JUSTICE IS NO LONGER BLIND: HOW THE EFFORT TO ERADICATE SEXUAL ASSAULT IN THE MILITARY UNBALANCED THE MILITARY JUSTICE SYSTEM

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"[I]t's relatively easy to stand up for beliefs when it's the popular thing or the in vogue thing. It's relatively easy to be pro-victim or anti-crime. But it can be quite another to be against the injustice done to [the] accused, especially when they are already considered guilty by society, by the media, by their unit and by their commander, all prior to trial."[1]

In recent years, political actors and the media have devoted substantial attention to the alarming prevalence of sexual assault in the United States Armed Forces. As the issue has drawn the public's ire, Congress, the President, and the Department of Defense have responded by calling for and implementing aggressive measures to curb military sexual assaults and punish offenders. These are laudable goals. But, in their eagerness to solve this complex problem, the Executive and Legislative Branches have created another problem: in

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1. STAFF OF THE COMPARATIVE SYS. SUBCOMM., REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 153 (May 2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/01_CSS/CSS_Report_Final.pdf [hereinafter REP. OF THE COMPARATIVE SYS. SUBCOMM.].

This Note draws on the reports of the congressionally mandated Response Systems to Adult Sexual Assault Crimes Panel and its Comparative Systems Subcommittee and Role of the Commander Subcommittee—all of which have received remarkably little public and scholarly notice. Establishment of the Response Systems to Adult Sexual Crimes Panel, 78 Fed. Reg. 25,972 (Apr. 29, 2013). For twelve months, this independent committee and its three subcommittees conducted an in-depth "review and assessment of the systems used to investigate, prosecute, and adjudicate adult sexual assault crimes in the military" with an eye toward improving system effectiveness. *Id.*; *see* STAFF OF THE RESPONSE SYS. PANEL TO ADULT SEXUAL ASSAULT CRIMES PANEL, REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 1 (June 2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf [hereinafter REP. OF THE RESPONSE SYS. PANEL]; REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra*, at 247. These reports are particularly valuable because these reports attempt "to balance the need to increase victim confidence in the system and victim rights with the rights of those accused of sexual assault." *Id.* at 2; STAFF OF THE ROLE OF THE COMMANDER SUBCOMM., REPORT OF THE ROLE OF THE COMMANDER SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 109 (May 2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/02_RoC/ROC_Report_Final.pdf [hereinafter REP. OF THE ROLE OF THE COMMANDER SUBCOMM.].

the military justice system, an accused's due process rights have been compromised to ensure increased and expedited convictions.

This Note examines how the military justice system prosecutes sexual assault cases, focusing on the procedural due process problems facing an accused in an adult rape case. Part II explains the framework for analyzing cases and the climate in which they are prosecuted. Part III explores overarching features of the military justice system that are particularly problematic in the context of sexual assault prosecutions before turning to the distinct inequities facing an accused in the current pretrial, trial, and sentencing phases of a court-martial. Part IV argues that the military justice system should be rebalanced by making four changes that would enhance an accused's due process rights.

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I. INTRODUCTION

Sexual assault is a widespread problem in the United States military.[2] The Department of Defense ("DoD") defines "sexual assault" as "[i]ntentional sexual contact characterized by use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent."[3] The term encompasses "a broad category of sexual offenses," including "rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these acts."[4]

2. Major Michael J. McDonald, *Rape is Rape: How Denial, Distortion, and Victim Blaming Are Fueling a Hidden Acquaintance Rape Crisis*, 2014 ARMY L. 35 (2014) (discussing "the variety of ways in which rape occurs and the prevalence of the problem").

3. DEP'T OF DEF., DEPARTMENT OF DEFENSE DIRECTIVE 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE ("SAPR") PROGRAM 18 (Jan. 23, 2012, Incorporating Change 2, Jan. 20, 2015), http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf [hereinafter DEP'T OF DEF. DIRECTIVE 6495.01].

4. *Id.*

The military has long had significant incidence and prevalence rates of sexual assault. Based on the last two[5] DoD estimates,[6] 18,900–26,000[7] active duty Service members become victims of sexual assault each year.[8] Of the 1.2 million active duty servicemen, 10,400–13,900 will be sexually assaulted; of the 203,000 active duty servicewomen, 8,500–12,100 will be sexually assaulted.[9] The majority of these assaults have historically been serious sexual assaults involving penetration or attempted penetration.[10]

These numbers are not anomalies. Twenty percent of all female veterans report having been victims of sexual abuse during their service.[11] And, in DoD surveys of active duty Service members conducted since 2006, between 4.4 percent and 6.8 percent of women, and between 0.9 percent and 1.8 percent of men, consistently report having been subjected to unwanted sexual contact within the prior year.[12] Making matters worse, an estimated eighty-six percent of military sexual assault victims

5. No estimated past-year prevalence of sexual assault survey was conducted during fiscal year 2013. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013 3 (Apr. 22, 2014), *available at* http://www.sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf [hereinafter DEP'T OF DEF. ANNUAL REP. ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013].

6. These statistics may, however, be flawed. For a discussion of the shortcomings of DoD statistics on sexual assault, see Tricia D'Ambrosio-Woodward, *Military Sexual Assault: A Comparative Legal Analysis of the 2012 Department of Defense Report on Sexual Assault in the Military: What It Tells Us, What It Doesn't Tell Us, and How Inconsistent Statistic Gathering Inhibits Winning the "Invisible War"*, 29 WISC. J. L., GENDER & SOC'Y 173 (2014); Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy*, 11 OHIO ST. J. CRIM. L. 579 (2014).

7. An estimated 26,000 Service members experienced unwanted sexual contact in FY 2012. Johanna Lee, *The Quest for Military Sexual Assault Reform*, HARV. POL. REV., Apr. 26, 2014, *available at* http://harvardpolitics.com/united-states/quest-military-sexual-assault-reform/. *But see* D'Ambrosio-Woodward, *supra* note 6, at 175 (critiquing the DoD's data gathering and reporting techniques and how they are obscuring the issue of sexual assault in the military). In 2014, the Department of Defense used an additional method of estimating sexual assaults and found that approximately 18,900–20,300 Service members had experienced unwanted sexual contact in FY 2014. DEP'T OF DEF., DEPARTMENT OF DEFENSE OVERVIEW: FISCAL YEAR 2014 DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 1–2 (May 2015) [hereinafter DEP'T OF DEF. OVERVIEW: FISCAL YEAR 2014].

8. This is an increase from 19,000 in 2010. James Dao, *In Debate over Military Sexual Assault, Men Are Overlooked Victims*, N.Y. TIMES (June 23, 2013), http://www.nytimes.com/2013/06/24/us/in-debate-over-military-sexual-assault-men-are-overlooked-victims.html?pagewanted=all&_r=0.

9. DEPARTMENT OF DEFENSE OVERVIEW: FISCAL YEAR 2014, *supra* note 7, at 1–2; Bill Briggs, *Male Rape Survivors Tackle Military Assault in Tough-Guy Culture*, NBC NEWS (May 16, 2013), http://usnews.nbcnews.com/_news/2013/05/16/18301723-male-rape-survivors-tackle-military-assault-in-tough-guy-culture. This means that, every single day of FY 2012, 38 men and 33 women became victims of sexual assault. *Id.*

10. *E.g.*, DEP'T OF DEF. ANNUAL REP. ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013, *supra* note 5, at 2 ("Of the 6.1 percent of Active Duty women surveyed who indicated experiencing USC [unwanted sexual contact]: 31 percent reported a completed penetration, 26 percent reported attempted penetration, 32 percent reported unwanted sexual touching, and 10 percent did not specify the USC experienced. Of the 1.2 percent of Active Duty men surveyed who indicated experiencing USC: 10 percent reported a completed penetration, 5 percent reported attempted penetration, 51 percent reported unwanted sexual touching, and 34 percent did not specify the USC experienced.").

11. Joe Nocera, *This War Is No Longer Invisible*, N.Y. TIMES (Feb. 22, 2013), http://www.nytimes.com/2013/02/23/opinion/this-war-is-no-longer-invisible.html?_r=0.

12. DEP'T OF DEF., 2014-2016 SEXUAL ASSAULT PREVENTION STRATEGY 4 (2014), *available at* http://www.sapr.mil/public/docs/reports/SecDef_Memo_and_DoD_SAPR_Prevention_Strategy_2014-2016.pdf.

never report their assaults[13]—considerably more underreporting than among civilians, sixty-five percent of whom never report sexual assaults.[14]

Sexual assault, is of course, devastating for the victim. Having significant numbers of sexual assaults in its ranks is also a black eye on the military's public image. But sexual assault is far more than simply a matter of embarrassment for the armed forces. It "imposes significant costs[,] . . . impairs mission readiness as a whole," and "disrupts unit cohesion."[15]

Given the high numbers of sexual assaults and the seriousness of their effects, the military has been subjected to increasing pressure to stem the tide of sexual assaults in its ranks.[16] Public outrage has been stirred by the steady drumbeat of headlines decrying military sexual assaults and the military's response to them,[17] as well as award-winning documentaries, like "The Invisible War," that investigate "the epidemic of rape within the U.S. military."[18] In turn, as Part II.B explains, Members of Congress,[19] the President,[20] the Secretary of Defense,[21] and senior military leadership[22] have eagerly joined in the chorus calling for swift reform.

In response, the DoD formed the Sexual Assault Prevention and Response Office and embraced a comprehensive sexual assault prevention and response policy that pushes for accountability and increased re-

13. Lee, *supra* note 7.

14. JENNIFER L. TRUMAN & LYNN LANGTON, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2013, at 7 (2014), *available at* http://www.bjs.gov/content/pub/pdf/cv13.pdf (noting a civilian underreporting rate of 65.2 percent for rape and sexual assault in 2013).

15. U.S. COMM'N ON CIVIL RIGHTS, SEXUAL ASSAULT IN THE MILITARY 2–3 (2013), *available at* http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf.

16. Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice Re-traumatize Sexual Assault Survivors in the Courtroom?*, 11 OHIO ST. J. CRIM. L. 439, 439 (2014); *see also infra* notes 57–64 & accompanying text.

17. *See, e.g.*, *infra* notes 125–56.

18. Nocera, *supra* note 11; Press Release, Cindegim & Docuramafilms, The Invisible War, (June 22, 2012), *available at* http://invisiblewarmovie.com/images/TheInvisibleWarPressKit.pdf.

19. *See*, *e.g.*, Craig Whitlock, *Law Makers Demand Crackdown on Sex Assault in Military*, WASH. POST (June 4, 2013), http://www.washingtonpost.com/world/national-security/military-chiefs-balk-at-sex-assault-bill/2013/06/04/cd061cc4-cd1c-11e2-ac03-178510c9cc0a_story.html.

20. *See*, *e.g.*, Findings and Conclusions re: Def. Motion to Dismiss for Unlawful Command Influence at 3, United States v. Johnson, N-M. Trial Judiciary, Haw. Jud. Cir. (June 12, 2013), *available at* http://www.stripes.com/polopoly_fs/1.225981.1371237097!/menu/standard/file/johnson-uci-ruling.pdf; *see also* Karen Parrish, *Obama to Military Sexual Assault Victims: 'I've Got Your Backs'*, AM. FORCES PRESS SERVICE (May 7, 2013, 4:39 PM), http://content.govdelivery.com/accounts/USDOD/bulletins/7a0560; Michael D. Shear, *Obama Calls for 'Moral Courage' at Naval Academy Graduation*, N.Y. TIMES (May 24, 2013), http://www.nytimes.com/2013/05/25/us/politics/obama-naval-academy-commencement.html?_r=0; Erik Slavin, *Judge: Obama Sex Assault Comments 'Unlawful Command Influence'*, STARS & STRIPES (June 14, 2013), http://www.stripes.com/judge-obama-sex-assault-comments-unlawful-command-influence-1.225974.

21. *See*, *e.g.*, Michael Hill & Lolita C. Baldor, *Defense Secretary Hagel Tells West Point Cadets They Must Stamp Out Scourge of Sexual Assault*, STARTRIBUNE (May 25, 2013, 1:43 PM), http://www.startribune.com/politics/208934541.html.

22. *See*, *e.g.*, Reuters, *Gen. Dempsey Warns Obama of Sexual Assault 'Crisis'*, NEWSMAX (May 16, 2013, 7:58 PM), http://www.newsmax.com/Newsfront/dempsey-obama-sexual-assault/2013/05/16/id/504956/.

porting of sexual assaults.[23] To the military's credit, these initiatives have been successful: both sexual assault reporting and prosecutions have increased.[24] For example, in fiscal year ("FY") 2014, 6131 sexual assaults were reported—a seventy percent increase from FY 2012.[25] Commanders were also able to take disciplinary action in seventy-six percent of these cases—a ten percent increase from FY 2012.[26]

Unfortunately, aggressive efforts to eliminate sexual assault in the military have created an often-overlooked problem for the military justice system. The due process rights of the accused have steadily deteriorated in sexual assault cases.[27] At the same time, a heavy thumb has been placed on the scales in favor of alleged victims.[28] The result: justice is no longer blind in military sexual assault prosecutions.

