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## Zero Tolerance or Zero Accountability: An Examination of Command Discretion and the Need for an Independent Prosecutorial Authority in Military Sexual Assault Cases

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### Cover Page Footnote

First and foremost, I would like to thank my family for their unwavering love and support, especially my husband, Noah, my son, Nikolai Charles, my daughter, Naiah Rose, and my parents, Holly and Marty McKitterick. Thank you to my grandparents, Carol and Charles, for their constant encouragement and cheerleading over the years. Thank you to Dale and Sherry McKitterick for their love, kindness, and inspiration throughout many endeavors. I also want to express my sincerest appreciation for the professors at the University of Dayton who have had the most significant impact on me throughout law school, most notably Professor Julie Zink, who is an exceptional teacher and always willing to lend an ear and the most thoughtful advice; Professor Richard Perna, whose guidance in the classroom led me to a real passion to practice; Professor Tracy Reilly, whose enthusiasm for the law and learning is infectious and inspirational; and Professor Thaddeus Hoffmeister for his questioning and insights as my faculty advisor. Writing about this issue would not have been possible without the support and encouragement from the many mentors I have had throughout law school, including Judge Mary Katherine Huffman and Judge Michael J. Newman, both of whom challenged me to think about the law differently and offered me endless opportunities for learning. Lastly, I would like to dedicate my Comment to my grandfather, Charles, a constant champion who never let me lose sight of my goals.

**ZERO TOLERANCE OR ZERO  
ACCOUNTABILITY? AN EXAMINATION OF  
COMMAND DISCRETION AND THE NEED FOR AN  
INDEPENDENT PROSECUTORIAL AUTHORITY IN  
MILITARY SEXUAL ASSAULT CASES**

*Nadia Klarr\**

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\* J.D., University of Dayton School of Law, 2016; B.A. in Rhetoric and Political Science, Hillsdale College, 2012. First and foremost, I would like to thank my family for their unwavering love and support, especially my husband, Noah, my son, Nikolai Charles, my daughter, Naiah Rose, and my parents, Holly and Marty McKitterick. Thank you to my grandparents, Carol and Charles, for their constant encouragement and cheerleading over the years. Thank you to Dale and Sherry McKitterick for their love, kindness, and inspiration throughout many endeavors. I also want to express my sincerest appreciation for the professors at the University of Dayton who have had the most significant impact on me throughout law school, most notably Professor Julie Zink, who is an exceptional teacher and always willing to lend an ear and the most thoughtful advice; Professor Richard Perna, whose guidance in the classroom led me to a real passion to practice; Professor Tracy Reilly, whose enthusiasm for the law and learning is infectious and inspirational; and Professor Thaddeus Hoffmeister for his questioning and insights as my faculty advisor. Writing about this issue would not have been possible without the support and encouragement from the many mentors I have had throughout law school, including Judge Mary Katherine Huffman and Judge Michael J. Newman, both of whom challenged me to think about the law differently and offered me endless opportunities for learning. Lastly, I would like to dedicate my Comment to my grandfather, Charles, a constant champion who never let me lose sight of my goals.

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I. INTRODUCTION

On November 3, 2012, Lt. Col. James Wilkerson (“Wilkerson”), a 31st Fighter Wing Inspector General and F-16 pilot, was convicted of aggravated sexual assault<sup>1</sup> and sentenced to one year in jail<sup>2</sup> and dismissed<sup>3</sup> from the Air Force.<sup>4</sup> On February 26, 2013, only three months after Wilkerson was sentenced, Lt. Gen. Craig Franklin<sup>5</sup> dismissed the case against Wilkerson.<sup>6</sup> Despite a full investigation and Wilkerson’s failed polygraph examination, which was submitted to a jury of four colonels and one

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<sup>1</sup> Wilkerson was accused of entering the bedroom of a houseguest, groping her breasts, and digitally penetrating her until the woman, who had met the Wilkerson that evening at a party, awoke to the assault upon discomfort and left the Wilkerson home, shoeless, in the middle of the night. Nancy Montgomery, *Case Dismissed Against Aviano IG Convicted of Sexual Assault*, STARS & STRIPES (Feb. 27, 2013), <http://www.stripes.com/news/air-force/case-dismissed-against-aviano-ig-convicted-of-sexual-assault-1.209797>.

<sup>2</sup> The jury had broad sentencing discretion, ranging from no punishment to confinement up to thirty years. Nancy Montgomery, *Former IG Gets 1-Year Sentence, Dismissal for Sexual Assault*, STARS & STRIPES (Nov. 3, 2012), <http://www.stripes.com/news/former-ig-gets-1-year-sentence-dismissal-for-sexual-assault-1.195865>.

<sup>3</sup> Equivalent to a dishonorable discharge and making him ineligible to receive retirement benefits and pay. *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Montgomery, *supra* note 1. Lt. Gen. Craig Franklin was the Third Air Force Commander and the convening authority of Wilkerson’s court-martial, as well as a former commander of the 31st Fighter Wing who is also an F-16 pilot. *Id.*

<sup>6</sup> *Id.*

lieutenant colonel, Lt. Gen. Franklin concluded that “the entire body of evidence was insufficient to meet the burden of proof beyond a reasonable doubt.”<sup>7</sup> In addition to the dismissal of the entire case, Wilkerson was selected for promotion to colonel and permitted to return to “full-duty status.”<sup>8</sup> Nancy Parrish, president of Protect Our Defenders,<sup>9</sup> stated, “It’s a classic example of the broken military justice system[] . . . . It’s absolute command discretion over the rule of law.”<sup>10</sup> The organization is one of many advocacy groups and congressional members calling for the removal of prosecutorial authority over sexual assault cases from within the chain-of-command.<sup>11</sup>

Sexual assault is a major cause of concern within the military, evidenced by the fact that the Department of Defense has implemented a comprehensive policy in order to prevent sexual assault in the Armed Forces.<sup>12</sup> Sexual crimes within the military jumped 34.5% from 19,300 assaults in Fiscal Year (“FY”) 2010 to 26,000 assaults in FY 2012.<sup>13</sup> The percentage of victims who report their assaults dropped significantly from 13.5% in 2011 to 9.8% in 2012, a 27% reporting reduction.<sup>14</sup> In addition, the Sexual Assault Prevention and Response Office (“SAPRO”) reports that of the victims who chose not to report, 47% expressed that fear of retaliation or reprisal was the reason for not reporting their abuse, while another 43% were influenced by the negative experiences of other victims who reported their abuse.<sup>15</sup> Seventy-four percent of female victims and 60% of male victims indicated a perception of “one or more barriers to reporting sexual assault.”<sup>16</sup> The overwhelming majority of victims who reported a sexual assault indicated that they experienced professional, social, or administrative retaliation.<sup>17</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Protect Our Defenders is a human rights organization working with victims, survivors, their families, and retired military to reform how the Department of Defense handles sexual harassment, rape, and sexual assault within the military. *About Protect Our Defenders*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/about/> (last visited Apr. 10, 2016); Montgomery, *supra* note 1.

<sup>10</sup> Montgomery, *supra* note 1.

<sup>11</sup> *Id.*

<sup>12</sup> SEXUAL ASSAULT PREVENTION & RESPONSE, U.S. DEP’T OF DEF., ABOUT SAPRO (2016), <http://www.sapr.mil/index.php/about>.

<sup>13</sup> SEXUAL ASSAULT PREVENTION & RESPONSE, U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012, at 13 (2013), [http://www.sapr.mil/public/docs/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-volume\\_one.pdf](http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-volume_one.pdf) [hereinafter ANNUAL REPORT: FISCAL YEAR 2012].

<sup>14</sup> *Get the Facts on Military Rape, Assault and Other Sexual Offenses*, PROTECT OUR DEFENDERS, [http://protectourdefenders.com/images/POD\\_FactSheet.pdf](http://protectourdefenders.com/images/POD_FactSheet.pdf) (last visited Apr. 10, 2016) [hereinafter *Get the Facts*].

<sup>15</sup> *Id.*; see also ANNUAL REPORT: FISCAL YEAR 2012, *supra* note 13, at 27.

<sup>16</sup> *Get the Facts*, *supra* note 14; see also SEXUAL ASSAULT PREVENTION & RESPONSE, U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013, at 54 (2014), [http://www.sapr.mil/public/docs/reports/FY13\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault.pdf](http://www.sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf) [hereinafter ANNUAL REPORT: FISCAL YEAR 2013].

<sup>17</sup> *Get the Facts*, *supra* note 14; see also ANNUAL REPORT: FISCAL YEAR 2012, *supra* note 13, at 27.

The United States military is a unique entity with a very specific mission: defense of the nation.<sup>18</sup> The military is fundamentally different from the civilian world because of its sole mission and very distinct charge; as such, a separate and distinct system of justice is crucial for the successful undertaking of its mission.<sup>19</sup> Each incident of sexual assault in the military is detrimental to the achievement of that mission.<sup>20</sup> Despite the current Department of Defense initiatives to address the issue and promote the prevention of sexual assault, the Department of Defense admits that sexual assault is still “one of the most serious challenges facing our military.”<sup>21</sup> The obvious question presented, then, becomes, “What more can be done to remedy the poor handling of sexual assault cases in the military?”

The answer is simple, but has encountered substantial resistance from high-ranking military officials. The Department of Defense ought to establish an independent agency responsible for prosecutorial discretion in military sexual assault cases; in so doing, the military will take real steps toward curtailing sexual assault in the military by creating a system of accountability that prosecutes and punishes sexual assault while simultaneously deterring others from engaging in similar criminal activity. Such a system of justice will be concerned with fairness and objectivity, lending itself to maintaining trust amongst service members, and will ultimately prove beneficial to the mission.

This Comment will first provide an overview of the current process of handling sexual assault cases as they arise within the armed forces and discuss the need for a separate military system of justice. This examination will address the major areas of concern and the impact these problems have on victims of sexual assault. Second, this Comment will review the measures taken thus far by the Department of Defense to promote the prevention of sexual assault. This examination will review the principal justifications the Department of Defense employs to defend the current practice of prosecutorial authority remaining within the chain-of-command.<sup>22</sup> Finally, this Comment will address the many benefits of removing prosecutorial authority from the chain-of-command and propose additional provisions necessary in order for the Department of Defense to more effectively combat sexual assault.

## II. BACKGROUND

Part II of this Comment more thoroughly frames the problem for

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<sup>18</sup> CHARLES D. STIMSON, *SEXUAL ASSAULT IN THE MILITARY: UNDERSTANDING THE PROBLEM AND HOW TO FIX IT*, at v (2013).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> ANNUAL REPORT: FISCAL YEAR 2013, *supra* note 16, at 6.

