.

Analyzing causation is an ongoing process. A broad and interdisciplinary dialogue is, by its very design, to stimulate more study and understanding of causation. Accordingly, steps two and three of this four-step method often occur simultaneously. Through rigorous scholarship and thought, scholars have created frameworks and concepts that military leaders should use when studying a potential problem with the UCMJ.

The first concept that military leaders should use is of durational time. In his book *A World of Becoming*, political theorist William Connolly explains the concept:

> As we do so, we find ourselves plunged into a moment of time without movement, engaging different zones of temporality coursing through and over us. For that scene arrests multiple sites and speeds of mobility that impinge upon one another when in motion. We may commune for a moment with a drop of time itself before we ease up from our seats to ramble out of the theater . . . . We belong to time, but we do think often about the strange element through (or 'in') which we live, breathe, act, suffer, love, commune, and agitate. Indeed, it would be unwise if we focused on this register of experience too often. We would lose our ability to act with efficacy, confidence, and fervor in the world. For action requires simplified perception to inform it.[569]

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[568] *Id.* at 73. During an oft-quoted press conference, former Secretary of Defense Donald Rumsfeld explained the concept by stating, "There are known knowns. There are things we know we know. We also know there are known unknowns. That is to say, we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know." Bezan Darro, *Donald Rumsfeld Unknown Unknowns !*, YOUTUBE (Aug. 7, 2009), http://www.youtube.com/watch?v=GiPe1OiKQuk.

[569] WILLIAM E. CONNOLLY, A WORLD OF BECOMING 2 (2011).

Connolly then uses two more images to better explain the concept.

> We barely glance at the cup of coffee before picking it up, refusing to tarry over its size, texture, shape, colors, odor, and distance. And there is no time to note the color and make of that car rushing at you before you dive out of its way. But still it does make both thought and action more subtle to dwell in time periodically.[570]

Yet another way to understand the concept is to imagine a photograph. What systems within the world have come together, at that specific moment in time, to make that photograph what it is? If the photograph is of a person, why are they laughing, smiling, crying, or other conveying look at that very moment? What are their apparent emotions? What motivated them to be in that exact spot? What is happening in the background? What is the weather? By performing this exercise and listing all the open systems one can imagine, one will have a more precise understanding of all of the open systems interacting at that very moment.

Trial attorneys should have no problem implementing the concept of durational time, as the entire point of a criminal trial is to perform this exact exercise. All of the procedural and evidentiary rules are designed to help the court receive the most accurate picture possible to analyze when making a decision. The entire purpose of a scientific crime scene investigation is to preserve or recreate that moment in time when the offense occurred. Surprisingly, military attorneys in charge of reviewing the UCMJ appear to have rarely, if ever, employed this approach when trying to better understand a claimed problem with the UCMJ. Part VI.B.1.ii provides an example of how to do this. First, however, an explanation of how to categorize the causes of problems is necessary.

One frequent problem with a causation diagnosis is the lack of a typology. Typologies help for a number of reasons. In medicine, typologies facilitate the study and treatment of conditions. One of the most well-known and extensive typologies is the *Diagnostic and Statistical Manual of Mental Disorders*.[571] Because the biological causes

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[570] *Id.*

[571] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL HEALTH DISORDERS (5th ed. 2013).

of mental-health disorders are not as precisely diagnosable as other maladies, mental-health professionals use typologies to assist with understanding not only the potential cause of the disorder but also how to treat it. Such a typology would assist military leaders shepherding the UCMJ, as the causal mechanisms behind problems with the UCMJ are also not biological or tangible.

In *How to Map Arguments in Political Science*, Craig Parsons "proposes a typology of explanation of human action."[572] Since the criminal activity that the UCMJ regulates, as well as those responsible to regulate it, are human in nature, it provides a tailor-made way to characterize the causes of problems. There are four explanations, or causal logics, that explain conduct. While this article cannot fully explore or describe these logics, a brief introduction paired with the applied example below will demonstrate their potential usefulness.