This Note focuses on the procedural due process problems confronting an accused in an adult rape trial and argues that the military justice system should be rebalanced to secure an accused's due process rights. Part II explains the framework for analyzing adult rape cases in the military justice system and the climate in which these cases are prosecuted.

Part III analyzes the problems inherent in the current system. Some of the military justice system's overarching features are particularly problematic in sexual assault cases. The system lacks transparency,[29] places individuals who have committed sexual misconduct in charge of prosecuting and preventing sexual assault,[30] and is exceptionally victim-

23. *Mission & History*, U.S. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE, http://sapr.mil/index.php/about/mission-and-history (last visited Oct. 12, 2015); *see also* DEP'T OF DEF. DIRECTIVE 6495.01, *supra* note 3, at 18; DEP'T OF DEF., DEPARTMENT OF DEFENSE INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE ("SAPR") PROGRAM PROCEDURES (Mar. 28, 2013), *available at* http://sapr.mil/public/docs/directives/649502p.pdf [hereinafter DEP'T OF DEF. INSTRUCTION 6495.02].

24. DEP'T OF DEF. ANNUAL REP. ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013, *supra* note 5, at 2–5.

25. DEP'T OF DEF. OVERVIEW: FISCAL YEAR 2014, *supra* note 7, at 2. In FY 2013, 5061 sexual assaults were reported—a fifty percent increase from FY 2012. OFFICE OF THE SEC'Y OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, DEPARTMENT OF DEFENSE FACT SHEET 2–3 (2014), *available at* http://www.sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_Fact_Sheet.pdf. Of these assaults, ultimately 4,660 were unrestricted reports, which are reports that trigger an official investigation. DEP'T OF DEF., EXECUTIVE SUMMARY: DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2014, at 7 (Apr. 2015); DEP'T OF DEF. DIRECTIVE 6495.01, *supra* note 3, at 4. This marks a substantial increase from the 2558 unrestricted reports filed in FY 2012 and the 3678 unrestricted reports filed in FY 2013. *DoD Annual Report on Sexual Assault in the Military Finds 50 Percent Increase in Reports*, SAPR SOURCE (Summer 2014), http://www.sapr.mil/public/saprsource201408.html; *see also* Lee, *supra* note 7.

26. DEP'T OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2014, at 89–91 (Apr. 2015). This is also an increase from FY 2013. Commanders were only able to take "disciplinary action against 73 percent of the alleged offenders" in FY 2013. *DoD Annual Report on Sexual Assault in the Military Finds 50 Percent Increase in Reports*, *supra* note 26.

27. *See* Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 154 (2014) ("The accused is losing substantial due process rights under the FY 14 [National Defense Authorization Act].").

28. Nonetheless, some argue that the military must do much more to protect alleged victims. *See, e.g.*, Schenck, *supra* note 16.

29. Lee, *supra* note 7.

30. *Id.*

centric.[31] Moreover, it places military defense counsel organizations at a training, funding, and experience disadvantage compared with trial counsel (the prosecutors).[32] But what makes the current system particularly pernicious is that, as Part III.B.5 explains, at least the appearance of unlawful command influence—that is, denying the accused due process[33] by attempting to "coerce or, by any unauthorized means, influence the action" of courts-martial or military tribunals[34]—may well be inescapable given the clear directives of executive, legislative, and military authorities that allegations of sexual assault must be swiftly and harshly dealt with.[35]

An accused also faces distinct inequities in the pretrial, trial, and sentencing phases of a court-martial.[36] Pre-referral defense requests for witnesses, depositions, and evidence must go through trial counsel and the convening authority. This forces defense counsel to disclose what would otherwise be confidential information about defense witnesses and theories, which thereby provides trial counsel with more information more quickly than their civilian counterparts. Further, in stark contrast with civilian practices, defense counsel has no independent, deployable investigators.[37] Additionally, the jury pool is often tainted by mandatory, yet flawed, military sexual assault prevention programs. Finally, sentencing procedures consistently diverge from those in most civilian jurisdictions to the detriment of the accused. While no one issue identified here would itself necessarily merit the significant reform sketched in Part IV, taken together, these issues deny due process to the accused.

Part IV suggests adjustments to the military justice system that would rebalance the system, thereby securing the accused's due process rights. This Note keys in on four changes that would significantly reduce the risk of unlawful command influence, enhance system legitimacy, and strengthen an accused's due process rights. Specifically, the military justice system should be rebalanced by: (1) providing defense counsel organizations with adequate funding and personnel, including independent, deployable investigators; (2) giving dispositional authority to independent prosecutors; (3) authorizing military judges to rule on pretrial matters from the earliest of pretrial confinement or preferral of charges; and (4) changing sentencing practices by eliminating unitary sentencing and making military judges the sole sentencing authority in noncapital cases.

Importantly, while this Note focuses on systemic injustice to an accused, nothing here suggests that the military should stop making strong efforts to eradicate sexual assault, protect victims' rights, and encourage the reporting of sexual assaults. These goals must be pursued. Neverthe-

31. *See, e.g.*, DEP'T OF DEF. ANNUAL REP. ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013, *supra* note 5, at 110–12.

32. *See infra* Part II.

33. United States v. Calley, 46 C.M.R. 1131, 1149 (A.C.M.R. 1973).

34. 10 U.S.C. § 837 (2012).

35. *See infra* Part II.

36. *See infra* Part III.

37. REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at 8.

less, stamping out sexual assaults need not come at the expense of treating an accused fairly. Alleged rapists are distinctly unsympathetic, but the U.S. Constitution does not permit an alleged rapist's due process rights to be trammeled, regardless of how tempting it might be.[38]

II. BACKGROUND

This Part explains the fundamentals of the military justice system and the climate in which military rape prosecutions occur. It then describes the statutory basis for, and court-martial process specifically applied to, military adult rape prosecutions. Throughout, it highlights challenges for protecting an accused's due process rights.

A. Fundamentals of the Military Justice System

The military justice system is a unique legal system. Its objectives are broader than civilian justice systems. It delegates authority in an unusual manner. And those subjected to it may have weaker due process protections.

American criminal justice systems are designed to further multiple objectives, generally punishment, rehabilitation, deterrence, incapacitation, and reintegration.[39] The military justice system's objectives, however, go beyond these and, due to the military's functions, must balance concerns that civilian systems need not. The military justice system is specifically designed to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[40] Good order and discipline are therefore viewed as intertwined with military justice, "and preserving the integrity of the system is of the utmost importance."[41]

The military justice system is also unique because it gives a typically nonlegal professional sweeping power. Military commanders are "responsible for . . . enforcing the law, protecting Soldiers' rights, and protecting and caring for victims of crime."[42] This has important ramifications for how sexual assault allegations are handled. When an alleged sexual assault occurs, commanders' duties are twofold: (1) "take appropriate administrative and criminal action against offenders" and (2) "en-

38. U.S. CONST. amend. V.

39. JOHN J. DIIULIO, JR., RETHINKING THE CRIMINAL JUSTICE SYSTEM: TOWARD A NEW PARADIGM, *in* PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM 6 (1993), *available at* http://www.bjs.gov/content/pub/pdf/pmcjs.pdf.

40. MANUAL FOR COURTS-MARTIAL UNITED STATES, I-1 (2012 ed.).

41. Murphy, *supra* note 27, at 139; *see generally* Memorandum from Sec'y of Def., to Sec'ys of the Military Dep'ts, et al., *Integrity of the Military Justice Process* (Aug. 6, 2013). For a discussion of how the military justice system struggles to balance justice and discipline, see David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1 (2013).

42. THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, COMMANDER'S LEGAL HANDBOOK 7 (2015), *available at* https://www.jagcnet.army.mil/Sites/jagc.nsf/0/EE26CE7A9678A67A85257E1300563559/$File/Commanders%20Legal%20HB%202015%20C1.pdf.

sure protection of the due process rights of those who are accused of sexual assault crimes."[43] As a result, while commanders should robustly execute sexual assault prevention and response programs, they must also ensure that their commands are receiving training that emphasizes the accused's due process rights, particularly proper "respect for the presumption of innocence."[44]

The due process rights of military personnel are not, however, necessarily the same as the due process rights of civilians.[45] This is because Article I, Section 8 of the U.S. Constitution gives Congress the authority to regulate the armed forces.[46] Congress therefore has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline" and "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."[47] Consequently, while Congress is subject to Due Process Clause requirements when legislating in military affairs and the "Clause provides some measure of protection to defendants in military proceedings," courts give the highest deference to congressional determinations in the military context.[48] The standard applied to due process challenges makes it abundantly clear that deference is at its apogee in this area: "whether the factors militating in favor of [the claimed due process right] are so extraordinarily weighty as to overcome the balance struck by Congress."[49] Accordingly, Service members asserting a due process right that Congress is loath to protect[50] will find courts less solicitous of their claims than courts would be if Service members were not subject to the Uniform Code of Military Justice ("U.C.M.J.").[51]

But while Service members' due process rights will likely be given less robust protection than civilians' due process rights, the Due Process Clause is still an important check on congressional power. Courts will not stand by idly while Congress runs roughshod over Service members' basic due process rights. The U.S. Supreme Court has clarified that Service members are entitled to "a fair trial in a fair tribunal."[52] It has also reminded the lower courts that, when faced with challenges that severely test "our Nation's commitment to due process[,] . . . we must preserve our commitment at home to the principles for which we fight abroad."[53]

43. REP. OF THE ROLE OF THE COMMANDER SUBCOMM., *supra* note 1, at 2.
44. *Id.*
45. Rostker v. Goldberg, 453 U.S. 57, 67 (1981).
46. Weiss v. United States, 510 U.S. 163, 176–77 (1994) (citations omitted).
47. *Id.* at 177 (citations and internal quotation marks omitted).
48. *Id.* at 176–78 (citations omitted).
49. *Id.* at 177–78 (citations and internal quotation marks omitted).
50. *See* Part IV.B.
51. *Id.* at 177.
52. *Id.* at 178 (citations and internal quotation marks omitted).
53. Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004); *see* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164–65 (1963). Indeed, "in the name of national defense," courts must not "sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *Hamdi*, 542 U.S. at 532 (quoting United States v. Robel, 389 U.S. 258, 264 (1967)).

Service members' due process rights are also protected by prohibitions on unlawful command influence. Unlawful command influence occurs when any person subject to the U.C.M.J. attempts to "coerce or, by any unauthorized means, influence the action" of courts-martial or military tribunals and is prohibited by Article 37 of the U.C.M.J.[54] Military appellate courts are sensitive to unlawful command influence, which "is to be condemned as a denial of military due process"[55] and "a corruption of the truth-seeking function of the trial process."[56] Since unlawful command influence is the "mortal enemy of military justice," courts must zealously guard against both actual and apparent unlawful command influence.[57] This is because "[t]he mere appearance of unlawful command influence may be 'as devastating to the military justice system as the actual manipulation of any given trial.'"[58]

The test for the appearance of unlawful command influence is less arduous than the test for unlawful command influence. It is an objective test "focus[ing] upon the perception of fairness in the military justice system as viewed through the eyes of a member of the public."[59] This test is satisfied if "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding."[60] Even DoD civilian leadership can create a unlawful command influence problem through their policy statements.[61]

54. 10 U.S.C. § 837 (2012).

55. United States v. Calley, 46 C.M.R. 1131, 1149 (A.C.M.R. 1973).

56 United States v. Thomas, 22 M.J. 388, 393–94 (C.M.A. 1986).

57. *Id.* at 393; United States v. Howell, NMCCA 201200264, 2014 CCA LEXIS 321, at *27 (N.M.C. Ct. Crim. App. May 22, 2014) (quoting United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006)) ("Congress and (the Court of Appeals for the Armed Forces) are concerned not only with eliminating actual unlawful command influence, but also with 'eliminating even the appearance of unlawful command influence at courts-martial.'"); *see* United States v. Rodriguez, 16 M.J. 740, 742 (A.F.C.M.R. 1983) ("It is a bedrock principle of military justice that every person tried by court-martial is entitled to have his guilt or innocence, and his sentence, determined solely upon the evidence presented at trial, free from all unlawful influence exerted by military superiors or others.").

58. *Howell*, 2014 CCA LEXIS 321, at *26 (quoting United States v. Ayers, 54 M.J. 85, 94–95 (C.A.A.F. 2000)).

59. *Id.* at *27 (quoting *Lewis*, 63 M.J. at 415).

60. *Id.* at *27–28. (quoting *Lewis*, 63 M.J. at 415).