<sup>22</sup> SEXUAL ASSAULT PREVENTION & RESPONSE, U.S. DEP'T OF DEF., MISSION & HISTORY (2016), <http://www.sapr.mil/index.php/about/mission-and-history> [hereinafter MISSION & HISTORY].

sexual assault in the military and discusses the importance of a separate system of military justice. This Part also introduces the reader to the Uniform Code of Military Justice, the Manual for Courts-Martial, the very extensive court-martial procedures, as well as Department of Defense investigative units. Finally, it will examine current and past initiatives to prevent sexual assault in the military.

*A. Sexual Assault in the Military: Framing the Problem*

According to the Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2013, the military received 5,061 reports of sexual assault.<sup>23</sup> Three thousand seven hundred sixty-eight of those reports were unrestricted, while 1,293 were restricted.<sup>24</sup> The restricted reports are immediately funneled out of the process with no adjudication.<sup>25</sup> Among the 3,768 unrestricted reports, 3,234 perpetrators were identified.<sup>26</sup> Of those perpetrators, only 2,149 were considered for possible action, with the remaining funneled out due to the commander determining the allegations unfounded and other reasons.<sup>27</sup> Of the 2,149 remaining perpetrators, charges were only initiated against 838 perpetrators, 210 perpetrators received non-judicial punishments, 56 were administratively discharged, and 83 experienced adverse administrative actions.<sup>28</sup> ***Of the 5,061 reports of sexual assault in Fiscal Year 2013, only 370 perpetrators were convicted of a charge at trial*** and only 274 perpetrators were confined to jail.<sup>29</sup> Interestingly, not all perpetrators who were convicted were convicted of sexual assault.<sup>30</sup> Staff Sergeant Stace Nelson, a U.S. Marine Corps Naval Criminal Investigative Service Agent (“NCIS”), admitted that most cases are pled down because “the military does not like to prosecute people and keep them as felony convictions.”<sup>31</sup>

Although the sheer numbers certainly provide cause for concern, the numbers alone do not adequately frame the problem. The military culture itself heightens the impact that sexual assault has in the military in comparison to sexual assault in the civilian world. Brigadier General Loree Sutton, a psychiatrist in the U.S. Army, indicates that because the military is a relatively closed system, the military is a prime “target-rich environment” for a sexual predator.<sup>32</sup> This is in large part due to the catch and release system the military

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<sup>23</sup> ANNUAL REPORT: FISCAL YEAR 2013, *supra* note 16, at 67.

<sup>24</sup> *Id.*

<sup>25</sup> THE INVISIBLE WAR, at 42:48 (Chain Camera Pictures Jan. 20, 2012).

<sup>26</sup> ANNUAL REPORT: FISCAL YEAR 2013, *supra* note 16, at 67.

<sup>27</sup> *Id.* at 76.

<sup>28</sup> *Id.* at 78.

<sup>29</sup> *Id.* at 83.

<sup>30</sup> *Id.*

<sup>31</sup> THE INVISIBLE WAR, *supra* note 25, at 1:28:48–1:29:00.

<sup>32</sup> *Id.* at 31:42.

employs.<sup>33</sup>

NCIS Staff Sergeant Nelson acknowledged that rapists in the military are much more capable and dangerous criminals; the military rapist who is investigated is educated regarding the process and understands how to do the crime without doing the time.<sup>34</sup> Helen Benedict, author of *The Lonely Soldier*, stated during an interview:

Most rapists are repetitive criminals. It is a kind of crime that has an obsessive quality so people do it again and again. So the tragedy of that is that every one of these guys that gets off free will be doing it to other women again and again, often for years and years and years.<sup>35</sup>

Russell Strand, Chief of the Family Advocacy Law Enforcement Training Division of the U.S. Army, attaches a number to the repetitive criminal to which Helen Benedict referred. He stated, “The average sex offender in their lifetime has about 300 victims and the vast majority of sex offenders will never be caught.”<sup>36</sup> Staff Sergeant Nelson also properly identifies that this catch and release system, which allows predators to repetitively commit sexual assault crimes, is not solely a military problem.<sup>37</sup> Approximately 5% of reported sexual assaults result in conviction; even fewer perpetrators, only 4%, end up on the sex offender registry.<sup>38</sup> Under the current system, these repetitive criminals are able to get out of the military without a felony record and without any warning to the public of sexual assault transgressions in the military. Former Air Force Chief Prosecutor Col. Don Christensen acknowledged that military sex offenders “know that they can commit these offenses with almost impunity.”<sup>39</sup>

While sexual assault has a devastating presence in the civilian world, it is an extremely abhorrent and discounted reality in the military. General Martin E. Dempsey, the Chairman of the Joint Chiefs of Staff, spoke to First and Second Class Air Force Cadets on the importance of character, trust, and faith in the military.<sup>40</sup> Gen. Dempsey articulated that “[t]rust holds the

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<sup>33</sup> *Id.* at 1:29:18. The military routinely “investigates” reports of sexual assault only to release the perpetrator and close the investigation, allowing perpetrators to be much more the wiser concerning the investigative procedures and the inner workings of the military justice system. *Id.* at 1:29:20–1:29:35.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1:27:46–1:28:03.

<sup>36</sup> *Id.* at 1:28:04.

<sup>37</sup> *Id.* at 1:29:15.

<sup>38</sup> ANNUAL REPORT: FISCAL YEAR 2013, *supra* note 16, at 83.

<sup>39</sup> *Remarks from Protect Our Defenders President Don Christensen at Military Justice Improvement Act Press Conference with Senator Kirsten Gillibrand*, PROTECT OUR DEFENDERS (Dec. 2, 2014), <http://www.protectourdefenders.com/remarks-from-protect-our-defenders-president-don-christensen-at-military-justice-improvement-act-press-conference-with-senator-kirsten-gillibrand/> [hereinafter *Remarks from Protect Our Defenders President*].

<sup>40</sup> Amber Baillie, ‘Trust Holds Our Profession Together’: U.S.’s Top Military Officer Encourages Academy Cadets to Never Lose Faith in Their Military Careers, U.S. AIR FORCE ACAD., <http://www.usafa.af.mil/news/story.asp?id=123370062> (last updated Nov. 8, 2013).



military profession together.”<sup>41</sup> Army Chief of Staff General Ray Odierno spoke at an Army Annual Meeting and expressed similar sentiments.<sup>42</sup>

General Odierno articulated the practical importance of trust and unit cohesion, explaining that military members “have to be there for each other in the most stringent of conditions. You have to believe that they will be there for you at the most important times. You have to work as a team and that trust must be built over time, and it must be earned . . . .”<sup>43</sup> Sexual assault destroys trust and unit cohesion by breaking down the individual, breeding a new culture of fear, and impacting the victim in ways unknown in the civilian world. For example, a sexual assault victim in the military may be forced to work closely with his or her accuser or may face retaliation for a report of sexual assault, two common practices currently impacting sexual assault victims in the military. Additionally, unlike civilian victims, a military sexual assault victim is unable to bring a cause of action against the military for harm incurred incident to military service,<sup>44</sup> including the military’s failure to protect its service members from sexual assault.

Aside from eroding trust and breaking down the mission of the military, sexual assault in the military significantly impacts the physical and psychological well-being of military members and their families. Kori Cioca of the U.S. Coast Guard was raped and beaten by her supervisor, which resulted in a dislocated jaw requiring a partial bone replacement.<sup>45</sup> She has been on a soft diet for five years and still has not received surgery or benefits.<sup>46</sup> Marine Lance Cpl. Jeremiah Arbogast was drugged and raped by a fellow Marine who served no prison time upon conviction due to his 23 years of admirable service.<sup>47</sup> Lance Cpl. Jeremiah Arbogast was ostracized after his report of sexual assault and later medically discharged as a result of mental health problems resulting from the sexual assault.<sup>48</sup> Consequently, Lance Cpl. Arbogast suffered from depression and post-traumatic stress, which led to a paralyzing self-inflicted gunshot wound.<sup>49</sup> Department of Defense statistics indicate that “[victims] who have been raped in the military have a PTSD [post-traumatic stress disorder] rate higher than [soldiers] who’ve been in combat.”<sup>50</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> Raymond J. Piper, *CSA: Trust is Bedrock of Army Profession*, U.S. ARMY (Oct. 26, 2012), [http://www.army.mil/article/89904/CSA\\_\\_Trust\\_is\\_bedrock\\_of\\_Army\\_Profession/](http://www.army.mil/article/89904/CSA__Trust_is_bedrock_of_Army_Profession/).

<sup>43</sup> *Id.*

<sup>44</sup> *Feres v. United States*, 340 U.S. 135, 146 (1950).

<sup>45</sup> THE INVISIBLE WAR, *supra* note 25, at 15:33.

<sup>46</sup> *Id.* at 15:53.

<sup>47</sup> Chris Carroll, *Senate Panel Explores Links Between Sex Assault, PTSD and Suicide*, STARS & STRIPES (Feb. 26, 2014), <http://www.stripes.com/news/senate-panel-explores-links-between-sex-assault-ptsd-and-suicide-1.270119>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> THE INVISIBLE WAR, *supra* note 25, at 34:27.

Defense Secretary Leon E. Panetta acknowledged the drastic problem and called for a zero tolerance policy for sexual assault in the military,<sup>51</sup> explaining that “[sexual assault] is a crime that hurts survivors, their families, their friends and their units . . . .”<sup>52</sup> Moreover, “sexual assault reduces overall military readiness.”<sup>53</sup> In these military units that tolerate sexual assault and refuse to actively combat the perpetrators, incidents of sexual assault triple.<sup>54</sup> Although high ranking military officials claim that the military is “in the process of instituting . . . changes,”<sup>55</sup> the problem is more accurately reflected by Peter Jennings’ sentiments characterizing the Navy Tailhook scandal, stating, “A great wall of silence ha[s] gone up to protect the guilty.”<sup>56</sup> This must change.

### *B. The Need for a Separate System of Justice*

In June of 1775, the Second Continental Congress created the Continental Army.<sup>57</sup> On the same day, Congress also initiated a committee to recommend rules and regulations for the government of the army.<sup>58</sup> The committee, comprised of George Washington and four others, drafted and proposed 69 separate “Articles of War” which were approved on June 30, 1775, and listed the types of offenses that could be tried by a court-martial.<sup>59</sup> For example, Article VII specifies the following:

Any officer or soldier, who shall strike his superior officer, or draw, or offer to draw, or shall lift up any weapon, or offer any violence against him, being in the execution of his office, on any pretence whatsoever, or shall disobey any lawful commands of his superior officer, shall suffer such punishment as shall, according to the nature of his offence, be ordered by the sentence of a general court-martial.<sup>60</sup>

Only days after George Washington was appointed General and

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<sup>51</sup> *Id.* at 43:31–43:40.

<sup>52</sup> Claudette Roulo, *DOD to Revise Sexual Assault Prevention Training*, U.S. DEP’T DEF. (Sept. 25, 2012), <http://archive.defense.gov/news/newsarticle.aspx?id=118000>.