The first two causal logics, which are labeled "structural" and "institutional," are "logic-of-position" causes, as all rational actors would do the same thing if placed in the same scenario. A structural claim is when one argues that a rational actor is doing what anyone would do because the "obstacle course of material . . . channels her to certain actions." An institutional claim is when one argues that a rational actor is doing what anyone would do because the "obstacle course of . . . man-made constraints and incentives channels her to certain actions."[573]

The second two, which are labeled "psychological" and "ideational," are "logic-of-interpretation" causes, as they explain actions "by showing that someone arrives at an action only through one interpretation of what is possible or desirable." "Ideational claims do so by asserting that particular people have historically situated ways of interpreting things around them." For example, religious beliefs and cultural norms are often largely ideational. "Psychological claims assert that people perceive the world around them through hard-wired instincts, affective commitments, and/or cognitive shortcuts." Suboptimal results created by heuristics are the primary example.[574]

Military leaders who read and digest Parsons's book will better understand the causal claims behind the current sexual assault debate.

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[572] CRAIG PARSONS, HOW TO MAP ARGUMENTS IN POLITICAL SCIENCE 3 (2007).
[573] *Id.* at 13.
[574] *Id.*

For example, the debate on whether commanders should retain disciplinary authority under the UCMJ invokes all four types of claims. A claim that any rational actor would take away command authority is structural. A claim that the UCMJ's rules on pretrial investigations, which made sense when enacted but, because of path dependence,[575] now produce unintended, suboptimal results, is likely institutional. A claim that commanders simply choose to not prosecute sexual assault to protect their friends is likely ideational. A claim that heuristics caused military leaders to miss the sexual misconduct-related challenge to the UCMJ is psychological.

Three of the benefits that Parsons sees flowing from his typology would benefit military leaders who use it. First, it helps users focus on "the most basic bits of logic about what causes what," thereby eliminating "odd historical distinctions and false debates."[576] Because Senator McCaskill has often opined that there is a false "victims versus commanders" debate,[577] those who use Parsons's typology would be better able to get to the crux of her frustration. Second, his typology is all encompassing, which "clarifies and focuses our efforts."[578] In other words, it sets proverbial "left and right limits" in terms of explanations for actions, which facilitates more productive discussion. Third, much like doctrine, a shared understanding of core terms "facilitate[s] rather than impede[s] direct competition and combination."[579]

Mastering the concepts of durational time and causal mechanisms requires study and practice. Such persistence is necessary, as a failure to use them or other similar tools could result in the same mistakes as before, resulting in an unsolicited major change to the UCMJ. How to apply these tools is demonstrated in the following applied example.

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[575] Path dependence, which is "integral" to the institutional causal logic, occurs when "the impact of institutions on subsequent action" is unintended. *Id.* at 72–74.
[576] *Id.* at 3.
[577] *Senate Approves McCaskill Sex Assault Bill*, NAVY TIMES, Mar. 10, 2014, http://www.navytimes.com/article/20140310/NEWS05/303100027/Senate-approves-McCaskill-sex-assault-bill.
[578] PARSONS, *supra* note 572, at 3.
[579] *Id.*

iii. Applied Example

The concept of durational time can be applied to any moment. While trial attorneys are adept at applying the concept of durational time to specific events, in the context of UCMJ reform, it may be more useful to start with a moment in time at which multiple early indicators have coalesced. The wounded warrior example provides an ideal example.

On March 3, 2014, Senator Richard Blumenthal held a joint press conference with members of Yale Law School's Veterans Legal Services Clinic, a representative of the Vietnam Veterans of America Connecticut State Council, and former servicemembers with "bad paper" discharges who are plaintiffs in the case.[580] Because of all of the speakers at this conference either individually or representatively factor into the framework set forth in Part IV, it would be a good place to apply the durational time concept to understand the complexity of the issue and the causes of the problem.

The nearly forty-five-minute-long press conference is full of investigatory leads. The press conference begins with an overview of the issue. Many individual stories that serve as precursor strategic cases are told. Senator Blumenthal then provides an overview of the reasons that he supports the case. In highlighting the unfairness of many less than honorable discharges, to include punitive discharges by court-martial, Senator Blumenthal states,

> The reasons for these discharges were directly related to post-traumatic stress. Their actions resulted from the wounds of war, and they were discharged with less than honorable status, which became a stigma, or a black mark, causing them not only to be denied the benefits of medical treatment and employment aid, but also to be discriminated against by employers.[581]