61. United States v. Hagen, 25 M.J. 78, 87–88 (C.M.A. 1987) (Sullivan, J., concurring) ("A typical general or flag officer exercising convening-authority power will almost always have superiors, higher-ranking military officers or civilians in policy positions. These superiors as well must refrain from sending signals down the chain of command as to expected results in a criminal case. Real or perceived policy considerations in the operation of military departments have no place in determining the guilt or innocence of an individual charged with a crime under the laws of our land. Superior commanders and staff officers, as well as military or civilian legal officers, must never, directly or indirectly, interfere with a convening authority's exercise of his lawful duty. The convening authority must make his or her own decision on the case. It is not only unprofessional but a fraud on the system for a superior to 'send the word' down to a convening authority as to a desired result in a criminal case which will please the leadership of our armed forces."); Findings and Conclusions re: Def. Motion to Dismiss for Unlawful Command Influence at 7, United States v. Johnson, N-M. Trial Judiciary, Haw. Jud. Cir. (June 12, 2013), *available at* http://www.stripes.com/polopoly_fs/1.225981.1371237097!/menu/standard/file/johnson-uci-ruling.pdf (noting that the Navy-Marine Corps Court of Criminal Appeals has "heeded 'the admonitions from the CAAF about the potential insinuation of [unlawful command influence] by the civilian leadership of the Department" and reviewed the actions of the Secretary for apparent unlawful command influence").

A finding of actual or apparent unlawful command influence can result in significant remedial measures. For example, the highest military appellate court "has set aside sentences when it has found that statements of policy impinged on the independence of court-martial personnel."[62]

B. The Climate in Which Military Rape Prosecutions Occur

Military rape prosecutions occur in a climate in which military and civilian leadership are aggressively seeking to eradicate sexual assault. The DoD has implemented a Sexual Assault Prevention and Response Strategic Plan that each branch must comply with.[63] The plan is designed to "ensure that every Servicemember understands that sexist behaviors, sexual harassment, and sexual assault are not tolerated, condoned, or ignored" so that a culture of "dignity and respect" can be cultivated.[64] The Joint Chiefs of Staff have ordered leaders at every level of the military to "integrate the intent, lines of effort and tenets of this Strategic Direction as a part of [their] daily command routines and activities."[65]

Congress is also actively seeking to increase reporting and prosecution of sexual assaults.[66] Since the 2009 National Defense Authorization Act ("NDAA"), Congress has enacted over forty-seven provisions reforming the U.C.M.J. and otherwise directly addressing sexual assault in the armed forces.[67] In order to improve the effectiveness of the military justice system's response to sexual assault, Congress has even required that the Secretary of Defense establish a Response Systems Panel to independently assess and report to the Armed Services Committees of the U.S. House of Representatives and the U.S. Senate on how the military justice system investigates, prosecutes, and adjudicates adult sex crimes.[68]

Members of the military chain of command have made it clear that they, too, have zero tolerance for sexual assault in the military. Because defense counsel have filed many motions asserting unlawful command influence as a result of these comments, as Part III.B.5 explains, some of the more allegedly problematic statements are discussed below.

62. *Id.* at 7 (discussing United States v. Fowle, 22 C.M.R. 139, 141 (C.M.A. 1956) and United States v. Estrada, 17 C.M.R. 287 (C.M.A. 1957)).

63. Memorandum from Sec'y of Def. Chuck Hagel on Sexual Assault Prevention and Response to the Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretary of Defense for Personnel and Readiness, Chiefs of the Military Services, Chief of the National Guard Bureau, and General Counsel of the Dep't of Def. 1–3 (May 6, 2013), *available at* http://www.sapr.mil/public/docs/reports/SecDef_SAPR_Memo_Strategy_Atch_06052013.pdf.

64. *Id.* at 1.

65. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE STRATEGIC PLAN 4 (Apr. 30, 2013), *available at* http://www.sapr.mil/public/docs/reports/SecDef_SAPR_Memo_Strategy_Atch_06052013.pdf.

66. 160 CONG. REC. 1336 (daily ed. Mar. 6, 2014) (statement of Sen. Harry Reid).

67. *Id.* (statement of Sen. James Inhofe).

68. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576(a)(1), 126 Stat. 1758-63 (2013).

President Barack Obama, the Commander-in-Chief,[69] told military sexual assault victims:

> The bottom line is: I have no tolerance for this . . . [s]o I don't want just more speeches or awareness programs or training but ultimately folks look the other way. If we find out somebody's engaging in [sexual assault], they've got to be held accountable—prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period. It's not acceptable.[70]

Similarly, recent Secretaries of Defense have repeatedly emphasized that they are closely monitoring how sexual assaults are handled and will do everything they can to eradicate them. For example, in May 2013, Secretary Chuck Hagel stated that "[i]t's not good enough to say we have a zero tolerance policy (when it comes to sexual assault in the armed forces) . . . . I want to know how it's being done, and I want to know everything about it."[71] Because "[s]exual harassment and sexual assault in the military are a profound betrayal—a profound betrayal—of sacred oaths and sacred trusts[,] . . . [t]his scourge must be stamped out. We are all accountable and responsible for ensuring that this happens."[72] Further, in a letter to Senator Barbara Boxer in March 2013, Secretary Hagel announced that he was "committed to doing everything [he] can to stop sexual assault in the armed forces."[73] Secretary of Defense Leon Panetta, Secretary Hagel's immediate predecessor, made similar statements.[74]

Senior military leaders have eagerly joined the push to eradicate sexual assault in the military. For example, on April 19, 2012, General James F. Amos, the Commandant of the Marine Corps and a member of the Joint Chiefs of Staff, stated:

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69. U.S. CONST. art. II, § 2, cl. 1.

70. Findings and Conclusions re: Def. Motion to Dismiss for Unlawful Command Influence at 3, United States v. Johnson, N-M. Trial Judiciary, Haw. Jud. Cir. (June 12, 2013), *available at* http://www.stripes.com/polopoly_fs/1.225981.1371237097!/menu/standard/file/johnson-uci-ruling.pdf (citing Michael O'Brien, *Obama: 'No Tolerance' for Military Sexual Assault,* NBC News (May 7, 2013, 3:15 PM), http://nbcpolitics.nbcnews.com/_news/2013/05/07/18107743-obama-no-tolerance-for-military-sexual-assault); *see also* Parrish, *supra* note 20; Shear, *supra* note 20; Slavin, *supra* note 20.

71. Jennifer Hlad, *Hagel: Military Has in Many Ways Failed on Sexual Assault*, STARS & STRIPES (May 17, 2013), http://www.stripes.com/news/us/hagel-military-has-in-many-ways-failed-on-sexual-assault-1.221358.

72. Hill & Baldor, *supra* note 21.

73. Findings and Conclusions re: Def. Motion to Dismiss for Unlawful Command Influence at 1, United States v. Johnson, N-M. Trial Judiciary, Haw. Jud. Cir. (June 12, 2013).

74. Secretary Panetta stated that "General Dempsey [the Chairman of the Joint Chiefs of Staff] and I consider [sexual assault] a serious problem that needs to be addressed" and noted that "commanders must hold offenders appropriately accountable" on April 16, 2012. *Id.* at 2. On June 29, 2012, he said that "[t]he command structure from the chairman on down have made very clear to the leadership in this department that [sexual assault] is intolerable and it has to be dealt with . . . . [W]e have absolutely no tolerance for any form of sexual assault." On April 17, 2012, he declared: "The most important thing we can do is prosecute the offenders, deal with those who have broken the law and committed this crime. And if we do that then we can begin to deal with this issue—not only prosecute those that are involved, but more importantly send a signal that this is not a problem that we are going to ignore in the United States military." *Id.*

> We have got Marines that are predators . . . . I see it across the Marine Corps. . . . we have got an officer that has done something absolutely disgraceful and heinous and . . . we elect to retain him. . . . Why would I want to retain someone like that? I see the same thing with staff NCOs. . . . I see this stuff in court-martials [sic], I see it in the behavior and just for the life of me I can't figure out why we have become so ecumenical? Why we have become so soft? Where we're gonna [sic] keep a sergeant that absolutely doesn't belong in the United States Marine Corps. Why would we need to do that? And the answer is we don't. . . . And I want the staff NCOs in here and I want the officers in here, the commanding officers, and the sergeants major to take a hard look at how we do business. If you have a Marine that's not acting right, you've got a Marine that deserves to leave the Corps, then get rid of them; it is as simple as that.[75]

The Chairman of the Joint Chiefs of Staff, General Martin Dempsey, has made similar statements.[76] In a meeting between President Obama, Secretary of Defense Hagel, and the Chiefs of Staff to discuss sexual assaults, the President reported that the chiefs

> "care about this, and they're angry about it, and I heard directly from all of them that they're ashamed by some of what's happened . . . . They all understand this is a priority and we will not stop until we see this scourge from what is the greatest military in the world eliminated."[77]

75. United States v. Easterly, NMCCA 201300067, 2014 WL 341938 at *3–4 (N.M.C. Ct. Crim. App. Jan. 31, 2014).

76. Miranda Petersen, *Miranda Petersen Email: Attachment 5—Unlawful Command Influence*, Comment to *Public Comments*, RESPONSE SYS. TO ADULT SEXUAL ASSAULT CRIMES PANEL (Sept. 3, 2013), *available at* http://responsesystemspanel.whs.mil/public/docs/Public_Comment_Unrelated/03-Sep-13/06_Email_POD_DSD_Att5_UnlawfulCmdInfl_20130917.pdf.

77. Reuters, *supra* note 22. Further examples of a wide array of military leaders making strong comments on sexual assault include the following: (1) Secretary of the Navy Ray Mabus stressed on May 3, 2011, that it was important to "hol[d] offenders accountable" and emphasized Navy personnel's role in "'[e]nding this scourge' of sexual assaults in the Navy and Marine Corps." Findings and Conclusions re: Def. Motion to Dismiss for Unlawful Command Influence at 2, United States v. Johnson, N-M. Trial Judiciary, Haw. Jud. Cir. (June 12, 2013). (2) On April 1, 2012, Admiral Jonathan Greenert, Chief of Naval Operations, "stressed that it is 'important that we support sexual assault victims and hold offenders accountable,'" calling "sexual assault 'unacceptable' and urg[ing] that it not be tolerated." *Id.* (3) On June 27, 2012, Admiral Greenert stated that the sexual assault statistics "bother[ed] the hell out of me," and, on April 3, 2013, he again "urged commanders to 'hold people accountable' for sexual assault." *Id*. at 3. (4) On January 8, 2013, Admiral Greenert and Secretary Mabus declared "that they were disappointed and angry over continued incidents of sexual assault." *Id.* (5) On March 14, 2013, Force Master Chief for Navy Recruiting Command Earl Gray stated that "'[f]alse allegations of sexual assault are 3% (per NCIS data) which means 97% of allegations are true[,]'" and subsequently "entreated Navy leadership to prevent 'revictimization' and to 'ensure transfer requests are processed within 72 hours.'" *Id.*

C. The Statutory Basis and Court-Martial Process for Military Rape Prosecutions

Sexual assaults in the military are charged under Article 120 of the U.C.M.J.[78] Congress has, however, struggled to draft a workable statute.[79] The 2006 iteration of Article 120 was particularly disastrous,[80] managing to include unconstitutional burden shifting,[81] create a legal impossibility,[82] and acquire a reputation as "neither a model of clarity nor a model statute."[83] As a result, Congress changed Article 120 to its current form in 2012.[84] Article 120 defines rape as follows:

> (a) Rape.—Any person subject to this chapter who commits a sexual act upon another person by—(1) using unlawful force against that other person; (2) using force causing or likely to cause death or grievous bodily harm to any person; (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping; (4) first rendering that other person unconscious; or (5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct.[85]

A distinct court-martial process is followed for adult rapes charged under Article 120. Once an alleged assault has occurred, an alleged victim has two reporting options: (1) filing a restricted report; or (2) filing an unrestricted report.[86] If alleged victims choose to file an unrestricted report, they disclose that they were sexually assaulted, but they have no

78. UNIFORM CODE OF MILITARY JUSTICE § 45 art. 120 (2012), *available at* http://www.sapr.mil/public/docs/ucmj/UCMJ_Article120_Rape_Sexual_Assault.pdf.

79. *See generally* Major Mark D. Sameit, *When a Convicted Rape Is Not Really a Rape: The Past, Present, and Future Ability of Article 120 Convictions to Withstand Legal and Factual Sufficiency Reviews*, 216 MIL. L. REV. 77 (2013).

80. *See* Colonel R. Peter Masterton, *Annual Review of Developments in Instructions*, 2013 ARMY L. 1, 4 (2013).