<sup>53</sup> *Id.*

<sup>54</sup> Anne G. Sadler et al., *Factors Associated with Women’s Risk of Rape in the Military Environment*, 43 AM. J. INDUS. MED. 262, 268 (2003).

<sup>55</sup> Interview with General John Jumper, U.S. Air Force. *THE INVISIBLE WAR*, *supra* note 25, at 43:01–43:05.

<sup>56</sup> *Id.* at 41:20–41:23.

<sup>57</sup> A military force arising out of the dispute between the United Kingdom and inhabitants of the newly formed colonies in North America that existed for more than two centuries and is now known as the United States Army. GREGORY E. MAGGS & LISA M. SCHENCK, *MODERN MILITARY JUSTICE: CASES AND MATERIALS 1* (2012).

<sup>58</sup> *Id.*; *see also* 2 JOURNALS OF THE CONTINENTAL CONGRESS 113 (Worthington Chauncey Ford ed., 2d ed. 1775).

<sup>59</sup> MAGGS & SCHENCK, *supra* note 57, at 1; *see also* JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 58, at 112–23.

<sup>60</sup> MAGGS & SCHENCK, *supra* note 57, at 1–2; *see also* JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 58, at 113.

Commander-in-Chief of the Army, he appointed a Judge Advocate of the Continental Army.<sup>61</sup> The need for a separate military justice system is evidenced in the fact that the separate rules and regulations and the appointment of legal officers were instituted immediately following the formation of the new army.<sup>62</sup>

Two primary reasons for the existence of a separate military system of justice are discipline and mobility.<sup>63</sup> The Supreme Court has repeatedly recognized that “[m]ilitary law[] . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.”<sup>64</sup> The Court has indicated that the military is “a specialized society separate from civilian society” which has “laws and traditions of its own [developed] during its long history.”<sup>65</sup> Additionally, the primary purpose of the military is to fight or be prepared “to fight wars should the occasion arise.”<sup>66</sup> In order to prepare for and carry out its vital purpose, “the military must insist upon a respect for duty and a discipline without counterpart in civilian life.”<sup>67</sup> Given such need for duty and discipline, the military prosecutes many crimes that are unique to military life and would not be appropriately considered in the civilian system. For example, military members can be prosecuted for adultery, not going to work on time, and disrespecting a supervisor.<sup>68</sup> Ultimately, the military may prosecute a service member for any behavior that the military deems inappropriate under the punitive article 10 U.S.C. § 933.133, Conduct Unbecoming of an Officer and a Gentleman.<sup>69</sup> The laws governing military discipline have a long history rooted in unique military experiences and needs that are as powerful today as in the past.<sup>70</sup>

Concerning mobility, the military’s base of operations sees no boundaries, often operating in locations where civil authority does not exist.<sup>71</sup> As a practical matter, when troops are deployed overseas, missions cannot be put on hold in order to address a disciplinary problem; likewise, the problem cannot be ignored until troops come home.<sup>72</sup> The Court has recognized that “[c]ourt-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order.”<sup>73</sup>

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<sup>61</sup> MAGGS & SCHENCK, *supra* note 57, at 2.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Burns v. Wilson, 346 U.S. 137, 140 (1953); *see also* Parker v. Levy, 417 U.S. 733, 744 (1974).

<sup>65</sup> Parker, 417 U.S. at 743.

<sup>66</sup> United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

<sup>67</sup> Schlesinger v. Councilman, 420 U.S. 738, 757 (1975).

<sup>68</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES

62 (2012) [hereinafter MCM]; 10 U.S.C. §§ 886.86, 889.89 (2012).

<sup>69</sup> 10 U.S.C. § 933.133 (2012).

<sup>70</sup> Schlesinger, 420 U.S. at 757.

<sup>71</sup> MAGGS & SCHENCK, *supra* note 57, at 2.

<sup>72</sup> *Id.*

<sup>73</sup> United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22 (1955).

### C. *The Uniform Code of Military Justice*

The military justice system varied among the branches prior to 1950. However, in 1950, Congress enacted the Uniform Code of Military Justice (“UCMJ”) in order to create a single, comprehensive system of military justice for all members of the uniformed services of the United States, including the Air Force, Army, Coast Guard, Marine Corps, Navy, National Oceanic and Atmospheric Administration Commissioned Corps, and Public Health Service Commissioned Corps.<sup>74</sup> The UCMJ closely resembles the original Articles of War, discussed *supra*, which are codified at 10 U.S.C. § 801 to § 941.<sup>75</sup> While the UCMJ contains many of the same provisions from the Articles of War, the UCMJ also contains provisions targeting modern forms of misconduct that were unknown in 1775, such as drunk driving.<sup>76</sup> The UCMJ also dictates investigative procedures, court-martial jurisdiction, trial procedure, punishment, sentencing, and post-trial procedure and review.<sup>77</sup>

### D. *The Manual for Courts-Martial*

The Manual for Courts-Martial (“MCM”) is a comprehensive military attorney’s manual<sup>78</sup> with the primary purpose of providing for “just determination of every proceeding relating to trial by court-martial.”<sup>79</sup> The MCM contains the Rules of Court-Martial (“R.C.M.”) and Military Rules of Evidence (“Mil. R. Evid.”).<sup>80</sup> “These rules [closely] resemble the Federal Rules of Criminal Procedure and the Federal Rules of Evidence,” and serve the same primary function with the exception of the court-martial procedures.<sup>81</sup>

### E. *Court-Martial Procedures*

Once an offense is reported, one of two actions may be taken: apprehension or an initial report.<sup>82</sup> The next step in the process is determining whether to impose a pretrial restraint<sup>83</sup> on the service member.<sup>84</sup> Next, the case goes to the commander for immediate disposition.<sup>85</sup> Pursuant to R.C.M. 306 and 402, the commander may take no action, take an administrative

<sup>74</sup> *About*, UNIFORM CODE MIL. JUST., <http://www.ucmj.us/about-the-ucmj> (last visited Apr. 10, 2016).

<sup>75</sup> MAGGS & SCHENCK, *supra* note 57, at 4; *see also* 10 U.S.C. §§ 801–941.

<sup>76</sup> MAGGS & SCHENCK, *supra* note 57, at 5; *see also* 10 U.S.C. § 911.111.

<sup>77</sup> *See* 10 U.S.C. §§ 832, 836, 855, 859; *see also Structure*, UNIFORM CODE MIL. JUST., <http://www.ucmj.us/structure-of-the-ucmj> (last visited Apr. 10, 2016).

<sup>78</sup> MAGGS & SCHENCK, *supra* note 57, at 5.

<sup>79</sup> MCM, *supra* note 68, at II-1.

<sup>80</sup> MAGGS & SCHENCK, *supra* note 57, at 5; *see also* MCM, *supra* note 68, at 1–3.

<sup>81</sup> MAGGS & SCHENCK, *supra* note 57, at 5–6.

<sup>82</sup> *Id.* at 12.

<sup>83</sup> Pursuant to R.C.M. 304, a “pretrial restraint ‘may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.’” *Id.* at 13.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 12–13.

action,<sup>86</sup> issue a non-judicial punishment,<sup>87</sup> or prefer charges<sup>88</sup> and forward the case onto additional court-martial proceedings.<sup>89</sup> If the commander prefers charges, he would complete a “charge sheet” designating the type of court-martial<sup>90</sup> having convening authority over the case.<sup>91</sup>

The convening authority would then have similar options for disposition of the case, including forwarding charges to another type of court-martial convening authority for further disposition.<sup>92</sup> The convening authority also has the ability to order a “pretrial investigation”<sup>93</sup> in order to secure more information for the purpose of appropriately disposing the case.<sup>94</sup> A staff judge advocate would then review the investigation report and make recommendations to the convening authority.<sup>95</sup> If the convening authority decides to refer charges to a court-martial, the trial will closely resemble a civilian criminal trial.<sup>96</sup> A court-martial begins with an arraignment, followed by a trial on the merits, unless the accused enters a guilty plea.<sup>97</sup> Following the trial on the merits is a finding of guilt.<sup>98</sup> If the accused is found guilty, a decision on the sentence will follow, along with an announcement of the sentence.<sup>99</sup>

The accused may request a trial by a judge or by a panel.<sup>100</sup> The make-up of the panel, however, is very unlike a civilian jury in that “[i]ts members . . . consist of officers or enlisted members [selected] by the convening authority to hear the case.”<sup>101</sup> The accused may request that one-

<sup>86</sup> *Id.* at 13. Under R.C.M. 306, the commander may address “misconduct with ‘administrative corrective measures,’ [including] counseling, admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproaches, rebukes, or extra military instruction.” *Id.*

<sup>87</sup> *Id.* Commonly referred to as an “Article 15,” Chapter 3, Article 15 of the UCMJ authorizes “the commander to impose minor punishments on soldiers for violations of the UCMJ, without trying them by court-martial unless the accused insists on a court-martial [proceeding].” *Id.*

<sup>88</sup> *Id.* Pursuant to R.C.M. 307, the commander “prefers charges by putting them in writing, stating that he or she has personal knowledge of or has investigated the [circumstances] set forth in the charges and specifications, and [then] signing them under oath,” generally completed through the issuance of a “charge sheet.” *Id.*

<sup>89</sup> *Id.* at 12–13.

<sup>90</sup> “[T]here are three types of courts-martial: a summary court-martial, a special court-martial, [and] a general court-martial. These three types . . . differ in the formality” of their proceedings, as well as the types of penalties imposed. *Id.* at 16 (internal citation omitted). A summary court-martial is very informal and imposes modest sentences while a general court-martial is an adversary criminal trial conducted according to formal rules of evidence and procedure and is typically convened for more serious offenses and imposes any lawful sentence authorized for the offense, including life imprisonment and the death penalty. *Id.* at 16–17.

<sup>91</sup> *Id.* at 16.

<sup>92</sup> *Id.* at 12.

<sup>93</sup> Also commonly referred to as an “Article 32 investigation,” pursuant to R.C.M. 405. MCM, *supra* note 68, at II-38.

<sup>94</sup> MAGGS & SCHENCK, *supra* note 57, at 17–18.

<sup>95</sup> *Id.* at 12.