Senator Blumenthal concludes his remarks with a striking warning, vowing,

> I [will] continue a legislative solution that will help correct this injustice and I'm going to continue to try to

[580] Press Conference, Yale Law School & Senator Richard Blumenthal (Mar. 3, 2014), http://vimeo.com/88110369 [hereinafter Joint Press Conference].
[581] *Id.*

> persuade officials that they can do the right thing without legislation or a lawsuit. In fact, the Secretary of Defense, literally today, could grant what this lawsuit seeks, on his own authority, correct this injustice. . . . I will call . . . on the Secretary of Defense to correct this injustice, to do the right thing.[582]

Unlike many media articles, Senator Blumenthal properly points the focus on DoD, not VA, noting that the VA is bound by the characterization of discharge that DoD issues. He continues, "This issue really is with the Department of Defense and Secretary of Defense Hagel."[583]

Using this press conference as the moment in durational time to study, military leaders would see numerous potential open systems that could contribute to this problem. To illustrate just a few, Senator Blumenthal correctly pointed out that the UCMJ is a critical factor in this problem. Second, because of the PTSD angle, human psychology, particularly as it relates to the manner in which humans respond to stressful stimuli, is also in play. Third, the military's Physical Disability Evaluation System (PDES) plays a role in this problem.[584] Fourth, the VA and its policies and procedures are worthy of review. Fifth, Senator Blumenthal's interest in the issue could be explored. Sixth, the advocacy groups and their background and motivations for becoming involved are open for discussion.

The next step is to apply Parsons's causal-mechanism typology to better understand how these systems might interrelate. While this step should typically be repeated during and after step three, which is developing a broad and interdisciplinary dialogue, an initial attempt will help identify with whom that dialogue should occur. In this case, the lawsuit is based upon several premises. First, the speakers all allege that PTSD contributes to criminal behavior. Post-traumatic stress disorder, however, is usually not a defense for a crime, as those with PTSD can appreciate the wrongfulness and quality of their actions.[585] Why then,

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[582] *Id.*

[583] *Id.*

[584] For a good overview of the PDES, see Lakandula Duke Dorotheo, *The Army Physical Disability Evaluation System*, U.S. ARMY MEDICAL DEP'T J., Jan.–Mar. 2010, at 5, *available at* http://www.cs.amedd.army.mil/AMEDDJournal/2010janmar.pdf.

[585] U.S. DEP'T OF ARMY, PAM 27-9, MILITARY JUDGES' BENCHBOOK ¶ 6-4 (1 Jan. 2010). For a simple, non-technical summary, see Seth Robson, *Using PTSD as a Defense*, STARS

should PTSD matter? The answer becomes clear when applying Parsons's causal-mechanism typology. Even though the cause of criminal misconduct is almost always ideational, Parsons's typology illustrates that psychological causes can still impact one's decision making, even though that person retains enough control over their actions to be legally responsible for the results.[586]

The next fact that should be explored using Parsons's causal typology is why veterans with documented service connections are not eligible for benefits. Applying the typology will show three potential institutional causes for this problem. First, PDES-related rules designed to protect servicemembers from being administratively discharged prior to qualifying for DoD disability benefits might have actually created more wounded warriors without benefits, as commands chose to use court-martial charges to punish misconduct that the command would have otherwise punished administratively.[587] Second, the complicated morass that are the VA's rules on benefits eligibility, while enacted for valid reasons, have created an almost impossible-to-navigate bureaucracy that is effectively denying hundreds of thousands of potential veterans a fair assessment of their claim.[588] Third, and most importantly, the UCMJ, whose rules were developed and repeatedly modified to "strengthen the national security of the United States,"[589] may have created a generation of prosecutors who are motivated to minimize the role of psychological causal mechanisms versus accounting for them in a manner that is more well-suited for the UCMJ's ultimate purpose.[590]

& STRIPES, Aug. 21, 2008, http://www.stripes.com/news/using-ptsd-as-a-defense-1.82145.

[586] *See* PARSONS, *supra* note 572, at 15 (presenting a diagram that depicts how psychological causal mechanisms can impact ideational causal mechanisms). Lieutenant Colonel Celestino Perez, Jr., used this example during a lecture on *How to Map Arguments in Political Science*. Celestino Perez, Jr., Lecture on PARSONS, *supra* note 572 (Jan. 10, 2014).