81. United States v. Prather, 69 M.J. 338, 345 (C.A.A.F. 2011); *see also* United States v. Medina, 69 M.J. 462, 464 (C.A.A.F. 2011) (citation omitted).

82. *Prather*, 69 M.J. at 345 (stating that the 2006 Article 120 created a legal impossibility as a result of having two burden shifts: "The problem with the provision is structural. If the trier of fact has found that the defense has proven an affirmative defense by a preponderance of the evidence, it is legally impossible for the prosecution to then disprove the affirmative defense beyond a reasonable doubt and there must be a finding of not guilty. There are simply no instructions that could guide members through this quagmire, save an instruction that disregards the provision.").

83. United States v. Neal, 68 M.J. 289, 305 (C.A.A.F. 2010) (Ryan, J., concurring in part and dissenting in part). See Brigadier General (Ret.) Jack Nevin & Lieutenant Joshua R. Lorenz, *Neither A Model of Clarity Nor A Model Statute: An Analysis of the History, Challenges, and Suggested Changes to the "New" Article 120*, 67 A.F. L. REV. 269 (2011), for an in-depth discussion of the 2006 statute's shortcomings.

84. Jim Clark, *2012 Emerging Issues 6423, Clark on 2012 UCMJ Article 120, Effective 28 June 2012*, LEXISNEXIS (2012).

85. 10 U.S.C. § 920(a) (2012).

86. DEP'T OF DEF. DIRECTIVE 6495.01, *supra* note 3, at 4, 16, 18.

expectations of confidentiality.[87] Alleged victims filing an unrestricted report will receive medical treatment and counseling and be assigned a Sexual Assault Response Coordinator ("SARC") and a Sexual Assault Prevention and Response Victim Advocate ("SAPR VA").[88] Individuals filing unrestricted reports must report the alleged assault to law enforcement.[89] An official investigation into the alleged assault can then be initiated.[90]

If, however, alleged victims choose to file a restricted report, they confidentially disclose that they were sexually assaulted.[91] They will still receive medical treatment and counseling and will be assigned a SARC and SAPR VA.[92] But, a report will *not* be made to law enforcement, and an official investigation will *not* be triggered absent narrow exceptions[93] or an alleged victim's consent.[94] Accordingly, disciplinary proceedings, including a court-martial, will almost never be initiated unless an alleged victim files an unrestricted report.

Once an alleged victim has made an unrestricted report of sexual assault, any person subject to the U.C.M.J. may prefer charges. This "preferral of charges" formally initiates charges against an accused, starting the court-martial process; it is similar to pressing charges or swearing out a complaint in a civil jurisdiction.[95] To prefer charges, an authorized person signs charges and specifications under oath before a commissioned officer, swearing that he or she either has personal knowledge of the alleged offense or has investigated the alleged offense and believes that the charges and specifications are true.[96]

A convening authority—a commissioned officer in a command position,[97] who is generally either a special or general courts-martial convening authority—will then appoint an investigating officer ("IO") to conduct a thorough, pretrial hearing (an "Article 32 hearing") to investigate

87. *See id.* at 4, 18.
88. *Id.* at 4.
89. *Id.* at 21.
90. *Id.* at 4.
91. *Id.* at 5.
92. *Id.*
93. There are five exceptions that allow a restricted report to be disclosed: (1) the alleged victim consents to the disclosure in writing; (2) disclosure is "[n]ecessary to prevent or mitigate a serious and imminent threat to the health or safety of the victim or another person"; (3) disclosure is "necessary to process duty or disability determinations for Service members"; (4) discoslure is "[r]equired for the supervision of coordination o[r] coordination of direct victim treatment or services"; and (5) disclosure is "[o]rdered by a military official . . ., Federal or State judge, or [is] required by a Federal or State statute or applicable U.S. international agreement." DEP'T OF DEF. INSTRUCTION 6495.02, *supra* note 23, at 30–31.
94. DEP'T OF DEF. DIRECTIVE 6495.01, *supra* note 3, at 5.
95. *Military Justice Fact Sheets: The Military Justice System (The Uniform Code of Military Justice and Manual for Courts-Martial*, Headquarters Marine Corps, http://www.hqmc.marines.mil/Portals/135/MJFACTSHTS%5B1%5D.html (last visited on Nov. 17, 2015).
96. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 307(b). All Rules for Courts-Martial ("R.C.M.") may be found in the *Manual for Courts-Martial*.
97. *Id.* at 103(6).

the charges.[98] Congress has, however, recently restricted the scope of an Article 32 hearing. Congress has primarily done so by redesignating the Article 32 hearing as a "preliminary hearing" instead of an "investigation," relieving alleged victims of the necessity of testifying, and giving alleged victims the right to obtain a transcript of the hearing.[99]

After an Article 32 hearing has concluded, the IO will provide the initial disposition authority with a report of her conclusions and a recommended disposition in the case.[100] Unlike civilian jurisdictions, the provability of charges against an accused is not considered in deciding whether the minimum threshold to charge a Service member is met.[101]

Convening authorities have disposition authority to dismiss charges or refer them for nonjudicial punishment, administrative action, or court-martial.[102] Allegations of rape or serious sexual assault are only triable by a general court-martial, which limits convening authorities with disposition authority to the small number of typically flag or general officers that are general courts-martial convening authorities ("GCMCA") authorized by Article 22.[103] Consequently, prior to referring any charge to trial by general court-martial, the GCMCA's staff judge advocate ("SJA") must review the report and give the GCMCA written advice on the disposition decision.[104] The GCMCA alone possesses the discretion to refer the charge to a general court-martial and may not consider the accused's character and military service when making a disposition decision.[105]

The current system highly incentivizes referring serious sexual assaults to a general court-martial. If the GCMCA decides not to refer charges against the accused to trial by court-martial, he or she must attach a written statement justifying the decision.[106] If the GCMCA does not refer charges to court-martial and the SJA recommended referral, Service Secretaries (e.g., the Secretary of the Navy) will review the

98. U.C.M.J. art. 32; MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 405; United States v. McDowell, Misc. Dkt. No. 2013-28, 2014 WL 1323102, at *4 (A.F. Ct. Crim. App. Mar. 13, 2014) (quoting United States v. Samuels, 27 C.M.R. 280, 286 (C.M.A. 1959)) (stating that the Article 32 investigation "operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges").

99. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(a), 127 Stat. 954–55 (2014).

100. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 405.

101. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 28.

102. *See* U.C.M.J. art. 15; MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 306, 401; *Defense Services FAQ*, U.S. NAVY JUDGE ADVOCATE GENERAL'S CORPS, http://www.jag.navy.mil/legal_services/legal_services_faqDEFENSE.htm (last visited Oct. 12, 2015).

103. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1705, 127 Stat. 959 (2014); Memorandum from Sec'y of Def. Leon Panetta on Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases to the Sec'ys of the Military Dep'ts, Chairman of the Joint Chiefs of Staff, Commanders of the Combatant Commands, and Inspector Gen. of the Dep't of Def. (Apr. 20, 2012), *available at* http://www.dod.gov/dodgc/images/withhold_authority.pdf.

104. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 406.

105. National Defense Authorization Act for Fiscal Year 2014 § 1708; MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 407.

106. National Defense Authorization Act for Fiscal Year 2014 § 1744(e)(6).

GCMCA's decision.[107] If the SJA recommends not referring charges to court-martial and the GCMCA agrees, the GCMCA's next superior commanding officer, who must also be a GCMCA of at least grade O-7 (brigadier general or rear admiral), will review the decision.[108] Proposed federal legislation, such as the Victim's Protection Act of 2014 ("VPA"), would also mandate Secretarial review if senior trial counsel (the prosecutor) disagrees with a GCMCA's decision to not refer a case to court-martial.[109] Finally, VPA § 3 and the House markup of the 2015 NDAA would require the Secretaries of the Military Departments to consider commanding officers' "attitudes toward handling sexual assault allegations" when assessing their job performance.[110]

A convening authority also plays an extensive role in pretrial matters. Military defense counsel must submit requests for experts, witnesses, depositions, documents, and other evidence through trial counsel and the SJA to the convening authority.[111] Trial counsel has no comparable requirement.[112] Defense counsel may only submit such requests to a military judge after a case has been referred and the convening authority has denied the request.[113] An *ex parte* procedure, wherein trial counsel would not be present, is not available.[114] Moreover, unlike trial counsel, defense counsel have no independent, deployable investigators, forcing defense counsel to request investigators from the convening authority—requests that are typically denied by both convening authorities and military judges.[115] Finally, the convening authority affects the trial because he or she controls who may potentially become a member of the court-martial panel—the civilian equivalent of choosing the jury pool.[116]

At the conclusion of a trial, members determine a verdict by voting through a secret ballot. Generally, only a two-thirds vote is needed to convict an accused in noncapital cases,[117] although a three-fourths vote is necessary if the punishment is confinement for more than ten years or life.[118] A sentence is determined almost immediately after a verdict is rendered.[119] If the accused chose trial by members, or if the accused pleaded guilty and agreed to member sentencing, the accused will have her sentence determined by the members.[120] But, if he or she opted for a

107. *Id.* § 1744(c).

108. *Id.* § 1744(d); *see* Memorandum from Secretary of Defense Leon Panetta, *supra* note 103.

109. Victim Protection Act of 2014, S. 1917, 113th Cong. (2014); National Defense Authorization Act for Fiscal Year 2014 § 1744(d); *see* Memorandum from Secretary of Defense Leon Panetta, *supra* note 103.

110. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 43–44 n.13.

111. *Id.* at 29.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 26.

116. This is because the convening authority is the one who details the members of the court-martial panel. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 503.

117. *Id.* at 921.

118. Discussion of R.C.M. 1004(B), MANUAL FOR COURTS-MARTIAL, *supra* note 40, at II-135.

119. *See* MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 1001(a)(2).

120. REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at 138.

bench trial or pleaded guilty and agreed to sentencing by a military judge, the military judge will determine the sentence.[121] An accused may not choose trial by members and sentencing by a military judge.[122] A wide variety of potential sentences are possible, including reprimand, death, forfeiture of pay and allowances, fines, reduction in pay grade, restriction to specified limits, confinement, hard labor without confinement, punitive separation, and a bad conduct discharge.[123] But dishonorable discharge is mandatory for rape convictions.[124] A unitary sentence will be given, meaning that the sentencing authority will give one overall sentence, not a sentence per each charged count.[125]

While it has lavished considerable control in the court-martial process on the convening authority, Congress has recently restricted the convening authority's power in the one area where it benefitted the accused. Once a sentence is handed down in a rape case, the convening authority may no longer set aside a finding of guilty or reduce it to a finding of guilty on a lesser included offense, which the convening authority historically had the power to do.[126]

As for the appeals process, sentences that result in punitive discharge or at least one year of confinement are automatically reviewed by an appellate court.[127] Other cases receive automatic review by judge advocate generals ("JAGs").[128]

III. ANALYSIS

This Part explains the implications of an accused being prosecuted in this system and climate. As Part II demonstrated, a Service member accused of rape will be charged in a system that balances protections for the accused with other considerations, provides the convening authority—typically a nonlegal professional—with sweeping powers over the court-martial process, and gives fewer due process protections than a civilian would likely receive. The Service member will be charged under a statute that Congress has been forced to reword repeatedly, only to have it be stricken down.[129] And the Service member will find that, once charges have been initiated, the system virtually guarantees that he will face a general court-martial, regardless of the strength of the evidence

121. *Id.*
122. *Id.*
123. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 1003, 1004.
124. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 572(a)(2), 126 Stat. 1753 (2013).
125. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 1003(c)(1)(C).
126. National Defense Authorization Act for Fiscal Year 2014 § 1702(b), Pub. L. No. 113-66, 127 Stat. 955 (2013); Zachary D. Spilman, *2014 Emerging Issues 7217, Zachary D Spilman: Analysis of the New Article 60(c)*, EMERGING ISSUES, *available at* LexisNexis.
127. *See* MANUAL FOR COURTS-MARTIAL, *supra* note 40 at 1110; REP. RESPONSE SYS. PANEL, *supra* note 1, at 139.
128. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 1112.
129. *See generally* Sameit, *supra* note 79.

against him. This entire process will take place in an environment that is primed to ignore injustice to an accused.[130]

Part III begins with a case example illustrating the inequities facing Service members accused of sexual assault. It then assesses overarching problems in the military's prosecution of sexual assaults before focusing on specific problems in the court-martial procedure—namely, the pretrial, trial, and sentencing inequities facing an accused. To be fair, no one problem identified here would itself merit the significant reform sketched out in Part IV. Taken together, however, these limitations create a problem of constitutional magnitude: the denial of due process to the accused.

A. United States v. Sinclair

For only the third time in over sixty years, the U.S. Army court-martialed a general in 2013.[131] This highly-publicized case,[132] *United States v. Sinclair*, illustrates how the system is slanted against defendants.