<sup>96</sup> *Id.* at 18.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

third of the panel members consist of enlisted members; however, the convening authority still retains ultimate authority.<sup>102</sup> Finally, the panel does not have to be unanimous in its decision; rather, a finding of guilt only requires a two-thirds vote.<sup>103</sup>

If found guilty, the accused has two opportunities for a review of his conviction.<sup>104</sup> First, the convening authority will have the opportunity to review the trial record and can approve the findings or dismiss the findings.<sup>105</sup> The convening authority may also approve the sentence, mitigate the sentence, or disapprove the sentence.<sup>106</sup> Finally, the accused may also seek review of his conviction from a court of appeals.<sup>107</sup>

### *F. Department of Defense Investigative Units*

The UCMJ details the investigation procedures each branch adheres to when investigating matters concerning a court-martial charge.<sup>108</sup> The UCMJ requires a “thorough and impartial investigation of all the matters” pertaining to the alleged offense.<sup>109</sup> The investigation includes “a recommendation as to the disposition” of the case, as well.<sup>110</sup> The Department of Defense authorizes the various military branches to carry out such investigative services.<sup>111</sup> The four major Department of Defense investigative agencies include the U.S. Army Intelligence Command, the U.S. Army Criminal Investigative Command, the Naval Investigative Service, and the Office of Special Investigations, Air Force.<sup>112</sup> While the Department of Defense has consolidated many investigative capabilities into the Defense Security Service (“DSS”), formerly known as the Defense Investigative Service (“DIS”), the independent investigative agencies of each branch remain operative today.<sup>113</sup>

The Air Force Office of Special Investigations (“AFOSI”)<sup>114</sup> is a federal law enforcement agency responsible for criminal investigations,

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 12.

<sup>106</sup> *Id.* But see discussion of 2014 changes to the UCMJ, *infra* Section III.B.2.a.

<sup>107</sup> MAGGS & SCHENCK, *supra* note 57, at 12.

<sup>108</sup> 10 U.S.C. § 832.32 (2012).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> James B. Burch, *Investigation – Defense Criminal Investigative Service (DCIS)*, OFF. INSPECTOR GEN., U.S. DEP’T DEF., [http://dodig.mil/INV\\_DCIS/index.cfm](http://dodig.mil/INV_DCIS/index.cfm) (last visited Apr. 10, 2016); see also CRIM. INVESTIGATIONS PROGRAM, DEP’T AIR FORCE, AIR FORCE INSTRUCTION 71-101, at 1 (2015), [http://static.e-publishing.af.mil/production/1/saf\\_ig/publication/afi71-101v1/afi71-101v1.pdf](http://static.e-publishing.af.mil/production/1/saf_ig/publication/afi71-101v1/afi71-101v1.pdf).

<sup>112</sup> Burch, *supra* note 111.

<sup>113</sup> *Id.*

<sup>114</sup> The investigative units of each branch operate very similarly; however, for the purposes of conciseness, this Comment has chosen the AFOSI as a model example of the investigative units and their general responsibilities and operations.

among other investigative activities and operations, within the Air Force.<sup>115</sup> The field-operating agency is under the direction and guidance of The Inspector General of the Air Force.<sup>116</sup> AFOSI units are given the authority and independent discretion to assume investigative responsibility when it concerns Air Force or Department of Defense personnel, property, or resources.<sup>117</sup> The AFOSI is responsible for initiating investigations of all sexual assault offenses that occur within their jurisdiction.<sup>118</sup>

The AFOSI has eight field investigation regions around the world, each comprised of subordinate field units, including squadrons, detachments, and operating locations.<sup>119</sup> In total, AFOSI operates 144 units in the United States and 63 units overseas.<sup>120</sup> While each unit serves the investigative needs of nearby major commands, the AFOSI unit and its personnel operate independent of those commands and their chains-of-command flow directly to AFOSI headquarters in Quantico, Virginia.<sup>121</sup> The completely separate chain-of-command organization ensures unbiased investigations.

Another key contributing factor to “achieving an efficient, effective and unbiased investigative process” involves the practice of masking rank and grade of AFOSI agents.<sup>122</sup> Since AFOSI agents often interact with individuals who are both junior and senior in grade to them, often in an adversarial capacity, the issue of rank cannot impede the collection of information and evidence during the course of criminal investigations.<sup>123</sup>

### *G. Sexual Assault Prevention Initiatives in the Military*

In 2004, the Department of Defense, at the direction of the former Secretary of Defense Donald Rumsfeld, reviewed the “process for [the] treatment and care of victims of sexual assault in the Military . . . .”<sup>124</sup> Upon review, the Department of Defense assembled a task force<sup>125</sup> assigned to further investigate the process and return with recommendations.<sup>126</sup> The task force identified 35 key findings relevant to the then-current sexual assault policies and programs and proposed nine broad recommendations for

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<sup>115</sup> CRIM. INVESTIGATIONS PROGRAM, *supra* note 111, at 5.

<sup>116</sup> *Id.* at 8.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 15.

<sup>119</sup> *Air Force Office of Special Investigations*, AIR FORCE OFF. SPECIAL INVESTIGATIONS (Oct. 23, 2015), <http://www.osi.af.mil/library/factsheets/factsheet.asp?id=4848>.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> CRIM. INVESTIGATIONS PROGRAM, *supra* note 111, at 9.

<sup>123</sup> *See id.*

<sup>124</sup> MISSION & HISTORY, *supra* note 22.

<sup>125</sup> U.S. DEP'T OF DEF., TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT, at viii (2004), <http://www.sapr.mil/public/docs/reports/task-force-report-for-care-of-victims-of-sa-2004.pdf> [hereinafter TASK FORCE REPORT].

<sup>126</sup> MISSION & HISTORY, *supra* note 22.

corrective action.<sup>127</sup> One of the task force’s recommendations for immediate action was for the Department of Defense to “[e]stablish a single point of accountability for all sexual assault policy matters within the Department of Defense.”<sup>128</sup> “This led to the [creation] of the Joint Task Force for Sexual Assault Prevention and Response . . . .”<sup>129</sup> The task force worked on a comprehensive sexual assault and prevention policy that incorporated recommendations from the original task force.<sup>130</sup>

By 2005, the task force transitioned into a permanent office, the Sexual Assault Prevention and Response Office, or SAPRO.<sup>131</sup> Pursuant to the original task force’s recommendation, SAPRO serves as the single point of accountability for all sexual assault policy matters.<sup>132</sup> One of the primary components of SAPRO involves conducting and reviewing sexual assault-related research and reports, as well as reporting its findings to Congress.<sup>133</sup> One report issued out of SAPRO is the Workplace and Gender Relations Survey of Active Duty Members (“WGRA”).<sup>134</sup> This research is conducted annually and reports are generated approximately every two years.<sup>135</sup> For example, in 2012, the WGRA survey found that unwanted sexual contact increased significantly for active duty women from 4.4% in 2010 to 6.1% in 2012.<sup>136</sup> SAPRO also provides an annual report to Congress of its findings; the most recent report being the Department of Defense Fiscal Year 2013 Annual Report on Sexual Assault in the Military.<sup>137</sup>

### III. ANALYSIS

The military exists for one reason and only one reason—to defend the nation.<sup>138</sup> In order to accomplish this critical mission, military members must be combat-ready and combat-effective.<sup>139</sup> Good order and discipline are essential components in carrying out the mission.<sup>140</sup> Because of its unique dynamic, the military has its own system of justice apart from its civilian counterpart.<sup>141</sup> The military justice system exists to assist the military in its

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<sup>127</sup> TASK FORCE REPORT, *supra* note 125, at viii.

<sup>128</sup> *Id.* at xi.

<sup>129</sup> MISSION & HISTORY, *supra* note 22.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Fact Sheet: DMDC Survey*, SEXUAL ASSAULT PREVENTION & RESPONSE, U.S. DEP’T DEF. 1, 1 (2013), [http://www.sapr.mil/public/docs/research/WGRA\\_Survey\\_Fact\\_Sheet.pdf](http://www.sapr.mil/public/docs/research/WGRA_Survey_Fact_Sheet.pdf).

<sup>135</sup> SEXUAL ASSAULT PREVENTION & RESPONSE, U.S. DEP’T OF DEF., RESEARCH & REPORTS (2016), <http://www.sapr.mil/index.php/research>.

<sup>136</sup> *Fact Sheet: DMDC Survey*, *supra* note 134, at 2.

<sup>137</sup> ANNUAL REPORT: FISCAL YEAR 2013, *supra* note 16, at 12.

<sup>138</sup> STIMSON, *supra* note 18, at v.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*



mission to defend the nation.<sup>142</sup>

Sexual assault harms the mission.<sup>143</sup> Sexual assault in the military “has a uniquely greater damaging effect . . . that even one incident is unacceptable.”<sup>144</sup> While promoting justice and advancing victims’ rights may seem like the reasonable reason for this treatment, these worthy justifications are not behind the military’s understanding of the problem; rather, sexual assault is detrimental to the mission.<sup>145</sup> Sexual assault is “detrimental to morale, destroy[s] unit cohesion, show[s] disrespect for the chain of command, and damage[s] the military as a whole . . . .”<sup>146</sup> The mission requires military members to completely trust one another and the chain-of-command; however, sexual assault destroys trust and diminishes the military’s ability to remain combat-ready and combat-effective.<sup>147</sup>

#### *A. Current Process of Handling Sexual Assault Cases*

##### 1. Sexual Assault Reporting Options are Often Unachievable for Many Service Members

If an individual has been sexually assaulted, the military member has specific reporting options to consider.<sup>148</sup> The primary reporting options are Restricted Reporting and Unrestricted Reporting.<sup>149</sup> Restricted Reporting is only available to active duty military members and adult dependents.<sup>150</sup> The process is confidential and goes directly to a Sexual Assault Response Coordinator (“SARC”) in lieu of contacting law enforcement or the commander.<sup>151</sup> The military member will also receive medical care if he or she goes to the base hospital.<sup>152</sup> Evidence can be collected under Restricted Reporting and the military member has the option to modify the reporting option to Unrestricted Reporting at any time.<sup>153</sup> Restricted Reporting channels the sexual assault case into a path of no adjudication.