[587] *See* Murphy, *supra* note 523. *But see* Information Paper, Colonel (COL) Jonathan Kent, MEDCOM SJA, Impact of Misconduct during Army Physical Disability Evaluation System Process (2 Jan. 2012), *available at* http://www.crdamc.amedd.army.mil/meb/_files/Impact_Misconduct.pdf (discouraging circumvention of the PDES process).

[588] *See* Brooker et al., *supra* note 468, pt. IV.C.

[589] MCM, *supra* note 26, pt. I, ¶ 3.

[590] *See* Seamone, *supra* note 468, at 10–12 (setting forth an example of this potential phenomenon).

Third, military leaders should apply Parsons's typology to better understand why commanders routinely give benefit-precluding discharge characterizations to servicemembers whose misconduct is related to their service-connected injuries. Does the cause include ideational elements? In other words, are commanders making an informed choice to value retribution and deterrence versus rehabilitation? Or, is the cause partially structural? In other words, are commanders not properly educated on the manner? Are they making the same decision that anyone in their shoes would make, but without the correct information about how their decision will impact a servicemember's future, they make the wrong choice?

By performing the exercises in durational time and identifying and classifying potential causes of the problem, military leaders would identify numerous possible officials with whom to open a dialogue. For example, military justice experts could provide insight based on their experiences in these cases. Military physicians could explain their perspective on the PDES and how it might contribute to the problem. VA benefits experts could explain how "characterization of discharge" cases are handled throughout the VA.[591] Forensic psychiatrists and neuropsychologists could provide valuable insight on PTSD and how it relates to criminal activities. Veterans Service Organization (VSO) representatives could provide their perspective on the impact that less than fully honorable discharges have on veterans who desperately need the care that their type and characterization of discharge precludes. The VSOs could also provide a good scope for military leaders on how prevalent the problem really is, as military leaders often do not focus on societal issues not involving current servicemembers. Employers could discuss their hesitation to hire a veteran with a less than fully-honorable discharge. The potential list of valuable contributors is only limited by one's intellect, imagination, and resources.

This applied example indicates that the UCMJ, like any other system, is hopelessly intertwined with numerous other systems. Connolly summarizes it well with his theory called "a world of becoming."[592] He states,

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[591] While VA claims adjudicators have difficulty adjudicating these complicated cases, there are experts at the Veterans Benefits Administration (VBA) headquarters who understand these complicated cases and could provide this expertise. Professional Experiences, *supra* note 236.

[592] CONNOLLY, *supra* note 569, at 27.

> A world of becoming—consisting of multiple temporal systems, many of which interact, each with its own degree of agency—is a world in which changes in some systems periodically make a difference to the efficacy and direction of others. Moreover, since human beings themselves are composed of multiple micro-agents collaborating and conflicting with one another, it is wise to think of both individual and collective human agency as a complex assemblage of heterogeneous elements bound loosely together.[593]

Accordingly, when military leaders are looking to shepherd the UCMJ through ever-changing times, the seemingly entrenched approach of self-reflection is no longer enough. Military leaders cannot fix future problems alone. They need help from an array of perspectives and expert opinions that the tools in this section can help identify.

3. Developing A Broad, Interdisciplinary, and Team-Oriented Dialogue

Developing a broad and interdisciplinary dialogue sounds deceptively simple, but in terms of the DoD examination of the UCMJ, there is no evidence that it has ever been done on anything more than on an ad hoc basis as a reaction to a specific issue. This is surprising given that most judge advocates who have served as defense counsel on a complex case have developed a broad and interdisciplinary dialogue. A defense counsel who has represented a client charged with a serious sexual assault will almost assuredly develop and lead an extended and productive team-oriented dialogue, which will include input from psychiatrists, forensic neuropsychologists, mitigation experts, jury consultants, and family members and friends of the accused.[594] A good defense counsel will also create a dialogue with investigators, prison counselors and guards, and prosecuting attorneys.