Brigadier General Jeffrey A. Sinclair was tried for a litany of alleged offenses stemming from a three-year affair with his subordinate officer.[133] Among other things, he was charged with twice forcing her to fellate him against her will, threatening to kill her and her family if she ever told of their affair, committing adultery, and communicating inappropriately with four female officers.[134]

General Sinclair pleaded not guilty to all charges.[135] A jury of five major generals was empaneled, but only with considerable difficulty.[136] As Charles Dunlap Jr., a Duke law professor and former Air Force deputy JAG, noted, this was the result of "the atmosphere surrounding sexual assault cases in the military ha[ving] become 'hyperpoliticized.'"[137] Lawyers for the defense and prosecution "acknowledged the heavy political pressure swirling around the case," particularly given President Obama's "angry comments" mere months before, demanding that "military sex abusers be 'prosecuted, stripped out of their positions, court-martialed, fired, dishonorably discharged—period.'"[138] While forty generals were assigned to be potential panel members, almost all of them were stricken

130. *See generally id.*

131. Craig Whitlock, *Sordid Details Spill Out in Rare Court-Martial of a General*, WASH. POST (Aug. 14, 2013), http://www.washingtonpost.com/world/national-security/sordid-details-spill-out-in-rare-court-martial-of-a-general/2013/08/14/f6c89c68-008d-11e3-a661-06a2955a5531_story.html.

132. Alan Blinder & Richard A. Oppel Jr., *Faulting Army, Judge Puts off Assault Case*, N.Y. TIMES (Mar. 10, 2014), http://www.nytimes.com/2014/03/11/us/judge-in-generals-assault-case-weighs-claim-that-prosecution-was-tainted.html.

133. *Id.*

134. Press Release, Charge Sheet for Brigadier General Jeffrey A. Sinclair, Fort Bragg Press Center, *available at* http://www.fortbraggpresscenter.com/external/content/document/5287/1663395/1/BG%20Sinclair%20-%20Redacted%20charge%20sheet%20Dec%202012.pdf; *see also* Whitlock, *supra* note 131.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

from the panel because they admitted having "previously heard about the charges against Sinclair."[139]

Newspapers reported that the alleged victim's credibility was quickly called into question. She did not dispute that she had previously threatened suicide and to disclose the affair to Gen. Sinclair's superiors when they fought.[140] She testified that she had only disclosed their affair after flying into a "jealous rage" upon finding out that Gen. Sinclair loved his wife and was sleeping with other women.[141] She also testified that she "had not wanted the Army to charge [Gen. Sinclair] with forcible sodomy or a violent crime."[142] She originally claimed that the relationship was consensual—a claim substantiated by her statements to other Service members, text messages, and journal entries.[143] But she changed her story after investigators informed her that she, too, faced adultery charges.[144] In return for her testimony, the prosecution granted her immunity.[145]

As the case proceeded, it became apparent to both sides that the alleged victim made at least some false statements.[146] General Sinclair then proposed a plea agreement in which he would plead guilty to lesser charges, the prosecution would drop the most serious sexual assault charges, and Gen. Sinclair would be allowed "to retire at a reduced rank."[147] Lieutenant Colonel William Helixcon, who was trusted with prosecuting the case, told his superior "that the case should not move forward, that he didn't want to prosecute the case but that he was being forced to do so."[148] He also claimed that Brigadier General Paul Wilson, "a top Army lawyer at the Pentagon," was actually "'in charge' of the case."[149] Reinforcing this notion, Lieutenant Colonel James Bagwell, Fort Bragg's chief of military justice,[150] asked Gen. Wilson "for his thoughts

139. *Id.* These generals stated that "sexual assault is a serious problem in the ranks." *Id.* One general attended a required sexual assault prevention training program that used Gen. Sinclair "as a case study in bad behavior," while another informed the attorneys that his "general reaction" to reading about the case was that "this is going to be a black eye on the Army." *Id.*

140. Whitlock, *supra* note 131.

141. *Id.*

142. *Id.*

143. Alan Blinder & Richard A. Oppel Jr., *How a Military Sexual Assault Case Foundered*, N.Y. TIMES (Mar. 12, 2014), http://www.nytimes.com/2014/03/13/us/how-a-military-sexual-assault-case-foundered.html?ref=todayspaper&_r=0.

144. Whitlock, *supra* note 131. Provided they are military members, both a lover and a married person may be charged with adultery because the elements of adultery are: "(1) That the accused wrongfully had sexual intercourse with a certain person; (2) That, at the time, the accused or the other person was married to someone else; and (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." UNIFORM CODE OF MILITARY JUSTICE § 62, art. 134 (2012).

145. *Id.*

146. Richard A. Oppel Jr., *General's Bid for Dismissal of Sex Case is Countered*, N.Y. TIMES (Feb. 28, 2014), http://www.nytimes.com/2014/03/01/us/generals-bid-for-dismissal-of-sex-case-is-countered.html.

147. Blinder & Oppel Jr., *supra* note 132.

148. Blinder & Oppel Jr., *supra* note 143.

149. *Id.*

150. Blinder & Oppel Jr., *supra* note 132.

and opinion about General Sinclair's plea offer."[151] General Wilson should have had no influence on the case: Fort Bragg's Lieutenant General Joseph Anderson was the convening authority.[152] Shortly thereafter, Lt. Col. Helixcon withdrew when his superiors refused to drop the most serious allegations against Gen. Sinclair, even though "they would be 'very difficult to prove at trial.'"[153] The new prosecutor pressed forward with all charges.[154]

In December 2014, the alleged victim's special victim's counsel, Captain Cassie Fowler, sent Gen. Anderson, the convening authority, a letter arguing that he should reject a plea offer by Gen. Sinclair because "[a]llowing the accused to characterize this relationship as a consensual affair would only strengthen the arguments of those individuals that believe the prosecution of sexual assault should be taken away from the military."[155] As another Fort Bragg JAG later wrote, Cpt. Fowler's letter made Gen. Anderson's decision "easy."[156] Gen. Anderson explained that he "read the letter and made [his] decision" to reject a plea deal, although he later claimed that his only motivation was giving the alleged victim "her day in court."[157]

The military judge, Colonel James Pohl, was not convinced by Gen. Anderson's explanation. He halted the trial, released the panel, and, noting that "the military . . . seemed overly concerned about politics and its public image," ruled that Cpt. Fowler's letter had "raised the appearance of unlawful command influence."[158] Consequently, the defense was allowed to "submit a new plea offer to a different commander."[159]

In order to focus on the alleged victim's credibility, Gen. Sinclair had previously pleaded guilty to the lesser charges of adultery, possessing pornography in Afghanistan, and "having improper relationships with two other female Army officers."[160] Army prosecutors then cut a plea deal with Gen. Sinclair on the rape charge—he was reprimanded, fined

151. Blinder & Oppel Jr., *supra* note 143.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *See* Murphy, *supra* note 27, at 148 (citing David Zucchino, *Judge Rules Army Command Interfered in Sinclair Sexual Assault Case*, L.A. TIMES (Mar. 10, 2014), http://www.latimes.com/nation/nationnow/la-na-nn-sinclair-judge-rules-military-interfered-20140310,0,1682787.story#axzz2w9Rot3UP); *see also How a Military sexual Assault Case Foundered*, *supra* note 143.
159. Blinder & Oppel Jr., *supra* note 143.
160. Helene Cooper, *Senate Rejects Blocking Military Commanders from Sexual Assault Cases*, N.Y. TIMES (Mar. 6, 2014), http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html?_r=0; *see also* Blinder & Oppel Jr., *supra* note 134.

$20,000, and given no jail time.[161] Within three months, Gen. Sinclair was reduced to the rank of lieutenant colonel and forced to retire.[162]

As *Sinclair* demonstrates, and as will be expounded upon below, when handling sexual assault cases, the military justice system struggles with political pressure influencing the case, empaneling a member panel after members have been subjected to flawed, mandatory sexual assault prevention training, and unlawful command influence—factors that combine to undercut an accused's due process rights and throw the military justice system's legitimacy and integrity into question.

B. Problematic Features of the Military Justice System in Sexual Assault Cases

This Subpart examines several features of the military justice system that are particularly problematic in the context of sexual assault cases. It begins by analyzing the difficulties stemming from: (1) a lack of transparency in the military justice system; (2) placing individuals who have committed sexual misconduct in charge of prosecuting and preventing sexual assaults; and (3) altering the justice system to focus on victims, without ensuring that an accused's due process rights will be respected. It then discusses the problems of: (1) referring abnormally large numbers of sexual assault charges to courts-martial; (2) unlawful command influence; and (3) placing military defense counsel organizations at a training, funding, and experience disadvantage compared with trial counsel.

1. Lack of Transparency in the Military Justice System

The military justice system is far from a model of transparency.[163] As several members of the Response Systems to Adult Sexual Assault Crimes Panel noted, the system "continu[es] to operate outside the constraints of 21st-century norms for fairness and transparency in criminal justice."[164] The military's general lack of transparency is particularly apparent in two circumstances.

First, unlike civilian trials, military trials and their outcomes are minimally visible to the public. Civilian courts are presumptively open: absent special circumstances, trials and court filings are open to the public and anyone can walk into a federal or state courthouse and ask to

161. Craig Whitlock, *Disgraced Army General, Jeffrey A. Sinclair, Receives Fine, No Jail Time*, WASH. POST (Mar. 20, 2014), http://www.washingtonpost.com/world/national-security/disgraced-army-general-jeffrey-a-sinclair-receives-fine-no-jail-time/2014/03/20/c555b650-b039-11e3-95e8-39bef8e9a48b_story.html.

162. David Zucchino, *Army Demotes Gen. Jeffrey Sinclair Two Ranks for Sexual Misconduct*, L.A. TIMES (June 20, 2014), http://www.latimes.com/nation/nationnow/la-na-nn-army-sinclair-demoted-20140620-story.html.

163. Robert Draper, *The Military's Rough Justice on Sexual Assault*, N.Y. TIMES MAG. (Nov. 26, 2014), http://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html.

164. ADDITIONAL VIEWS OF PANEL MEMBERS, REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at 174.

read a case file for any reason.[165] The military justice system, on the other hand, makes it hard for the public to learn about trials. Military trials may be technically open to the public, but these trials are held on military bases—bases that are rarely, if ever, open to the general public.[166] Further, the military only makes brief trial results available to the public; court records and documents related to them will only be released after repeated Freedom of Information Act requests, appeals, fees, and often months of waiting.[167] This would be less problematic if military trial court decisions were available on major legal databases like Westlaw and LexisNexis. Unfortunately, only military appellate decisions are included in reporters.[168] This opacity is far from ideal because openness in a justice system "is designed to provide accountability."[169] Moreover, the opaqueness of the system makes it difficult to keep abreast of issues like unlawful command influence in sexual assault cases.

Second, the military will sometimes conceal information on investigations into Service members' sex-related misconduct from concerned legislators without giving a reason.[170] Consider two examples. In 2013, several Marines allegedly put up a Facebook page entitled "F'n Wook," which contained images of "women being tied up, beaten and shot."[171] When U.S. Representative Jackie Speier brought the page to Secretary of Defense Chuck Hagel's attention in May 2013, the Marine Corps responded by telling her "the situation was being investigated," yet the Marine Corps later refused to tell her "whether anyone had been disciplined."[172] In September 2014, U.S. Senators Kirsten Gillibrand and Claire McCaskill expressed concern to the Army over the court-martial testimony of a trainee at Fort Leonard Wood that "women were warned that they might not graduate if they reported any [sexual] assaults."[173] Fort Leonard Wood is the base "where the Army was teaching its criminal instigators the latest techniques in identifying sexual predators."[174] The Army informed the senators "that it had investigated the matter but would not disclose its findings."[175]

165. Richard Lardner & Eileen Sullivan, *Opaque Military Justice System Shields Child Sexual Abuse Cases*, AP (Nov. 18, 2015), http://www.apnewsarchive.com/2015/AP-Investigation-Child-sex-crimes-in-rank-and-file-shielded-by-opaque-military-justice-system/id-c7c2772ba05c4241a9bcebcf745d1c71.