Unrestricted Reporting is available to all personnel and cases are handled with discretion, sharing information only on a “need to know” basis.<sup>154</sup> The military member may receive medical care at any hospital he or

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> WRIGHT-PATTERSON AIR FORCE BASE, SEXUAL ASSAULT RESPONSE COORDINATOR (SARC) (2016), <http://www.wpafb.af.mil/units/sarc/>.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

she chooses.<sup>155</sup> Evidence is collected, thereby initiating a criminal investigation.<sup>156</sup> As such, the military member does not have the option to modify the reporting option to Restricted Reporting.<sup>157</sup>

Under both reporting options, the victim is urged to go to a military treatment facility.<sup>158</sup> In order to protect evidence, the victim is asked not to “shower, brush [his or her] teeth, put on make-up, eat, drink, or change . . . clothes until advised to do so.”<sup>159</sup> Much like the sexual assault itself, the victim remains out of control during the reporting process and may experience feelings of depression, anxiety or shame that victims often experience to some degree after sexual assault.<sup>160</sup>

While these processes are the official military reporting options available to a victim of sexual assault, the option is often not practical or even achievable for many service members. Rear Admiral Anthony Kurtka, Director of Military Personnel Plans and Policy in the U.S. Navy, emphatically stated during an interview that “any report of sexual assault is fully investigated in the United States Navy.”<sup>161</sup> Yet, many Navy service members did not receive such a response after being sexually assaulted. Trina McDonald, an enlisted U.S. naval service woman, arrived at an Alaskan isolated duty base where she was drugged and raped by military police over a nine-month period.<sup>162</sup> Trina’s attackers screened all of her outgoing calls and later threw her in the Bering Sea, making it clear to her they would kill her if she reported.<sup>163</sup> Hanna Sewell, a U.S. naval recruit who was eager to follow in her family’s tradition of service, was locked in a hotel room and raped by a fellow recruit.<sup>164</sup> Hannah had the courage to report her assault only for the investigative unit to lose her rape kit, the nurse examiner report, and all the photos depicting her injuries.<sup>165</sup> When contacted regarding Hannah’s case, NCIS headquarters in Washington D.C. reported that the evidence had since been recovered, but because the case was closed, no further investigation or action could be taken.<sup>166</sup>

## 2. Investigators Routinely Fail to Appropriately Respond and Investigate

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> SHARP: SEXUAL HARASSMENT/ASSAULT RESPONSE & PREVENTION, FAQs (2016), <http://www.sexualassault.army.mil/faqs.cfm#question3> [hereinafter FAQs].

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> THE INVISIBLE WAR, *supra* note 25, at 20:44.

<sup>162</sup> *Id.* at 29:35; *see also* Trina McDonald, *Help End Military Rape Culture*, POLITICO (Nov. 12, 2013, 9:19 PM), <http://www.politico.com/story/2013/11/opinion-trina-mcdonald-sexual-assault-military-rape-culture-99749.html>.

<sup>163</sup> THE INVISIBLE WAR, *supra* note 25, at 29:35; *see also* McDonald, *supra* note 162.

<sup>164</sup> THE INVISIBLE WAR, *supra* note 25, at 19:41.

<sup>165</sup> *Id.* at 23:15.

<sup>166</sup> *Id.* at 23:40.

## Reports of Sexual Assault

For those service members who are able to officially report sexual assault, investigators do not appropriately respond to and investigate the incidents. Rear Admiral Anthony Kurtka, Director of Military Personnel Plans and Policy in the U.S. Navy, claimed during an interview, “We have given specific training and continual training to our NCIS, Navy Criminal Investigative Service, those investigators, on how best to respond and to investigate those crimes.”<sup>167</sup> Despite claims of continual training in response and investigation practices, many service members are ignored and investigators, although not instructed to do so by official policies, are actually trained to make cases go away.<sup>168</sup>

Miette Wells, working in the U.S. Air Force Security Forces, stated that “if rape cases came in, they were never given to women.”<sup>169</sup> She explained that men took rape cases “because [women security officers] were too sympathetic.”<sup>170</sup> When U.S. Naval Officer, Tia Christopher, reported her sexual assault, she received no sympathy from a superior officer, who instead responded with mockery and ridicule: “Do you think this is funny? Is this all a joke to you? You’re the third girl to report rape this week. Are you guys like all in cahoots? Do you think this is a game?”<sup>171</sup> Sgt. Myla Haider, an investigator in the Army Criminal Investigation Division, claimed that investigators are not trained to properly respond to reports of sexual assault; rather, she insisted that victims of sexual assault were perceived as troublemakers.<sup>172</sup> She stated, “I was ordered to advise a victim of her rights for a false statement when I knew she wasn’t lying. I was asked to bring her in and advise her of her rights like a criminal and interrogate her for false statement ‘until I got the truth out of her.’”<sup>173</sup> Captain Greg Rinckey, an attorney for the Judge Advocate General’s Corps, admitted that often times when a report of sexual assault was made, a cursory investigation was done and then the victims were told to “suck it up.”<sup>174</sup> Capt. Rinckey acknowledged that the credibility of victims and witnesses were often attacked and confessed that investigations quickly turned into victim witch hunting.<sup>175</sup>

### 3. The Court-Martial Process Begins and the Victim is Traumatized Once

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<sup>167</sup> *Id.* at 22:56.

<sup>168</sup> *See generally id.*

<sup>169</sup> *Id.* at 22:25.

<sup>170</sup> *Id.* at 22:30.

<sup>171</sup> *Id.* at 25:00–25:16.

<sup>172</sup> *Id.* at 21:55.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 21:26; *see also* A. O. Scott, *For Some Who Served, an Awful Betrayal of Trust*, N.Y. TIMES (June 21, 2012), [http://www.nytimes.com/2012/06/22/movies/the-invisible-war-directed-by-kirby-dick.html?\\_r=0](http://www.nytimes.com/2012/06/22/movies/the-invisible-war-directed-by-kirby-dick.html?_r=0).

<sup>175</sup> THE INVISIBLE WAR, *supra* note 25, at 21:46.

## Again

Once an offense is reported, the case goes to the commander for an immediate determination on how to handle the case.<sup>176</sup> The commander has the authority to take no action, take an administrative action, such as counseling or internal reprimands, issue non-judicial punishment, or forward the case onto additional court-martial proceedings and recommend that the accused face charges.<sup>177</sup> At this point, trial counsel<sup>178</sup> will begin working on the case and consulting with the investigative unit<sup>179</sup> assigned to the case.<sup>180</sup> The convening authority may order a pretrial investigation, at which time an investigating officer will hear evidence and witnesses and report his findings as to whether there are reasonable grounds to believe that the accused committed the offense charged.<sup>181</sup> It is common for the victim to appear and testify at the hearing.<sup>182</sup> The victim has the right to an attorney, known as a Special Victim's Counsel, throughout the process.<sup>183</sup> The victims, however, are seriously impacted during these hearings. For example, a recent case involving allegations against a Naval Academy football player<sup>184</sup> consisted of three days' worth of questioning about the victim's motivations, medical history and apparel, which was perceived as disgraceful and degrading, as well as a potential violation of federal rape shield statutes.<sup>185</sup>

Under the UCMJ and the R.C.M., the Defense also has the ability to interview the victim before the court-martial proceedings.<sup>186</sup> One story told to *Protect Our Defenders* involved seven hours of questioning after seventeen hours of travelling, and demanded the victim lift up her shirt so that the defense counsel could see how her pants fit.<sup>187</sup> The survivor described the interview experience as “embarrassing, harassing, and demoralizing . . . .”<sup>188</sup>

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<sup>176</sup> See MAGGS & SCHENCK, *supra* note 57, at 12.

<sup>177</sup> *Id.* at 13; see also Teresa Scalzo, *Sexual Assault: The Court-Martial Process and Victim's Rights*, NAVY LIVE (Apr. 24, 2013), <http://navylive.dodlive.mil/2013/04/24/sexual-assault-the-court-martial-process-and-victims-rights/>.

<sup>178</sup> A military prosecuting attorney acts as trial counsel in court-martial proceedings.

<sup>179</sup> For example, the Air Force investigative unit is the Air Force Office of Special Investigations. The unit conducts criminal investigations on a full spectrum of conflict and provides counterintelligence services. *Air Force Office of Special Investigations*, *supra* note 119.

<sup>180</sup> Scalzo, *supra* note 177.

<sup>181</sup> See *id.*; see also MAGGS & SCHENCK, *supra* note 57, at 12.

<sup>182</sup> Scalzo, *supra* note 177.

<sup>183</sup> FAQS, *supra* note 158.

<sup>184</sup> Helene Cooper, *Former Naval Academy Football Player is Acquitted of Sexual Assault*, N.Y. TIMES (Mar. 20, 2014), [http://www.nytimes.com/2014/03/21/us/former-naval-academy-football-player-is-acquitted-of-sexual-assault-charges.html?\\_r=0](http://www.nytimes.com/2014/03/21/us/former-naval-academy-football-player-is-acquitted-of-sexual-assault-charges.html?_r=0).

<sup>185</sup> David Vergun, *New Law Brings Changes to Uniform Code of Military Justice*, U.S. ARMY (Feb. 20, 2014), [http://www.army.mil/article/120622/New\\_law\\_brings\\_changes\\_to\\_Uniform\\_Code\\_of\\_Military\\_Justice/](http://www.army.mil/article/120622/New_law_brings_changes_to_Uniform_Code_of_Military_Justice/).

<sup>186</sup> *Protect Our Defenders' Written Statement: Response Systems to Adult Sexual Assault Crimes Panel November 7-8, 2013 Hearing on Victims' Services*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/protect-our-defenders-written-statement-response-systems-to-adult-sexual-assault-crimes-panel-november-7-8-2013-hearing-on-victims-services/> (last visited Apr. 10, 2016).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

This example not only brings to light the traumatization victims experience after the assault, but also serves to emphasize the manner in which these interviews, to which the defense is entitled, are inappropriately conducted. Under UCMJ and R.C.M. guidelines, the defense is entitled to this interview and the victim does not have the option to decline.<sup>189</sup> Military courts acknowledge “[m]ilitary law has long been more liberal than its civilian counterpart in disclosing the government’s case to the accused and in granting discovery rights.”<sup>190</sup> The only change over the last sixty years to the defense’s seemingly unfettered right to interview a victim of sexual assault is the interview must take place in the presence of trial counsel, a counsel for the victim, or a sexual assault victim advocate, but only if requested by the victim.<sup>191</sup>

Upon completion of the pretrial investigation, a staff judge advocate reviews the investigation report and makes a recommendation to the convening authority.<sup>192</sup> The convening authority makes the ultimate determination on whether to proceed to trial.<sup>193</sup> If the convening authority decides to refer charges to a court-martial, the trial will closely resemble a civilian criminal trial.<sup>194</sup> The victim will most likely have to testify at the trial as well, which although not necessarily different from its civilian counterpart, a military victim has likely already endured extensive questioning by defense counsel at this point.<sup>195</sup> Under the UCMJ, the judge or panel must be convinced of the accused’s guilt beyond a reasonable doubt before the accused may be found guilty of sexual assault.<sup>196</sup> If the accused is found guilty, the case proceeds to sentencing, at which time the victim may be called to testify yet again.<sup>197</sup>

## *B. Current Initiatives and Sexual Assault Prevention and Response Efforts*

### 1. Recent Legislative Initiatives Battled for Inclusion in the 2014 National Defense Authorization Act

Several lawmakers have recently pressed for legislation that would fight sexual assault in the military.<sup>198</sup> While numerous lawmakers have jumped on the political fight, Senator Claire McCaskill and Senator Kirsten

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<sup>189</sup> 10 U.S.C. § 846.46 (2012).

<sup>190</sup> *United States v. Killebrew*, 9 M.J. 154, 159 (C.M.A. 1980).

<sup>191</sup> 10 U.S.C. § 846 (2012), *amended* by National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 683 (2013).