The Cynefin framework also calls for this type of dialogue. For complex problems, it recommends that leaders "increase levels of

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[593] *Id.*
[594] Professional Experiences, *supra* note 236.

interaction and communication."[595] The discussions should be open, and leaders should "encourage dissent and diversity."[596] A healthy competition of ideas is what creates successful dialogue.[597]

Perhaps the reason that such is not done for UCMJ reform, in addition to the impact of heuristics and other factors, is that doing so is so difficult. As is the case in trial preparation and UCMJ reform, things are not as simple as they first appear. Developing each element of the dialogue shows why.

The dialogue must be broad. This element is designed to incorporate a wide array of perspectives. In 1963, Major General Decker lauded the concept of incorporating external perspectives in UCMJ review.[598] The Code Committee's composition, which includes five civilian judges and two additional civilians,[599] appears to have been designed with this idea in mind. The breadth, however, must be much greater than this. As soon military leaders identify a potential problem with the UCMJ, they must seek out and initiate discussion with those advocating for the change. If discussing the case with an individual is not wise because that person may take legal action against DoD, an advocacy group could perform the same role. Advocacy groups would likely welcome such attention, as doing so would give them a voice for change with a receptive and powerful audience—one in addition to Congress.

Using the wounded warrior example as an illustration, a broad dialogue would include input from former servicemembers with service-connected disabilities who were denied benefits because the disability-fueled misconduct led to a less than honorable discharge. It would also include the advocacy groups, such as VSOs. Those who believe that they have been saddled with the consequences of the discharge, such as family members, social workers, or veterans treatment court mentors,[600] could also provide valuable input.

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[595] Snowden & Boone, *supra* note 560, at 73.
[596] *Id.*
[597] Professor Schlueter states that military leaders should listen to critics of the UCMJ because "like eating oatmeal, it is the right thing to do." He explains, "Criticisms should not be ignored simply because they irritate or annoy us. If we are wrong, then we should listen." Schlueter, *supra* note 30, at 10.
[598] *See supra* notes 96–99 and accompanying text.
[599] UCMJ art. 146(b) (2012).
[600] For a good description of veterans treatment courts, see JUSTICE FOR VETS, http://www.justiceforvets.org/ (last visited May 16, 2014). For a good description of how these courts could interact with the military justice system, see Seamone, *supra* note 468,

The dialogue must also be interdisciplinary. This element is intended to incorporate expertise from any profession that may provide valuable input in how to properly shepherd the UCMJ. The Response Systems to Adult Sexual Crimes Panel is a good example of how to do this.[601] Luckily, the military has uniformed expertise in almost every topic. The key is to find and leverage it. Applying the concept to the wounded warrior applied example, an interdisciplinary dialogue would include psychiatrists and neuropsychologists to provide input on the mechanics and dynamics of PTSD. Physicians and attorneys who specialize in the PDES would provide input on that system and how they see it relating to others. VA disability specialists would explain how the Veterans Affairs' systems perceive these cases, and how the military commander's decisions when applying the UCMJ's rules impact their decisions. Commanders would discuss how they value less than honorable discharges as a device to deter misconduct. Veterans Affairs physicians would provide their input on the long-term personal costs and ramifications of not providing treatment for service-connected injuries. Economists would calculate the cost on society. While gathering this group of people sounds laborious time consuming, the costs pale in comparison to the impact that an unsolicited major reform to the UCMJ could have on the military's readiness. As the 2014 NDAA proves, Congress will direct or perform this interdisciplinary approach if the military does not.

The dialogue must also be team-oriented. While attorneys are familiar and comfortable with adversarial processes and relationships, the effective dialogues are not generally possible unless all participants feel that their efforts are a part of a solution. Military leaders must also not let geographical challenges inhibit this dialogue. While in-person meetings are likely the most effective way to build a team-oriented approach, any approach may be more effective than the alternative of not taking adopting a broad and interdisciplinary dialogue.

The output of this dialogue is not rigid or even tangible. In most instances, military leaders will have to restart this approach from the beginning after gaining a better initial understanding. Such restarts are encouraged, as the entire point of the first three steps of the process is to gain a better understanding of the potential problem with the UCMJ at

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pt. VIII.

[601] *See supra* Part III.A.3.vi.

the earliest opportunity. Once military experts are satisfied that they have diagnosed the problem, step four is where they fix it before Congress takes unsolicited action. Using the medical analogy, step four is the application of the proposed cure.