166. *Id.*

167. *Id.*

168. DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1–3(E) (8th ed. 2012).

169. *Id.*

170. Draper, *supra* note 163.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

2. *Military Leaders Charged with Preventing and Prosecuting Sexual Assault Have Committed Sexual Misconduct*

Not only does the military justice system lack transparency, but also its fairness is called into question when the very individuals charged with preventing and punishing sex crimes have committed sexual misconduct themselves. The two most prominent examples are the cases of Lieutenant Colonel Jay Morse, the Army's top prosecutor for sex crimes, and Lieutenant Colonel Jeffrey Krusinski, the Air Force's director for sexual assault prevention.[176] In June 2014, Lt. Col. Morse was reprimanded for "molesting a female officer at a sexual assault prevention conference," while Lt. Col. Krusinski was reprimanded "for drunkenly fondling a woman in a bar against her will."[177] Neither faced any punishment beyond a reprimand. This was not for a lack of trying. When Lt. Col. Krusinski did not face civilian sexual battery charges, the chief Air Force prosecutor, Colonel Don Christenson, recommended that he be court-martialed.[178] The Air Force, however, opted to simply reprimand him and allow him to stay in the Air Force.[179]

3. *The Military Has Adopted a Victim-Centric Approach to Sexual Assault Cases*

A further problem with the military justice system is that it has adopted an overwhelmingly "victim-centric approach" to sexual assault cases, without developing any analogous defense capabilities.[180] Alleged victims are aided and supported by a dizzying array of actors. For example, an alleged victim will be helped by a Sexual Assault and Response Team, which often includes forensic lab and health care personnel, law enforcement representatives, victim advocates, and individuals in the Special Victim Capability—the Special Victim Unit Investigator, the Special Victim Prosecutor, and the Victim Witness Liaison—all of whom are expected to coordinate with the prosecutor's office and the SJA.[181] Moreover, victims are entitled to a Special Victim Counsel, also known as a Victim Legal Counsel, who is an attorney paid for by the military that represents alleged victim's "rights and interests during the investigation and court-martial process."[182]

176. *Id.*

177. *Id.*

178. *Id.*

179. Jon Harper, *Air Force to Reprimand Krusinski Rather than Pursue Court-Martial*, STARS & STRIPES (Sept. 4, 2014), http://www.stripes.com/news/air-force-to-reprimand-krusinski-rather-than-pursue-court-martial-1.301295.

180. REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at 113.

181. *Id.* at 97–99, 113. Alleged victims will also receive the support of unit and command leadership, a Sexual Assault Prevention and Response Victim Advocate, a Sexual Assault Response Coordinator, a Domestic Abuse Victim Advocate, a Victim Coordinator, the Victim Witness Assistance Program, on- and off-post social services, chaplains, and behavioral health services personnel. *Id.*

182. *Id.* at 93; *see also* U.S. AIR FORCE, SPECIAL VICTIMS' COUNSEL RULES OF PRACTICE AND PROCEDURE 14–16 (2013), *available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/05_USAF_SpecialVictimsCounsel_RulesofPracticea

Since 2004, legislation has radically altered the way that the military justice system handles sexual assault cases, uniformly changing the system to the alleged victim's benefit.[183] For example, in 2005, Congress protected Service members who reported sexual assault through the chain of command from retaliation.[184] In 2006, Congress rewrote and greatly expanded Article 120[185] and eliminated the statute of limitations for rape.[186]

The last three NDAAs are particularly notable because they contained over one hundred new requirements pertaining to military sexual assaults.[187] For example, in 2013, Congress mandated administrative discharges for Service members convicted of rape or sexual assault whose sentences did not include punitive discharge, meaning any Service member convicted of a sexual assault crime would be discharged one way or the other.[188] In the 2014 law alone, Congress made "the most sweeping changes to military law since 1968."[189] Among other changes, the 2014 NDAA narrowed the scope of Article 32 hearings from investigations to preliminary hearings[190] and curtailed convening authorities' Article 60 ability to mitigate or set aside sentences in Article 120 cases.[191] It also required that, if defense counsel were notified by trial counsel that the complaining witness would be testifying at the Article 32 hearing or court-martial, defense counsel had to request to interview the alleged victim through trial counsel.[192] "[A]ny interview of the victim by defense counsel" could only "take place . . . in the presence [of] trial counsel, a counsel for the victim, or a Sexual Assault Victim Advocate."[193] Moreover, the 2014 NDAA restricted dispensation for serious sex-related of-

ndProcedure.pdf; U.S. ARMY, SPECIAL VICTIM COUNSEL HANDBOOK 11–14 (Nov. 2013), *available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/03a_USA_SpecialVictimsConsel_Handbook.pdf.

183. *See, e.g.*, REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at Appendix G (summarizing relevant provisions of the FY 2004–2014 National Defense Authorization Acts).

184. National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 591, 118 Stat. 1811, 1933–34 (2004).

185. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256–63 (2006).

186. *Id.* § 553, 119 Stat. at 3264.

187. U.S. DEP'T OF DEF., EXEC. SUMMARY: REP. TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE 14 (2014), *available at* http://sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Executive_Summary.pdf.

188. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 572(a)(2), 126 Stat. 1632, 1753–54 (2013).

189. EXEC. SUMMARY: REP. TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE, *supra* note 187, at 14; *see also* Charles D. Stimson, *Military Sexual Assault Reform: Real Change Takes Time*, BACKGROUNDER 1–9 (2014), *available at* http://www.heritage.org/research/reports/2014/03/military-sexual-assault-reform-real-change-takes-time.

190. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1702(a), 127 Stat. 672, 954–55 (2014).

191. *Id.* § 1702(b), 127 Stat. at 955–56.

192. EXEC. SUMMARY: REP. TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE, *supra* note 187, at 14; *see also* National Defense Authorization Act for Fiscal Year 2014 § 1704, 127 Stat. at 958–59.

193. EXEC. SUMMARY: REP. TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE, *supra* note 187, at 14; *see also* National Defense Authorization Act for Fiscal Year 2014 § 1704, 127 Stat. at 958–59.

fenses to a general court-martial[194] and allowed victims to participate in a court-martial's clemency phase.[195] Congress also modified Rule for Courts-Martial 306 so that an accused's military service and character could no longer be considered in an initial disposition decision.[196] Finally, Congress mandated review of convening authorities' decisions not to refer serious sexual assault charges to courts-martial.[197]

To be clear, retooling the military justice system's response to sexual assaults in order to thoroughly support alleged victims is not malign in itself. Victims must be encouraged to come forward if the military is to effectively combat sexual assault. But Congress did little to ensure that an accused's due process rights would also be respected, despite radically altering the justice system. Instead, Congress gave alleged victims a panoply of advantages that often came at the expense of the accused. Congress merely allowed an accused to retain long-standing protections, such as the entitlement to military defense counsel for a court-martial (although this protection does not exist for non-judicial punishment).[198] Otherwise, Congress generally curtailed an accused's rights, as detailed above.

4. Virtually All Serious Allegations of Sexual Assault Are Referred to Court-Martial

System legitimacy and procedural fairness are essential to a justice system.[199] A legitimate and fair system cannot allow illegitimate or unfair pressure to change proof standards. In the military justice system, cases are only supposed to be referred to courts-martial if "there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it."[200] Nonetheless, virtually all serious allegations of sexual assault are referred to general courts-martial, regardless of whether these cases would be more appropriately tracked toward less severe punishments.[201]

194. *Id.* § 1705(b), 127 Stat. at 959–60.

195. *Id.* § 1706, 127 Stat. at 956–61.

196. *Id.* § 1708, 127 Stat. at 961.

197. *Id.* § 1744, 127 Stat. at 980–81.

198. *See, e.g.*, *Right to Counsel*, LEGAL SERVS., U.S. NAVY JUDGE ADVOCATE GEN. CORPS, (last visited Oct. 12, 2015).

199. *Cf.* REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at 163.

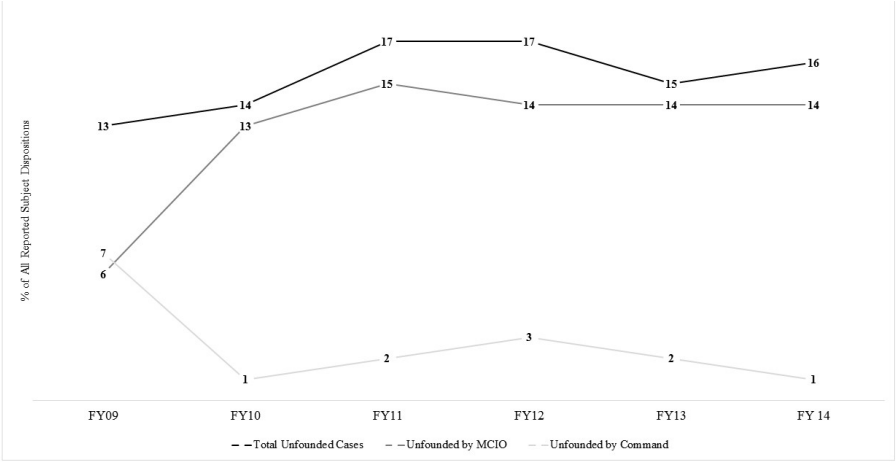
200. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 601(d)(1); *see also* U.C.M.J. art. 34.

201. Convening authorities rarely choose to pursue non-judicial punishment ("NJP") or discharge in lieu of court-martial. *See* REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 172. They are virtually never used when penetrative sexual assault is alleged. *Id.* For instance, in FY 2013, convening authorities referred sexual assault allegations to NJP at the following rates: Army, 133; Air Force, 27; Navy, 27; Marines, 1; Coast Guard, 4. *Id.* at 177. While the data does not indicate how many of these involved penetrative offenses, it would be extraordinary if many did because, in FY 2012, the Army sent 0 cases involving penetrative offenses to NJP (133 non-penetrative offenses were, however, referred for NJP) and the Marine Corps only allowed 2 cases involving a "contact sex offense" to be referred to NJP (14 non-contact cases were referred for NJP). *Id.* As for discharge in lieu of court-martial, in FY 2013, convening authorities permitted this outcome at the following rates: Army, 66; Air Force, 12; Navy, 4; Marines, 2; Coast Guard (total for FY 2007–2013), 10. *Id.* at 179. Again, nothing indicates that any of these involved penetrative offenses.

Because of the existing incentive structure, this result is eminently foreseeable. As explained in Parts II.C and III.B.5.c, positive performance evaluations, and therefore promotions, are partially dependent on how effectively sexual assaults are handled and decisions to not refer cases to court-martial must be put in writing, can be objected to by a litany of officers, and will be reviewed by a convening authority's superiors.[202]

The latest DoD annual report on military sexual assault demonstrates that there is indeed an abnormal number of sexual assault cases being referred to courts-marital.[203] First, as Figure 1 illustrates, after a DoD investigation of an allegation of sexual assault has been completed, commanders are extremely unlikely to find that a case is unfounded, that is, "false or baseless."[204]

FIGURE 1: UNFOUNDED CASES IN COMPLETED DOD INVESTIGATIONS OF SEXUAL ASSAULT[205]



Over the last five years, commanders have only been willing to say that allegations are unfounded in an average of 1.8 percent of all reported cases.[206] Compare this to Military Criminal Investigative Organizations, which adjudge an average of fourteen percent of reported subject dispositions to be unfounded.[207] While one would expect more cases to be found baseless during the preliminary investigations that Military Crimi-

202. *See* Murphy, *supra* note 27, at 130 (noting that commanders are incentivized to only take actions in sexual assault cases that reflect "what they think Congress believes to be the []correct action" due to the harsh consequences, such as being blocked for promotion or losing rank, that commanders have faced when they took actions some would view as "incorrect").

203. DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013, *supra* note 5, at 75, 81.

204. *Id.* at 89.

205. ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2014, *supra* note 26, at 101. The military started compiling this data in 2009.

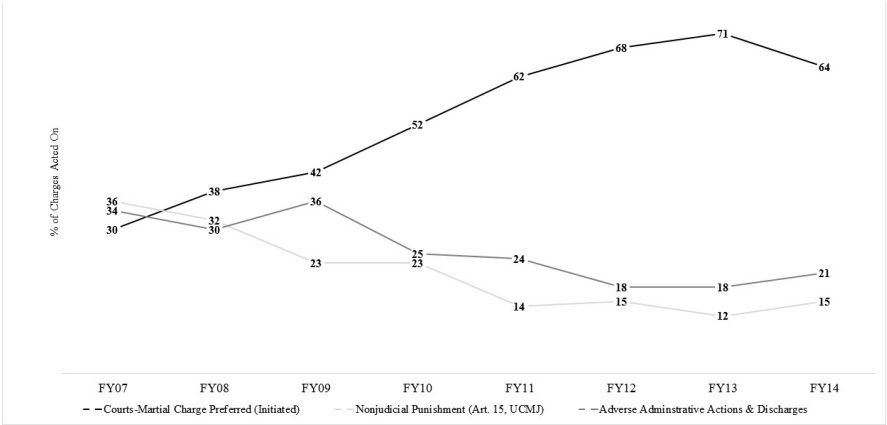
206. *See* Fig.1.

207. *Id.*

nal Investigative Organizations conduct, it is implausible that 98.2 percent of the cases that reach commanders are well founded. Commanders are apparently unwilling to weed out poor cases—a decision that comes at great cost to a wrongly accused Service member, who will be subjected to the humiliation and burden of an unnecessary investigation.