<sup>192</sup> *See* MAGGS & SCHENCK, *supra* note 57, at 217.

<sup>193</sup> *Id.* at 12.

<sup>194</sup> *Id.* at 6.

<sup>195</sup> Scalzo, *supra* note 177; *see also supra* notes 187–92 and accompanying text.

<sup>196</sup> Scalzo, *supra* note 177.

<sup>197</sup> *Id.*

<sup>198</sup> Halimah Abdullah, *Survivors of Military Sex Assaults Frustrated with Legislation*, CNN (Mar. 10, 2014, 7:00 PM), <http://www.cnn.com/2014/03/10/politics/military-sex-assault-survivors-speak-out/>.

Gillibrand have stood at the forefront with opposing legislative proposals.<sup>199</sup> Senator Gillibrand's proposal, the Military Justice Improvement Act of 2013, would give prosecutors outside the chain-of-command authority to determine whether to prosecute a report of sexual assault.<sup>200</sup> Senator McCaskill's approach, commonly referred to as "modest, conservative, watered-down and incremental,"<sup>201</sup> preserves the authority given to commanders to make prosecutorial decisions while addressing other, less glaring, criticisms of how sexual assault cases are currently handled in the military.<sup>202</sup>

Both proposals were competing for inclusion in the 2014 National Defense Authorization Act<sup>203</sup> ("NDAA").<sup>204</sup> The Senate Armed Services Committee considered and voted on the proposals for inclusion in the NDAA.<sup>205</sup> Senator McCaskill led the push to defeat Senator Gillibrand's rival bill, resulting in Senator McCaskill's bill contributing to the NDAA.<sup>206</sup>

## 2. 2014 National Defense Authorization Act Targets the UCMJ but Misses the Mark

Under Title XVII of the National Defense Authorization Act for Fiscal Year 2014, Congress includes several reforms of the UCMJ relating to sexual assault prevention and response.<sup>207</sup> These reforms, in large part, address Article 60 and Article 32 of the UCMJ.<sup>208</sup> Although congressional reformations target the UCMJ in an attempt to remediate sexual assault problems in the military, the instituted changes to both Article 60 and Article 32, as well as changes to procedural requirements, victims' rights, and the "Good Soldier Defense," completely miss the mark and continue allowing military inaction to remain unchecked.

### a. Article 60 Revisions Attempt to Regain Public Confidence

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<sup>199</sup> Melinda Henneberger, *Sen. McCaskill's Military Sexual-Assault Bill is Meatier than Advertised*, WASH. POST (Mar. 9, 2014), [http://www.washingtonpost.com/politics/sen-mccaskills-military-sexual-assault-bill-is-meatier-than-advertised/2014/03/09/cdf646b4-a79a-11e3-8d62-419db477a0e6\\_story.html](http://www.washingtonpost.com/politics/sen-mccaskills-military-sexual-assault-bill-is-meatier-than-advertised/2014/03/09/cdf646b4-a79a-11e3-8d62-419db477a0e6_story.html).

<sup>200</sup> Nora Caplan-Bricker, *Claire McCaskill Defends Her Controversial Stance on Military Sexual Assault*, NEW REPUBLIC (Mar. 6, 2014), <http://www.newrepublic.com/article/116899/military-sexual-assault-vote-senator-claire-mccaskill-her-bill>.

<sup>201</sup> Henneberger, *supra* note 199.

<sup>202</sup> Caplan-Bricker, *supra* note 200.

<sup>203</sup> The NDAA is passed annually, authorizing funding for the Department of Defense for the next year. *The Key Differences: Gillibrand's Amendment and Levin/McCaskill's Proposal*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/key-differences-between-gillibrands-and-levinmccaskills-proposals/> (last visited Apr. 10, 2016).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Abdullah, *supra* note 198.

<sup>207</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 683 (2013).

<sup>208</sup> Charles D. Stimson, *Military Sexual Assault Reform: Real Change Takes Time*, BACKGROUNDERS 1, 2 (2014), [http://thf\\_media.s3.amazonaws.com/2014/pdf/BG2888.pdf](http://thf_media.s3.amazonaws.com/2014/pdf/BG2888.pdf).

### Rather than Protect Sexual Assault Victims

The NDAA changes Article 60 of the UCMJ to reduce the commander's ability to modify court-martial findings and sentencing.<sup>209</sup> While the provisions do restrict the commander's ability to modify trial results, the provisions do not remove this authority completely, allowing commanders to overturn convictions or reduce the findings of guilt to a lesser offense, as well as modify sentencing in certain circumstances.<sup>210</sup> Any modification made, however, must be in writing.<sup>211</sup> Advocates of this change to Article 60 claim that the reform "gives victims and the public more confidence in the system as a whole, which is important in and of itself."<sup>212</sup> However, public perception of the system has little effect if the practice of overturning convictions and modifying sentences remain in practice and under the authority of the commander. Certainly commanders play a role in military culture, which can lead to a change in public perception; however, commanders are simply not qualified for their current role, which calls for legal training concerning both law and discretion in criminal prosecutions.<sup>213</sup>

### b. Article 32 Revisions Limit the Scope of the Preliminary Hearing, but Still Allow for Aggressive Cross-Examination of the Victim

The NDAA amends Article 32 to require the completion of a preliminary hearing prior to referral to court-martial for trial.<sup>214</sup> The provisions change Article 32 from an investigation to a preliminary hearing.<sup>215</sup> As such, rather than Article 32 serving as a tool of discovery, the provisions establish a preliminary hearing with more narrow objectives, including: "(A) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense[;] (B) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused[;] (C) Considering the form of [the] charges[; and] (D) Recommending the disposition that should be made of the case."<sup>216</sup>

The new Article 32 is meant to limit the focus and provide a forum for the government to establish probable cause rather than act as a defense discovery tool.<sup>217</sup> The new Article 32 still allows the accused to submit evidence and cross-examine witnesses, including the victim; however, the

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<sup>209</sup> National Defense Authorization Act § 1702.

<sup>210</sup> *See id.*

<sup>211</sup> *See id.*

<sup>212</sup> Stimson, *supra* note 208, at 3.

<sup>213</sup> Elizabeth L. Hillman, *Response Systems Panel on Military Sexual Assault Subcommittee on the Role of the Commander*, <http://www.gillibrand.senate.gov/imo/media/doc/Hillman%20Dissent%20re%20RSP%20Role%20of%20the%20Commander%20Decision.pdf> (last visited Apr. 10, 2016).

<sup>214</sup> National Defense Authorization Act § 1702.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Stimson, *supra* note 208, at 3.

victim is no longer required to testify without the presence of trial counsel.<sup>218</sup> The concern over aggressive cross-examination like that, which occurred in the Naval Academy rape case discussed *supra*, is addressed solely by placing a limitation on the scope of the hearing.<sup>219</sup>

### c. Procedural Requirements

The NDAA instituted additional procedural requirements for the handling of sexual assault cases.<sup>220</sup> One such provision requires the commander to immediately refer a report of sexual assault to the appropriate military criminal investigation organization involving individuals under the commander's chain-of-command.<sup>221</sup> Another provision requires completion of a written incident report within eight days of the report of sexual assault that would be given to the appropriate investigative agency and the chain-of-command above the unit in which the victim served.<sup>222</sup>

The NDAA also included a provision requiring review of a commander's decisions not to refer charges of sexual assault.<sup>223</sup> If a staff judge advocate recommends that charges be referred to a trial by court-martial and the commander decides not to refer charges, the commander would be required to forward the case file to the appropriate service Secretary for review.<sup>224</sup> Additionally, the commander would also be required to forward the case file to the next officer in the chain-of-command with convening authority for review.<sup>225</sup>

Proponents of the increased procedural requirements placed on the commander cite "increased transparency and multiple levels of evaluation and scrutiny" as reasons why this reform will have the most meaningful impact on sexual assault cases and victims.<sup>226</sup> The effect comes, in large part, from the fact that the commander's decision was the final word before these procedural requirements were adopted.<sup>227</sup>

While the increase in procedural requirements may have been well-intended, the reforms, in effect, create more problems than offer solutions. A commander's consultation with a staff judge advocate is already common practice in the military.<sup>228</sup> More importantly, the staff judge advocate works

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<sup>218</sup> *Id.* at 4.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1742, 127 Stat. 672, 979 (2013).

<sup>222</sup> *Id.* § 1743, 127 Stat. at 979.

<sup>223</sup> *Id.* § 1744, 127 Stat. at 980.

<sup>224</sup> *Id.* § 1744, 127 Stat. at 981.

<sup>225</sup> See Stimson, *supra* note 208, at 4.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *To Professionalize the Military Justice System and Reduce Sexual Assault: How the SASC FY 14 NDAA Falls Short and Why the Military Justice Improvement Act Must be Passed*, PROTECT OUR



directly under the commander, who also controls the staff judge advocate's professional evaluation.<sup>229</sup> As such, the threat of pressure to conform to the commander's discretion is ever-present, doing little to remove the inherent bias of the current system.<sup>230</sup> Additionally, the staff judge advocate handles a variety of cases and legal issues and generally is not an expert in one field.<sup>231</sup> As such, a staff judge advocate is not in the best position to offer advice on the strength of a criminal case.<sup>232</sup> Ultimately, there is little to no evidence indicating that these reforms will substantially impact the number of cases being referred to court-martial or how many cases will go through the procedural tape and end up on the desk of a particular service secretary.<sup>233</sup>

d. Codification of Victims' Rights Provisions Leave Victims Without Any Recourse and Maintain a Military Justice System that Breeds Retaliation

The NDAA incorporates provisions amending the UCMJ to include specific rights for victims of sexual assault.<sup>234</sup> However, many of the rights included among these provisions are already part of the common practices in the military.<sup>235</sup> Proponents believe that the codification of these rights enhances the confidence in and the credibility of the military justice system.<sup>236</sup> However, the NDAA does not provide victims any cause of action if the provisions are not followed.<sup>237</sup> Major General Mary Kay Hertog, SAPRO director, stated that if a military member feels that his or her commander is not adequately addressing a complaint, the military member should go outside the chain-of-command to the Department of Defense Inspector General.<sup>238</sup> However, as California congresswoman, Representative Jackie Speier, highlights, in the most recent GAO Study, not one case out of 2,594 sexual assault cases has been reviewed or investigated due to "other higher priorities."<sup>239</sup> If even going outside the chain-of-command does not result in adequate investigation, what recourse is a military sexual assault victim left? Major General Mary Kay Hertog suggests that service members have other avenues, namely reaching out to their congressmen.<sup>240</sup>

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DEFENDERS, [http://protectourdefenders.com/downloads/Professionalize\\_Military\\_Justice\\_System-Addressing\\_Opposition\\_Arguments\\_130725\\_Updated.pdf](http://protectourdefenders.com/downloads/Professionalize_Military_Justice_System-Addressing_Opposition_Arguments_130725_Updated.pdf) (last visited Apr. 10, 2016) [hereinafter *Professionalize the Military Justice System*].