4. Experimental Action

As Connolly explains, some of history's greatest philosophers, despite differences in viewpoints, "emphasize the value of dwelling periodically in fecund moments of duration to help usher a new idea, maxim, concept, faith, or intervention into being."[602] If military leaders use the concept of durational time to begin and foster the proper dialogues to properly shepherd the UCMJ, innovative solutions will likely ensue. Interestingly, military leaders may find that if a potential problem is diagnosed at an early enough stage, most solutions will not require UCMJ modification.

This article cannot predict what form the solutions might take. That is the beauty and power of the concept. Creating a broad and interdisciplinary team to solve a potential problem will foster solutions that prior UCMJ review committees never fathomed. Assumptions, such as the role of the commander in administering discipline, will be properly challenged from the beginning, versus simply taken as a given. There is guidance on how and when such solutions should be implemented.

In his book *System Effects: Complexity in Political and Social Life*, Robert Jervis explains,

> In a system, the chains of consequences extend over time and many areas: The effects of action are always multiple. Doctors call the undesired impact of medications "side effects." Although the language is misleading—there is no criterion other than our desires that determines which effects are "main" and which are "side"—the point reminds us that disturbing a system will produce several changes.[603]

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[602] CONNOLLY, *supra* note 569, at 71.

[603] ROBERT JERVIS, SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE 10 (1997) (quoting Garrett Hardin, *The Cybernetics of Competition*, PERSPECTIVES IN BIOLOGY IN MED. 79–80 (Autumn 1963)).

As the early indicators suggest, action should be taken as early as possible, as more treatment options will be available. Early action can have a dramatic result on the final result. Subscribers to the chaos theory in science are likely familiar with the "butterfly effect" concept, which posits that "a complicated dynamical system could have points of instability—critical points where a small push can have large consequences."[604] Even those who do not subscribe to chaos theory understand how early action can open options. It is widely known that early detection of cancer can increase treatment options and improve one's prognosis, and a wise investment of money early in life can lead to many more financial options later in one's life. Despite the complexity of the world, early intervention can make a big difference.

Given that the UCMJ, which itself is complex, is purposefully interwoven with countless other systems, there is a better way to intervene when we perceive that a correction is necessary. As Jervis states, "[W]e cannot develop or find 'a highly specific agent which will do only one thing. . . . We *can never do merely one thing*.'"[605] As a result, military practitioners can borrow another concept from William Connolly. Applying portions of the experimental-action concept to UCMJ reform, military leaders should "seek periodically to usher new concepts and experimental actions into the world that show promise of negotiating unexpected situations," and then "recoil on those interventions periodically to improve the chance that they do not pose more dangers or losses than the maxims they seek to correct."[606] Connolly is not alone in proposing this method of intervention.

General Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, has also borrowed from other disciplines in considering the exact same approach to solving complex problems. In a February 2014 interview, he stated,

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[604] JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE 18–19 (1987). The "butterfly effect" is "the notion that a butterfly stirring the air today in Peking can transform storm systems next month in New York." *Id.* at 8. This concept is also grounded in folklore. "For want of a nail, the shoe was lost; For want of a shoe, the horse was lost; For want of a horse, the rider was lost; For want of a rider, the battle was lost; For want of a battle, the kingdom was lost!" *Id.* at 23.

[605] JERVIS, *supra* note 603, at 10 (quoting Garrett Hardin, *The Cybernetics of Competition*, PERSPECTIVES IN BIOLOGY IN MED. 79-80 (Autumn 1963)) (emphasis added by JERVIS).

[606] CONNOLLY, *supra* note 569, at 165.

> And then the other interesting thing about strategy, to me, is whether it's best to define an end state and then deliberately plot a series of actions to achieve that end state . . . or whether the world in which we live today actually is one where, kind of like the Heisenberg principle in physics, where you should touch it and see what happens.[607]

There is no reason that such an approach should not be applied to our mission of shepherding the UCMJ in our ever-changing world. The Cynefin framework also supports an approach where we make a correction and then reevaluate its effectiveness. It states that in complex situations, "the leader's job" is to "probe, sense, respond."[608] Hypothetically applying this principle to the very real wounded warrior applied example will illustrate how it could work.