Moreover, as seen in Figure 2, when there is sufficient evidence to support action on allegations of sexual assault, commands overwhelmingly initiate courts-martial charges against an accused instead of using any other available disciplinary action. Cases tracked toward courts-martial have skyrocketed over the last seven years, going from the least likely disciplinary action in FY 2007 to by far the most common action in FY 2014, with a gulf of forty-three percent between cases sent to courts-martial and the next most common disciplinary action.[208]

FIGURE 2: COMMAND ACTION IN SEX ASSAULT OFFENSE WITH SUFFICIENT EVIDENCE TO SUPPORT ACTION[209]



As Figure 3 demonstrates, in FY 2014 alone, court-martial charges were initiated in 64.4 percent of all sexual assault offense actions where evidence supported commander action. In stark contrast, court-martial charges were initiated in only 10.9 percent of non-sexual assault offenses.

208. *See* Fig.2.

209. ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2014, *supra* note 26, at 92.

FIGURE 3. MILITARY SUBJECT DISPOSITIONS IN FY14[210]

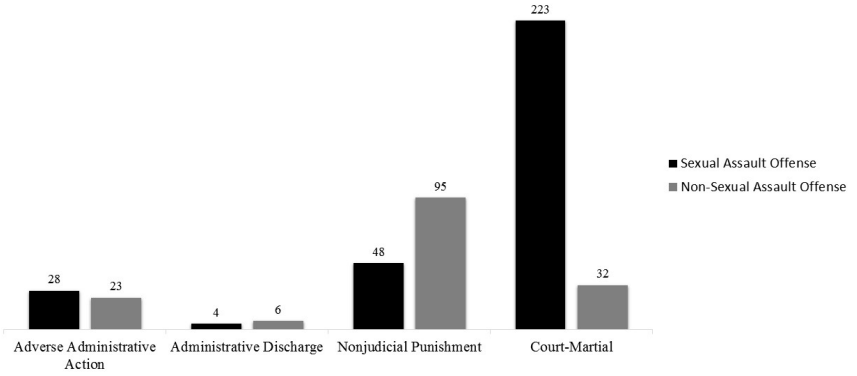
MILITARY SUBJECT DISPOSITIONS IN FY14	
Subject Disposition Category	**Dispositions Reported in FY14**
Military Subjects in Sexual Assault Cases Reviewed for Possible Disciplinary Action	**2,625**
Evidence-Supported Commander Action	**1,997**
Sexual Assault Offense Action	**1,550**
Court-Martial Charge Preferred (Initiated)	*998*
Nonjudicial Punishment (Art. 15, UCMJ)	*318*
Administrative Discharge	*111*
Other Adverse Administrative Action	*123*
Evidence Only Supported Action On a Non-Sexual Assault Offense	**447**
Court-Martial Charge Preferred (Initiated)	*49*
Nonjudicial Punishment (Art. 15, UCMJ)	*263*
Administrative Discharge	*30*
Other Adverse Administrative Action	*105*
Unfounded by Command/Legal Review	**48**
Commander Action Precluded	**580**
Victim Died	*0*
Victim Declined to Participate	*248*
Insufficient Evidence to Prosecute	*323*
Statute of Limitations Expired	*9*

Further illustrating how much more likely a sexual assault offense is to be pushed to court-martial than a non-sexual assault offense, Navy and Marine Corps commanders referred seventy-four percent of sexual assault cases to court-martial in FY 2013; only twenty percent of non-sexual assault cases were referred to court-martial.[211]

210. ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2014, *supra* note 26, at 89. One caveat to these numbers: the military apparently does not report the dispositions of cases that do not start out as sexual assault investigations.

211. *See* Fig.4.

FIGURE 4. ALL CASES PRESENTED TO COMMANDERS FOR DISPOSITION IN FY13: NAVY & MARINE CORPS COMBINED[212]



Commanders clearly prefer to refer serious sexual assault allegations to courts-martial. Make no mistake: this rash of courts-martial for sexual assault charges is not a harmless abnormality. Rather, it undercuts the military justice system's legitimacy and undermines key constitutional presumptions. As Captain Lindsay Rodman, a Marine JAG, explained, an accused's innocence is no longer being presumed and overprosecution has created a "vicious" acquittal cycle:

> [C]ommanders have attempted to accommodate public pressure to prosecute these cases. . . . commanders feel hamstrung to prosecute sexual assaults to the fullest, regardless of the possibility of success at trial. Political pressure from victims' rights groups have created an environment in which Servicemembers are no longer presumed innocent until proven guilty beyond a reasonable doubt, which is a constitutional travesty. Public complaints that the military does not take sexual assault seriously have prompted overprosecution in cases that would likely not go to trial in the civilian world. This creates a vicious cycle of acquittals in the court-martial system, continuing to compound an optics problem in the military.[213]

Of course, if the case profiles of sexual assault cases merited prosecution more than those of most non-sexual assault cases, sexual assault cases would be properly pushed to courts-martial at higher prevalence rates. Not so.[214] In fact, JAGs say convening authorities are ignoring their advice and pushing cases with bad facts to courts-martial:

> [C]ommanding officers and commanding generals often neglect to heed the advice of their legal advisors—the prosecutor, the Article

212. DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013, *supra* note 5, at App. J pp. 6, 20. The Navy and Marine Corps were the only branches providing data on all cases presented to commanders for disposition in FY 2013.

213. Lindsay L. Rodman, *Fostering Constructive Dialogue on Military Sexual Assault*, 69 JOINT FORCES Q. 25, 26 (2d Quarter 2013).

214. *Id.* at 28.

> 32 officer, and/or the SJA—and push forward on sexual assault cases that lack merit at trial. They do so because they fear they will be perceived as taking the accusations lightly. The problem in these cases is the facts. They often cannot be developed fully enough to achieve proof beyond a reasonable doubt . . . . When a prosecutor does not have good facts, convictions cannot be the expectation. Nor should we want there to be a conviction in many of those cases. That would require a standard below the "beyond a reasonable doubt" standard, creating an exception in criminal law for sexual assault cases in direct contravention of the Constitution.[215]

5. The Inescapable Problem of Unlawful Command Influence

One of the most significant problems with the military justice system's prosecution of sexual assaults today is that actual or apparent unlawful command influence—either of which constitutes a denial of due process[216]—is often, at least potentially, present.[217] Unless changes are instituted, the inescapable consequence is that unlawful command influence is likely to color the court-martial process in sexual assault cases, as the rash of unlawful command motions indicate that it has already started to do.[218]

a. Why Unlawful Command Influence Motions Are Prevalent

The first factor contributing to the prevalence of unlawful command influence problems is that unlawful command influence can affect any aspect of a court-martial and defense counsel need only meet a minimal threshold to assert it. Again, a person commits unlawful command influence by attempting to "coerce or, by any unauthorized means, influence the action" of courts-martial or military tribunals.[219] The test for *apparent* unlawful command influence is whether an objective, disinterested member of the public who was aware "of all the facts and circumstances, would harbor a significant doubt about the fairness of" the military jus-

215. *Id.* at 29–30. Unfortunately, military conviction rates in sexual assault cases cannot be compared to civilian conviction rates in similar cases, which would permit a better assessment of whether losing cases are being pushed to courts-martial. *See* REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 8. This is for three reasons. Much of the civilian data only tracks felony-level crimes, whereas Article 120 offenses "span a much wider range of conduct." *Id.* The military does not publish the disposition of sexual assault reports by offense, while state jurisdictions—where the overwhelming majority of sexual assault cases are tried—do not have to publish this data. *Id.* And civilian and military systems differ on how they "account for cases throughout the process," diverging, for instance, on whether investigators can "unfound and close a case before a prosecutor ever receives it," which has the effect of not accounting for all sexual assaults that are reported. *Id.* at 8–9.

216. United States v. Calley, 46 C.M.R. 1131, 1149 (A.C.M.R. 1973).

217. For an extensive analysis of unlawful command influence, see DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 365, 365–92 (7th ed. 2008); Murphy, *supra* note 27, at 144–53; Monu Bedi, Unraveling Unlawful Command Influence (Feb. 2015) (on file with author).

218. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 195.

219. 10 U.S.C. § 837 (2012).

tice system.[220] The defense has the initial burden of raising the issue, but need only meet the low standard of presenting "some evidence" of unlawful command influence.[221] Therefore, while the defense must show "more than [a] mere allegation or speculation," the defense only needs to "show facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the [judicial proceeding], in terms of its potential to cause unfairness."[222]

Once the defense makes this initial showing, the burden of proof shifts to the government to show one of the following beyond a reasonable doubt: (1) the facts upon which the unlawful command influence allegation is based are inaccurate; (2) the facts, while accurate, do not constitute unlawful command influence; or (3) even if the facts are accurate and constitute unlawful command influence, the unlawful command influence will not prejudice the proceedings or affect the sentence and findings.[223] "[O]nce unlawful command influence is raised," however, "a presumption of prejudice is created."[224]

In addition to the ease with which it can be at least asserted, unlawful command influence is likely to be found in sexual assault cases because the chain of command has spoken to how sexual assault cases should be handled and military personnel are conditioned to follow orders. Failure to obey orders is punishable under multiple U.C.M.J. articles, in extreme cases with death.[225] While it is true that military members must obey only *lawful* orders,[226] orders that are not patently illegal will almost always be followed because "an order requiring the performance of a military duty or act may be inferred to be lawful and . . . is disobeyed at the peril of the subordinate."[227] In reality, when a "service member is . . . tried for disobeying an order, it is presumed that the order is lawful, and the accused bears the burden of rebutting the presumption."[228] Further, "especially when coming from the president and general officers, the merest expressed wish of those higher in the chain of command is treated as an order enjoying a presumption of lawfulness."[229] This makes military justice different from civilian justice, as James Joyner, a professor at the Marine Corps Command and Staff College, and James W. Weirick, a former Marine JAG, explain:

220. United States v. Howell, NMCCA 201200264, 2014 CCA LEXIS 321, at *27–28 (N-M. Ct. Crim. App. May 22, 2014) (quoting United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006)).

221. *Id.* at *25–26 (citing United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013); United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999)).

222. *Id.* at *25–26 (citing *Salyer*, 72 M.J. at 423; *Biagase*, 50 M.J. at 150).

223. *Id.* at *26 (citing *Biagase*, 50 M.J. at 151).

224. *Id.* (quoting United States v. Douglas, 68 M.J. 349, 354 (C.A.A.F. 2010)).

225. *See, e.g.*, U.C.M.J. art. 90; U.C.M.J. art. 92; MANUAL FOR COURTS-MARTIAL, *supra* note 40, at IV-19–21; IV-23–25.

226. *See* United States v. Calley, 48 C.M.R. 419, 28 (C.M.A. 1973).

227. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at Part IV, ¶ 14(c)(2)(a)(i).

228. James Joyner & James W. Weirick, *Sexual Assault in the Military and the Unlawful Command Influence Catch-22*, WAR ON THE ROCKS (Oct. 7, 2015), http://warontherocks.com/2015/10/sexual-assault-in-the-military-and-the-unlawful-command-influence-catch-22/.

229. *Id.*

> Because military jurors are under obligation to follow the orders of those above them—and in particular the president, secretary of defense, and senior generals—the command climate and references to the wishes of senior leaders are much more difficult for military jurors to discount. Civilian jurors are simply not subject to that same pressure. Which, in turn, means military defendants need more protection than their civilian counterparts.[230]

As Part II.B noted, an aggressive campaign has been mounted to combat military sexual assaults: a campaign that has included thousands of speeches by government and military officials highlighting the need to eradicate military sexual assaults.[231] Given the combination of high-ranking members of the chain of command unequivocally stating how they expect allegations of sexual assault to be handled—swiftly and harshly[232]—and military personnel's propensity for following orders, defense attorneys can satisfy the low initial threshold for showing unlawful command influence in sexual assault cases relatively easily. Notably, however, doing so only establishes a rebuttable presumption of prejudice.

b. The Prevalence of Unlawful Command Influence Motions in Sexual Assault Cases

It is therefore unsurprising that defense attorneys in Article 120 cases have been consistently filing—and winning—unlawful command influence motions.[233]

Each Service branch was ordered to produce the unlawful command influence complaints and motions that had been filed in sexual assault cases from January 1, 2012, through December 18, 2013.[234] The branches do not generally track these complaints and motions. Nevertheless, the Army estimated that there were unlawful command influence motions filed "in approximately one-fourth of contested sexual assault cases."[235] The Air Force reported "numerous motions" and several complaints.[236] The Navy projected that "one motion per Sexual Assault Case" was filed.[237] The Marine Corps believed that one hundred motions had been filed.[238] And the Coast Guard reported that six motions were filed.[239]

230. *Id.*

231. James Joyner & James W. Weirick, *Sexual Assault in the Military and the Unlawful Command Influence Catch-22*, WAR ON THE ROCKS (Oct. 7, 2015), http://warontherocks.com/2015/10/sexual-assault-in-the-military-and-the-unlawful-command-influence-catch-22/.