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> Stimson, *supra* note 208, at 6.

<sup>234</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672, 952 (2013).

<sup>235</sup> Stimson, *supra* note 208, at 5–6.

<sup>236</sup> *Id.* at 6.

<sup>237</sup> *Id.*; *see also* National Defense Authorization Act § 1701.

<sup>238</sup> THE INVISIBLE WAR, *supra* note 25, at 1:24:20.

<sup>239</sup> *Id.* at 1:24:41.

<sup>240</sup> *Id.* at 1:25:47.

Another provision included in the NDAA prohibits retaliation against an alleged victim or other service member who reports a criminal offense.<sup>241</sup> The provision, however, is unlikely to effectively protect against the most common forms of retaliation, including errant medical diagnoses, refusal of safety transfers, inappropriate charging of collateral offenses against the victim, and ostracizing the victim professionally and socially.<sup>242</sup> The NDAA, while providing a broad definition for purposes of drafting the regulation, does not detail the types of retaliation practically faced by service members.<sup>243</sup> Moreover, the provision does not address the fact that many of these retaliatory acts are committed by superiors within the chain-of-command.<sup>244</sup> This provision is most absurd considering the most recent instruction on the administration of military justice. In the Air Force Guidance Memorandum to AFI 51-201, Administration of Military Justice, the Sample Commander's Recommendation Memorandum for Sexual Assault Offenses Subject to the Secretary of Defense Withhold Policy explicitly includes a section for the commander to detail the victim's background for recommending disposition for victim misconduct, evidencing the prevalence of victim retaliation.<sup>245</sup>

Additionally, the NDAA again fails to address how this provision will be implemented and what, if any, cause of action victims have if retaliation does occur. Moreover, the statutory language is so broad that actually enforcing the provision will be an arduous endeavor.<sup>246</sup>

e. The Use of the "Good Soldier Defense" is Modified to Include Jury Instructions

The NDAA eliminates "the character and military service of the accused from the [factors] a commander should consider in deciding how to dispose of [a sexual assault case]."<sup>247</sup> Evidence of a defendant's good military character is introduced in order "to provide the basis for an inference that the accused is too professional a soldier to have committed the offense with which he is charged."<sup>248</sup>

Unfortunately, this amendment will have little to no effect on the hotly-contested practice of using the "Good Soldier Defense." The defense is not actually an affirmative defense; rather, it is a judicial interpretation of

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<sup>241</sup> National Defense Authorization Act § 1709.

<sup>242</sup> *Professionalize the Military Justice System*, *supra* note 228.

<sup>243</sup> National Defense Authorization Act § 1709.

<sup>244</sup> *Id.*; *see also Professionalize the Military Justice System*, *supra* note 228.

<sup>245</sup> Air Force Guidance Memorandum from HQ USAF/JA to AF1 15-201, Administration of Military Justice (July 30, 2015), [http://static.e-publishing.af.mil/production/1/af\\_ja/publication/afi51-201/afi51-201.pdf](http://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-201/afi51-201.pdf).

<sup>246</sup> Stimson, *supra* note 208, at 7.

<sup>247</sup> National Defense Authorization Act § 1708.

<sup>248</sup> Randall D. Katz & Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 MIL. L. REV. 117, 118 (2001).

Mil. R. Evid. 404.<sup>249</sup> In practice, the military judge instructs the jury that such good character evidence may alone raise reasonable doubt. Military rules of evidence mirror the language of the federal rules of evidence; as such, despite the amendment, the accused will nonetheless be able to introduce good military character at trial.<sup>250</sup> The new NDAA changes will only affect how the jury is instructed to interpret such evidence.<sup>251</sup> Additionally, good military character may still be presented in sentencing proceedings as mitigating evidence and may also trigger specific sentencing instructions from the military judge.<sup>252</sup>

### *C. Flawed Justifications for Command Discretion and Retention of Prosecutorial Authority*

Proponents for retaining authority within the chain-of-command cite good order and discipline as the primary justifications for that system.<sup>253</sup> The argument is that command authority results in good order and discipline and overall operational effectiveness of the unit. Proponents argue that “[t]aking that power away from commanding officers eliminates an indispensable authority that cannot be delegated or transferred to another . . . .”<sup>254</sup> They recognize that commanders have an immense amount of power, but imply that this degree of control is justified because the commander is responsible for the training, good order, and discipline of service members in the unit.<sup>255</sup> The commander “exist[s] to carry out the mission, and as such, must retain the full legal authority to do just that, including but not limited to the authority to refer cases to court-martial.”<sup>256</sup> Proponents tout that “there’s no substitute for a commander who does it right.”<sup>257</sup>

The current system of command discretion and prosecutorial authority, however, creates a conflict of interest that breeds bias and inefficiency in the system. Proponents for retaining authority within the chain-of-command underestimate the impact the mixture of roles has, not only on the commander, but also on the unit and public perception. Elizabeth Hillman,<sup>258</sup> committee participant in the Response Systems Panel on Military Sexual Assault Subcommittee on the Role of the Commander, explained how

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<sup>249</sup> RESPONSE SYS. PANEL, [http://responsesystemspanel.whs.mil/Public/docs/Background\\_Materials/Requests\\_For\\_Information/RFI\\_Response\\_Q108.pdf](http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q108.pdf) (last visited Apr. 10, 2016).

<sup>250</sup> Stimson, *supra* note 208, at 6.

<sup>251</sup> *See generally Protect Our Defenders Policy Priorities*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/protect-our-defenders-policy-priorities/> (last visited Apr. 10, 2016).

<sup>252</sup> RESPONSE SYS. PANEL, *supra* note 249; *see also* United States v. Wheeler, 17 C.M.A. 274 (1967).

<sup>253</sup> STIMSON, *supra* note 18, at 2.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 4.

<sup>257</sup> *Id.*

<sup>258</sup> Elizabeth Hillman is the Provost & Academic Dean and Professor of Law at the University of California Hastings College of the Law. Hillman, *supra* note 213.

a mixture of roles negatively affects the unit.<sup>259</sup> “This mixture of roles, in which a convening authority must both protect the overall well-being of a unit and ensure that unit’s mission is accomplished as well as decide whether a specific factual context warrants prosecution, creates a conflict that cuts in different directions, all unhealthy.”<sup>260</sup>

In *United States v. Thomas*, the court boldly pronounced that “[c]ommand influence is the mortal enemy of military justice.”<sup>261</sup> The court observed that command influence could lead to a deprivation of a service member’s constitutional rights in a number of ways.<sup>262</sup> When command influence is exercised against defense witnesses, “it transgresses the accused’s right to have access to favorable evidence.”<sup>263</sup> When directed against defense counsel, command influence adversely affects the “accused’s right to effective assistance of counsel.”<sup>264</sup> When directed at a court member or military judge, command influence “deprive[s] the accused of his right to a forum where impartiality is not impaired because the court personnel have a personal interest in not incurring reprisals by the convening authority due to a failure to reach his intended result.”<sup>265</sup> Command influence not only “involves ‘a corruption of the truth-seeking function of the trial process,’”<sup>266</sup> but the “improper conduct by a commander may be even more injurious than such activity by a prosecutor”<sup>267</sup> given the realities of the chain-of-command structured military society. One example of improper command influence occurred during a rape case in which the commander preferred charges against an airman; however, when the case went to trial, that “same commander sat directly behind the defendant airman and brought him water.”<sup>268</sup> Not surprisingly, as a not guilty verdict was provided, the “commander leaped out of his chair, both arms in the air, and screamed ‘yes!’”<sup>269</sup>

Such a structure has proven that service members are not afforded the protection they deserve, but the structure instead breeds a culture of retaliation. The Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2012 reports that of the female victims who chose not to report, 47% expressed that fear of retaliation or reprisal was the reason for not reporting their abuse; an additional 43% heard about the negative

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<sup>259</sup> *See id.*

<sup>260</sup> *Id.*

<sup>261</sup> 22 M.J. 388, 393 (C.M.A. 1986).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*; *see also* *United States v. Stombaugh*, 40 M.J. 208, 211 (C.M.A. 1994).

<sup>266</sup> *Thomas*, 22 M.J. at 393.

<sup>267</sup> *Id.*

<sup>268</sup> Kristin Davis, *Why the AF’s Chief Prosecutor Left to Fight for Sex Assault Victims*, AIR FORCE TIMES (Jan. 5, 2015), <http://www.airforcetimes.com/story/military/crime/2015/01/05/air-forces-chief-prosecutor-left-fight-military-sex-assault-victims/21260851/>.

<sup>269</sup> *Id.*

experiences of other victims who reported their abuse.<sup>270</sup> Even more telling, an overwhelming majority of victims who reported a sexual assault indicated that they experienced professional, social, or administrative retaliation in response to reporting.<sup>271</sup> One case of victim retaliation involved a victim who reported her sexual assault only to face a no-contact order,<sup>272</sup> the commander testifying at the discharge hearing on behalf of the accused, and the commander ultimately issuing the victim performance feedback that indicated she was “too emotional.”<sup>273</sup>

Another case of victim retaliation involved Marine Corps Lt. Elle Helmer, who was stationed at Marine Barracks, D.C.<sup>274</sup> Donna McAleer, author of *Porcelain on Steel*, explained that Marine Barracks, D.C. is considered the most prestigious unit as it serves as the military’s showcase ceremonial unit.<sup>275</sup> After ceremonies and events, the Marines are expected to attend receptions and socialize.<sup>276</sup> At one such reception, Lt. Helmer was ordered to drink shots by her commander; she was subsequently raped by a senior officer.<sup>277</sup> An investigation was opened and closed three days later with no action taken against her rapist.<sup>278</sup> However, the base commander opened a new investigation and Lt. Helmer was charged with conduct unbecoming of an officer and public intoxication.<sup>279</sup> Yet another case of victim retaliation involved Army service member, Andrea Werner.<sup>280</sup> Ms. Werner was an unmarried woman sexually assaulted by a married man; upon reporting her assault, Ms. Werner was charged with adultery.<sup>281</sup>

While victim retaliation should certainly be a concern at the forefront, sexual assault retaliation comes in a variety of forms. For instance, Capt. Maribel Jarzabek, a specially appointed Air Force attorney representing victims of sexual assault, experienced retaliation for her zealous advocacy of sexual assault victims.<sup>282</sup> Capt. Jarzabek publicly supported legislation that would overhaul the way sexual assault cases are handled in the military and was consequently the subject of a criminal investigation for wrongfully advocating a partisan political cause and expressing opinions publicly that

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<sup>270</sup> See ANNUAL REPORT: FISCAL YEAR 2012, *supra* note 13, at 27.