Using our applied example, assume that military leaders took all of the actions described in the three steps above. Leaders found the issue by applying the early indicator tools. Embracing the complexity of the problem, they performed an initial causation analysis and developed a broad, interdisciplinary, team-oriented dialogue to better understand the problem. The team has now decided on one experimental action.

After applying the three steps above, all team members agree to recommend that Congress afford VA health benefits to all service-connected injuries even if the type and characterization of discharge precludes the former servicemember from receiving other benefits. All physicians agreed on this course of action, as they were most concerned with ensuring that former servicemembers in need of care could receive it. Senior VA administrators expressed unanticipated support, as the steep public relations and adjudication costs that these cases cause offset the additional treatment costs. The VA representatives were concerned that additional strain on the VA's already understaffed mental-health treatment could cause other problems, but they concluded that VA's ongoing efforts to hire more mental-health professionals should mitigate

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[607] *A Conversation with the Chairmen: General Martin E. Dempsey*, WAR ON THE ROCKS (Feb. 25, 2014), http://warontherocks.com/2014/02/a-conversation-with-the-chairman-general-martin-e-dempsey/.

[608] Snowden & Boone, *supra* note 560, at 73.

this risk.[609] Veterans law experts also pointed out that, contrary to assertions by Senator Blumenthal and others that all Soldiers with other than honorable discharges are precluded from receiving health care benefits,[610] most soldiers who receive OTH discharges are already entitled to health care.[611] This dialogue motivated the VA to implement an education effort to ensure that all VA adjudicators were not operating on mistaken assumptions. Military commanders were also satisfied with the plan, as the deterrent effect of a less than honorable discharge was protected.

Research commensurate with the dialogue revealed that a statutory change to VA benefits statutes, and not the UCMJ, was the only way to accomplish this. Military leaders, through the JSC, recommended this change to VA law. The recommendation had power because a broad, interdisciplinary dialogue was formed. Not only did the JSC make this recommendation, but so did the VA and all of the powerful VSO lobbies. Using the congressional action framework, the established advocacy groups highlighted the large victim class whose lives were impacted by protracted wars. The multidisciplinary team engaged Senator Blumenthal, educating him on both the logic of the proposal and the flaws in his previous statements about benefits eligibility. Senator Blumenthal, as a result, engaged and leveraged other members of Congress. Multiple precursor strategic cases were turned into catalytic strategic cases by congressional attention and media reports. As a result, Congress removed the statutory bars to VA health care.[612]

A brief counterfactual analysis to this hypothetical example illustrates might have happened military leaders not embarked on this approach. During his press conference at Yale Law School, Senator Blumenthal's disgust was focused on DoD, not VA.[613] He included punitive discharges issued to wounded warriors in his list of gripes with DoD. After years of calls to address this issue, Senator Blumenthal introduced legislation that, instead of taking a proverbial scalpel to the

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[609] News Release, Dep't of Veterans Affairs, Office of Pub. & Intergovernmental Affairs, VA Hires Over 1600 Mental Health Professionals to Meet Goal, Expands Access to Care and Outreach Efforts, Directs Nationwide Community Health Summits (June 3, 2013), http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2450.
[610] *See, e.g.*, Joint Press Conference, *supra* note 580; Murphy, *supra* note 523.
[611] Brooker et al., *supra* note 468, pts. VIII, IX.
[612] Two statutes can serve as a bar to VA health care benefits. *See* 38 U.S.C. § 5303 (2006); Pub. L. No 95-126, 91 Stat. 1106 (1977).
[613] *See* Joint Press Conference, *supra* note 580.

issue, addressed it with a hatchet. Senator Blumenthal, frustrated by the years of inaction and additional attention to this issue, lost confidence in commanders and their perceived ability to manage the UCMJ. Accordingly, he teamed with Senator Gillibrand, another senator who possessed the same frustrations, albeit because of a different issue. Together, they were successful in amending the UCMJ to remove commanders' prosecutorial discretion.

While counterfactual analyses to hypothetical situations are admittedly tenuous support for a proposition, this one strikingly corresponds with the debate around sexual assault in the military and the UCMJ's role in the problem. Notwithstanding the multitude of early indicators to the sexual assault crisis that were identified in Part IV, and despite decades of military leader assertions that they were focused on the problem of sexual assault in the military,[614] the situation got worse, and the UCMJ's role was never fully examined until after the unsolicited 2014 NDAA was passed.

This hypothetical example is purposefully oversimplified to illustrate the process's operation and potential. What, on the other hand, would happen in a situation in which the dialogue did not produce agreement or consensus? Surprisingly, the results do not change. Just because one of the people or organizations with whom the military initiates dialogue does not agree to a proposed solution does not change the value of the process to military leaders. In other words, the concurrence of those consulted is not required. Broad dialogue should not be conflated with broad consensus. In the end, military leaders must decide how to shepherd the UCMJ. Armed with a deeper understanding of a problem's complexity and cause at an earlier stage, military leaders can take more appropriate action. If military leaders had engaged in this dialogue in the 1990s or early 2000s, they may have recommended the exact same changes found in the 2014 NDAA. Given the military leader's vigorous opposition, however, such is unlikely. A better understanding of the problem could have prompted change in other areas. Even when no UCMJ or military justice system-related changes are necessary, military leaders should use the increased understanding to develop an informed and persuasive narrative.

Military leaders can engage the American public via Congress, media, and advocacy organizations to explain their perspective and

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[614] *See supra* Part IV.

efforts. Currently, military leaders do not do this enough. For example, military leaders refused to comment during the four-piece NPR series on wounded warriors.[615] Perceived inaction has multiple potential negative effects. As demonstrated above with Senator Blumenthal and his frustration with Secretary Hagel's perceived initial inaction,[616] precursor and catalytic strategic cases can be born. Media attention and advocacy groups also appear to be fueled by perceived DoD inaction.[617] Using the congressional action framework, perceived DoD inaction, even if untrue, can fuel congressional action. Engaging the American public with an honest and actively informed narrative is indispensible in any case, particularly those where a broad consensus is not possible.

VII. Conclusion

The 2014 NDAA demonstrates that the military needs to do a better job of diagnosing and fixing problems with the UCMJ. This article provides military leaders with the tools to do just that. The congressional action framework helps military leaders understand what Congress would define as a problem—a disease—with the UCMJ. It also serves to inform them when Congress may take unsolicited action to cure a disease. The early indicators show that issues that may impact the UCMJ are identifiable at a very early stage. The four-step approach shows military leaders how to best address, and if required, fix those problems.

There is no guarantee that military leaders will learn any lessons from the difficult debates surrounding the UCMJ and sexual misconduct. When interviewed about the wounded warrior issue that this article uses as an applied example, General Dempsey stated

> I wouldn't suggest that we should in any way reconsider the way we characterize discharges at the time of occurrence. . . . It is a complex issue and we all make choices in life that then we live with for the rest of

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[615] *See* Peñaloza & Lawrence, *Morning Edition: Other-Than-Honorable Discharge Burdens Like a Scarlet Letter*, *supra* note 531 ("The Pentagon. . . declined a request for an interview.").

[616] Joint Press Conference, *supra* note 580.

[617] *See, e.g.*, Yale Law School, *supra* note 534; Philipps, *supra* note 527.

> our lives and I think we have to understand that as well.[618]

The trouble with this quote is not General Dempsey's position to not change the discharge characterization system. What is disturbing is his hesitation to even consider the proposition even though he admits that it is a complex issue. General Dempsey, of all military leaders, has emphasized the role of professionalism and self-regulation.[619] Ironically, his assertion that we must live with our choices also evinces that he understands that decisions at an early stage can have a significant impact. Surprisingly, when it comes to the UCMJ and military justice issues, he and many other leaders appear hesitant to even look at potential issues.

Military leaders have shepherded the UCMJ to an existential crossroads. The strength of this nation's military depends on military leaders taking a new approach to UCMJ reform. This article will hopefully be just one of many suggestions on how to improve both the public's confidence in the UCMJ, as well as its objective ability to be fair and effective within a largely subjective environment.

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[618] Peñaloza & Lawrence, *Path to Reclaiming Identity Steep for Vets with 'Bad Paper'*, *supra* note 531.

[619] Jim Garamone, Am. Forces Press Serv., *Dempsey Calls for Rededication to Profession of Arms*, U.S. DEP'T OF DEF. (Feb. 23, 2012), http://www.defense.gov/news/newsarticle.aspx?id=67307.