<sup>271</sup> See *id.* at 27, 70.

<sup>272</sup> This is an order that the victim not contact the accused, as opposed to the accused being ordered not to contact the victim.

<sup>273</sup> Davis, *supra* note 268.

<sup>274</sup> THE INVISIBLE WAR, *supra* note 25, at 45:21.

<sup>275</sup> *Id.* at 44:20–44:33.

<sup>276</sup> *Id.* at 46:45.

<sup>277</sup> *Id.* at 47:07–48:20.

<sup>278</sup> *Id.* at 48:21–48:27.

<sup>279</sup> *Id.* at 48:30–48:55.

<sup>280</sup> *Id.* at 25:05.

<sup>281</sup> *Id.*

<sup>282</sup> See generally Craig Whitlock, *Air Force Lawyer Scolded for Facebook Post about Sexual Assault Cases*, STARS & STRIPES (Jan. 1, 2015), <http://japan.stripes.com/news/air-force-lawyer-scolded-facebook-post-about-sexual-assault-cases>.

could undermine public confidence in the Air Force.<sup>283</sup> However, public outrage over this investigation is misplaced. Capt. Jarzabek was out of line by speaking out on a political issue in her official capacity; however, attention should be drawn to the more significant issue of the retaliation she experienced as a special victims attorney. One of Capt. Jarzabek's first clients was a staff sergeant who accused an A1C (Airman First Class, a lower rank) of rape; the commander<sup>284</sup> dismissed the case, which prompted Capt. Jarzabek to draft a memorandum to the commander on behalf of her client.<sup>285</sup> In her memorandum, Capt. Jarzabek criticized the investigating officer and commented on the commander's failure to meet with the victim prior to making his determination.<sup>286</sup> In response to her memorandum, the Air Force reinvestigated the case and transferred jurisdiction to another commander.<sup>287</sup> While the reinvestigation was viewed as a military success story at the time, Capt. Jarzabek reported that she hit a turning point in her career, stating, "The memo really pissed a lot of people off. I started getting told my performance was substandard, even though my clients said they were extremely satisfied with my advocacy."<sup>288</sup>

Commanders retain the ultimate legal authority to prosecute sexual assault in the military, yet lack necessary legal training and rely on the advice of special judge advocates to evaluate cases; consequently, the current process is lengthy and inefficient. Rather than placing prosecutorial authority in the hands of one legally trained individual outside the chain-of-command, the current system places it with the commander who cannot make determinations without seeking the help of others. Proponents admit that the court-martial process today is extremely complicated, involving more expert witnesses than in years past, as well as forensic and scientific evidence; as such, there is a need for highly trained legal professionals and a more sophisticated approach.<sup>289</sup> The only approach that can meet the demands of the evolving court-martial process is the removal of prosecutorial authority from within the chain-of-command.

Proponents also argue that commanders must retain authority in order to maintain discipline within their respective units; however, this argument lacks merit. Commanders may, and often do, discipline within their unit, aside and apart from disciplinary measures taken during court-martial.

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<sup>283</sup> *Id.*

<sup>284</sup> Lt. Gen. Craig Franklin is the Third Air Force Commander and was also the same commander at Aviano Air Force Base who overturned Lt. Col. James Wilkerson's conviction for aggravated sexual assault. See *supra* notes 1-8 and accompanying text.

<sup>285</sup> Kristin Davis, *Lawyer in Trouble for Speaking Out on Sex Assault Policy*, AIR FORCE TIMES (Jan. 3, 2015, 11:33 AM), <http://www.airforcetimes.com/story/military/pentagon/2015/01/02/trouble-speaking-sex-assault-policy/21191863/>.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> STIMSON, *supra* note 18, at 22.

Additionally, the military has gone to great lengths to incentivize commanders to take sexual assault seriously; as such, commanders take action because they feel they have to rather than examining the facts of each case and making determinations based on merit.<sup>290</sup> Indeed, some commanders only refer cases to court-martial to enforce good order and discipline within their unit, despite legal advice to the contrary.<sup>291</sup> Commanders place “sending a message” above creating a fair, impartial system of justice for both the victims and defendants involved.<sup>292</sup>

While good order and discipline are vital to the mission and the demand for operational effectiveness is essential in order for the military to successfully carry out its mission, these ends are not achieved by enabling a broken process and enacting “reforms” that only address the symptoms rather than the underlying disease. The most recent provisions in the 2014 NDAA attack the problems at the surface rather than addressing them head on. In order to implement a solution that will fully address the broken military justice system, convening authority must be taken out of the hands of the commander and the chain-of-command.

*D. The Solution: Take Prosecutorial Authority Away from Commanders and Outside the Chain-of-Command and Institute an Independent Agency to Prosecute and Punish Sexual Assault*

Air Force Brigadier General Wilma L. Vaught articulated that “sometimes it takes a different kind of action to cause change to come.”<sup>293</sup> Less than 17% of alleged perpetrators were referred to court-martial in fiscal year 2013 and even fewer were convicted.<sup>294</sup> It is poignantly clear that the current Department of Defense initiatives to combat sexual assault in the military are failing. The measures taken thus far are not preventing sexual assault from occurring in the first instance and are not punishing sexual assault on the backend.

Former Air Force Chief Prosecutor Col. Don Christensen retired from the Air Force after 23 years to become President of *Protect Our Defenders* after witnessing first-hand the failures of the military justice system.<sup>295</sup> He recently spoke on the current failing system, stating the following:

Currently we have [a] system of justice, unlike any other in the United States, in which a person, who is not a lawyer, and without specialized training or significant experience in military justice or criminal investigations makes these

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<sup>290</sup> *See id.* at 4.

<sup>291</sup> *Id.* at 12.

<sup>292</sup> *Id.* at 4.

<sup>293</sup> THE INVISIBLE WAR, *supra* note 25, at 1:07:10.

<sup>294</sup> *See discussion supra* Section II.A.

<sup>295</sup> *Remarks from Protect Our Defenders President, supra* note 39.

weighty decisions. For in the military, a commander serving as convening authority makes the call on whether a case will be prosecuted, what the charges will be and who sits on the jury. Instead the convening authority is an officer trained with an entirely different skill set, usually in waging armed conflict as a pilot, ship commander or infantry officer. For that skill set they bring decades of training and experience to bear. And in that they excel. The same cannot be said for military justice.<sup>296</sup>

The solution is glaringly simple: take prosecutorial authority away from commanders and outside the chain-of-command and place it in the hands of an independent agency. In so doing, the military will take real steps towards curtailing sexual assault in the military by creating a system of accountability that prosecutes and punishes sexual assault while simultaneously deterring others from engaging in similar criminal activity.

In this one change, the entire disciplinary process shifts from a catch and release system to a system of justice concerned with fairness and objectivity, a system which lends itself to heightened standards and values trust between service members, and a system that ultimately proves beneficial to the mission. This Comment proposes the establishment of an independent authority responsible for prosecutorial discretion in military sexual assault cases. This independent agency would operate in a similar manner as the Department of Defense investigative units, such as the Air Force Office of Special Investigations. The independent prosecutorial agency would be given the authority and independent discretion to assume prosecutorial responsibility when it concerns military members. The independent prosecutorial agency and its personnel would operate independent of those commands the unit serves.

Additionally, the prosecutorial unit would maintain a completely separate chain-of-command organization in order to ensure thorough and unbiased investigations and decisions. Moreover, similar to the practices of the investigative units, the prosecutorial unit would mask rank and grade. Since the nature of the unit would require frequent interaction with individuals both junior and senior in grade to them, and often in an adversarial capacity, the issue of rank cannot impede fair and objective prosecutorial standards.

The implementation of prosecutorial units would allow individuals with necessary legal training to evaluate cases, alleviating the lengthiness and inefficiency of the current system that requires non-legally trained commanders to rely on the advice of special judge advocates in order to

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<sup>296</sup> *Id.*



attempt to accomplish the same task. Prosecutorial units will be better equipped to handle today's complicated court-martial process, often involving more expert witnesses than in years past, as well as forensic and scientific evidence. The implementation of units comprised of highly trained legal professionals and a more sophisticated approach will provide both victims and defendants a fair, impartial system of justice, currently unfound in the military system.

#### IV. CONCLUSION

Despite implementation of a comprehensive policy to prevent sexual assault in the military, sexual crimes within the military increased by 34.5% from fiscal year 2011 to fiscal year 2012 and reporting dropped from 13.5% to 9.8%.<sup>297</sup> While addressing front-end prevention measures, the military has taken no real steps toward curtailing sexual assault by creating a system of accountability that prosecutes and punishes sexual assault. In fiscal year 2013, less than 5% of reported sexual assaults resulted in conviction. Despite receiving 5,061 reports of sexual assault, the military only convicted 376 perpetrators and only 274 of those perpetrators were confined to jail. Each incident of sexual assault in the military is detrimental to its mission.

The current process of handling sexual assault cases involves sexual assault reporting options often unachievable for many service members and investigators who routinely fail to appropriately respond and investigate reports of sexual assault. The court-martial process allows for victim abuse and retaliation with little to no checks on the prosecutorial authority. Current initiatives and sexual assault prevention and response efforts have been modest and preserve the authority given to commanders to make prosecutorial decisions while addressing other, less impactful, criticisms of the system. The most recent legislative contributions were included in the 2014 National Defense Authorization Act, which primarily targeted UCMJ provisions, but completely miss the mark and continue to allow military inaction to remain unchecked. The amendments attempt to regain public confidence in the military justice system rather than make meaningful changes that will protect sexual assault victims. Moreover, Congress maintains a military justice system that breeds retaliation and leaves victims without any recourse.

The current system of command discretion and prosecutorial authority creates an inherent conflict of interest that breeds bias and inefficiency in the system. Commanders retain ultimate legal authority to prosecute sexual assault in the military, yet lack necessary legal training and rely on the advice of special judge advocates to evaluate cases, resulting in a lengthy and inefficient military justice system. Moreover, the structure cultivates a culture of retaliation. Although proponents argue that the

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<sup>297</sup> For an overview of relevant statistics, see *supra* Section I.A.

commander must have the ability to maintain good order and discipline, these ends are simply not achieved by enabling a broken system and enacting “reforms” that address the symptoms rather than the underlying disease.

The military has spent time and resources on initiatives such as SARC and SAPRO, which ultimately have proven to accomplish very little in the face of military sexual assault. Although the Department of Defense has created numerous policies under the façade of attempting prevention via general awareness and training, the time has come to take real steps towards combating this problem by taking action and creating a system of accountability that prosecutes and punishes sexual assault. A system of justice concerned with fairness and objectivity will only be realized once the Department of Defense establishes an independent agency responsible for prosecutorial discretion in military sexual assault cases. Only when this system is achieved will the mission of our military be realized. Anything less would be a disservice to our service members.