232. *See supra* Part II.B.

233. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 195. For statistics, sample motions or complaints, and trial counsel's response, see *Services' Responses to Request for Information #84*, RESPONSE SYS. PANEL (Dec. 19, 2013), *available at* http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q84.pdf.

234. *Id.* at 1.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 1–2.

239. *Id.*

Many motions for unlawful command influence have been successful, but the remedies for a finding of unlawful command influence vary widely.

In many cases, an accused has received "significant remedies" based on a convening authority having exercised unlawful command influence.[240] For example, in *United States v. Kaufman*, "sexual assault offenses were dismissed when the GCMCA received a promotion after referring a case where the recommendation from the chain of command and investigating officer was to not send the case forward."[241]

In other cases, JAGs have exercised unlawful command influence. For example, in *United States v. Sinclair*, "the military judge halted the trial and allowed the defense to submit another offer to plead guilty after finding that the convening authority had been unlawfully influenced" after a JAG asked the convening authority to reject a plea offer because accepting it would help individuals who wanted to strip the military of the power to prosecute military sexual assaults.[242] In another case, an accused had his case transferred to another convening authority—an "almost unheard of" remedy—because the Air Force Judge Advocate General (the top legal officer in the Air Force) told the initial convening authority that "absent 'smoking gun' evidence about an alleged victim's credibility, [sexual assault cases] should be sent to court-martial" and the failure to do so in the accused's case "would enable Senator Kirsten Gillibrand to gain needed votes on a pending bill to remove commanders from the court-martial process."[243] Moreover, in *United States v. Garcia*, the United States Army Court of Criminal Appeals set aside multiple findings of guilt upon finding that a JAG's "multiple references" during trial "to the Army's efforts to confront sexual assault . . . attempted to impermissibly influence the panel's findings by injecting command policy into the trial."[244] Strikingly, this means that, if shown to influence a case, the military's efforts to eradicate sexual assault may be, in and of themselves, enough to create a due process violation.

Defense attorneys have most often sought relief based on the ill-considered words of top military and civilian leaders. Defense attorneys have been particularly prone to seek relief based on speeches by Presi-

240. *See* Murphy, *supra* note 27, at 147–48 (citing Transcript of Article 39(a) session, United States v. Kaufman, at 71–72 (Shaw Air Force Base, June 15, 2013) (investigating officer found that no reasonable grounds existed for any of the sexual assault charges)). For a discussion of the severe consequences stemming from a finding of unlawful command influence, see Lieutenant James D. Harty, *Unlawful Command Influence and Modern Military Justice*, 36 NAV. L. REV. 231, 242 (1986).

241. *See id.* at 147–48 (citing Transcript of Article 39(a) session, United States v. Kaufman, at 71–72).

242. Murphy, *supra* note 27, at 148 (citing Zucchino, *supra* note 162).

243. Nancy Montgomery, *Sexual Assault Case Not Dismissed Despite Ruling of Unlawful Command Influence*, STARS AND STRIPES (Aug. 12, 2015), http://www.stripes.com/sexual-assault-case-not-dismissed-despite-ruling-of-unlawful-command-influence-1.362563.

244. No. 20130660 (A. Ct. Crim. App. Aug. 18, 2015), *available at* https://www.jagcnet.army.mil/Portals/Files/ACCAOther.nsf/MODD/5EB02B308E9DEC4585257EA60055DFB5/$FILE/mo-garcia,%20g.pdf.

dent Obama, General Dempsey, and General Amos.[245] After President Obama's remarks in May 2013 stating that he had zero tolerance for sexual assaults,[246] defense attorneys in dozens of sexual assault cases filed relatively successful motions alleging unlawful command influence.[247] For example, in *United States v. Fuentes* and *United States v. Johnson*, Commander Marcus Fulton, a Navy judge, "ruled that statements against sexual assault by President Obama constitute[d] apparent [unlawful command influence] and that, as a result, the defendants could not receive a punitive discharge if found guilty."[248] In June 2013, a military judge at South Carolina's Shaw Air Force Base "dismissed charges of sexual assault against an Army officer, noting the command influence issue."[249] And, in *United States v. Averell*, Commander John Maksym, a Navy judge, found that President Obama and General Dempsey's comments "constituted apparent [unlawful command influence] and granted the defense extra preemptory challenges."[250] Moreover, as of August 2013, eighty or more motions have been filed in sexual assault cases alleging unlawful command influence due to General Amos "assert[ing] that 80 percent of sexual assault accusations are legitimate," "disparage[ing] the 'buyer's remorse' defense in sexual assault cases as 'bullsh–,'" strongly "condemn[ing] immoral actions by Marines[,] and press[ing] for aggressive responses when they were discovered" in his Heritage Brief tour.[251] "At least four of these resulted in findings of apparent [unlawful command influence]."[252] In at least one case, an appellate court ordered a retrial, which resulted in the original sentence being set aside.[253]

245. For the text of these remarks, see *supra* Part II.B.

246. *See supra* Part II.B.

247. Jennifer Steinhauer, *Hagel Tries to Blunt Effect of Obama Words on Sexual Assault Cases*, N.Y. TIMES (Aug. 14, 2013), http://www.nytimes.com/2013/08/15/us/politics/hagel-tries-to-blunt-effect-of-obama-words-on-sex-assault-cases.html?_r=1&.

248. Petersen, *supra* note 76; *see also* Findings and Conclusions re: Def. Motion to Dismiss for Unlawful Command Influence, United States v. Johnson, N-M. Trial Judiciary, Haw. Jud. Cir. (June 12, 2013), *available at* http://www.stripes.com/polopoly_fs/1.225981.1371237097!/menu/standard/file/johnson-uci-ruling.pdf; Slavin, *supra* note 20; Steinhauer, *supra* note 247.

249. Petersen, *supra* note 76.

250. *Id.*; Erik Slavin, *Military Judge Reduces Challenges to Jury in Sex Assault Case*, STARS & STRIPES (July 25, 2013), http://www.stripes.com/news/pacific/military-judge-reduces-challenges-to-jury-in-sex-assault-case-1.232097; Erik Slavin, *USS Germantown Chief Petty Officer Sentenced for Sexual Assault*, STARS & STRIPES (July 30, 2013), http://www.stripes.com/news/pacific/uss-germantown-chief-petty-officer-sentenced-for-sexual-assault-1.232848.

251. Dan Lamothe & Gina Harkins, *Commandant's Actions in Scout Sniper Cases Eyed by Sex Assault Defense Attorneys*, MARINE CORPS TIMES (Aug. 4, 2013), http://www.marinecorpstimes.com/apps/pbcs.dll/article?AID=2013308040005; *see also* Hope Hoge Seck, *Marine's Sentence Cut in Half After Unlawful Influence Reversal*, MARINE CORPS TIMES (June 4, 2015), http://www.marinecorpstimes.com/story/military/crime/2015/06/04/marines-sentence-cut-in-half-after-uci-reversal/28408327/.

252. Petersen, *supra* note 76.

253. Hope Hoge Seck, *Marine's Sentence Cut in Half After Unlawful Influence Reversal*, MARINE CORPS TIMES (June 4, 2015), http://www.marinecorpstimes.com/story/military/crime/2015/06/04/marines-sentence-cut-in-half-after-uci-reversal/28408327/.

c. Unlawful Command Influence Problems Are Likely to Continue

Even if top military and civilian authorities become more adept at making statements that do not create unlawful command influence problems, there is no reason to believe that the unlawful command influence problem will cease to plague sexual assault cases. If anything, it may become more prevalent.

First, as Secretary of Defense Chuck Hagel noted, eliminating military sexual assaults remains one of the "highest priorities" of the DoD for the foreseeable future.[254] Consequently, the DoD has taken "aggressive action" and been "acutely focused"[255] on sexual assaults, recently adding "over 28 new initiatives . . . to strengthen how [it] prevent[s] and respond[s] to sexual assault."[256] The Secretary of Defense directed forty-one similar initiatives from 2012 to 2014.[257]

Second, the DoD has established command climate assessments that create a climate that fosters actions that could amount to unlawful command influence. The DoD has instituted mandatory climate assessment surveys that will be "automatically shared with the unit commander's immediate supervisor"; unit commanders are rated on this survey as part of their evaluation reports.[258] "At every level of Department leadership," the DoD baldly stated, "the message has been clearly established that sexual assault and harassment will not be tolerated, and the United States military is no place for individuals who find such behavior acceptable. Commanders are expected to embrace this philosophy. . . ."[259]

Moreover, proposed legislation such as the Victims Protection Act of 2014 ("VPA")[260] would, if passed,[261] certainly ensure that enterprising

254. Emmarie Huetteman, *Rise in Sexual Assault Reports Is a Positive, Hagel Says*, N.Y. TIMES (Dec. 4, 2014), http://www.nytimes.com/2014/12/05/us/rise-in-sex-assault-reports-is-a-positive-hagel-says.html. This is because "[e]radicating sexual assault from our ranks is not only essential to the long-term health and readiness of the force; it is also about honoring our highest commitments to protect our fellow soldiers, sailors, airmen and Marines." Press Release, Dep't of Def., Secretary Hagel Releases Progress Report to the President on Sexual Assault in the Military, Announces Four New Directives to Strengthen Department Response (Dec. 4, 2014), *available at* http://www.defense.gov/Releases/Release.aspx?ReleaseID=17063.

255. EXEC. SUMMARY: REP. TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE, *supra* note 187, at 5.

256. Tyrone C. Marshall Jr., *More Must be Done to Eliminate Sexual Assault, Hagel Says*, DOD NEWS, U.S. DEP'T OF DEF. (Dec. 4, 2014), http://www.defense.gov/news/newsarticle.aspx?id=123760; *see also* Press Release, *supra* note 244.

257. EXEC. SUMMARY: REP. TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE, *supra* note 187, at 6.

258. *Id.* at 15.

259. *Id.*

260. Victim's Protection Act of 2014, S. 1917, 113th Cong. (2014).

261. It is true that the VPA has not passed the House and technically died in a previous Congress. *S. 1917 (113th): Victims Protection Act of 2014*, GOVTRACK.US, https://www.govtrack.us/congress/bills/113/s1917 (last visited Oct. 12, 2015). But its provisions were popular enough to unanimously pass the Senate, indicating that, if reintroduced, it may well be enacted. *U.S. Senate Roll Call Votes 113th Congress-2nd Session*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=2&vote=00062 (last visited Oct. 12, 2015). Further, even if Congress does not pass the VPA, sections of it have been incorporated into the Fair Military Act, H.R.

defense counsel would long be able to make unlawful command influence claims. Two VPA provisions are particularly relevant. Section 3(c)(1) requires written performance appraisals of all Service members that must "include an assessment of the extent to which each such members supports the sexual assault prevention and response program of the Armed Force concerned."[262] Additionally, Section 3(c)(2) requires that commanding officers' performance appraisals include an evaluation of whether or not they have "established a command climate in which . . . allegations of sexual assault are properly managed and fairly evaluated."[263]

These provisions incentivize unlawful command influence because evaluations are used to identify those Service members who are best qualified for promotion.[264] The military promotions structure is an "up or out" system in which Service members can only stay in the military if they move up in rank.[265] Service members who are passed over twice for promotion are forced to either retire or leave the military.[266] If, then, the employment prospects of military personnel—particularly commanders who are convening authorities—rest in part upon how effectively they are working toward eliminating sexual assaults, these individuals have every reason to ensure that every allegation of sexual assault is punished as severely as possible. Accordingly, it would be surprising if unlawful command influence allegations do not continue to increase in the near future.

6. Military Defense Counsel Face a Training, Funding, and Experience Disadvantage

Another overarching problem with the military justice system is that military defense counsel organizations face a training, funding, and experience disadvantage when compared with trial counsel organizations. As a matter of fundamental "fairness and due process" and as a means of ensuring system legitimacy, it is vital that Service members accused of serious sexual assaults be provided with experienced,[267] adequately trained defense counsel,[268] particularly because they will almost inevitably be faced with a general court-martial.[269] "[A]n obvious imbalance between

4485, 113th Cong. (2014), and the FY 2015 National Defense Authorization Act. *See* REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at 58 n.12.

262. Victim's Protection Act of 2014, S. 1917, 113th Cong. § 3(c)(1) (2014).

263. *Id.* § 3(c)(2).

264. *See, e.g.,* DEP'T OF THE ARMY, ARMY REGULATION 623–3, EVALUATION REPORTING SYS. 1-8(a)(2) (Mar. 31, 2014), http://www.apd.army.mil/jw2/xmldemo/r623_3/main.asp.

265. Paul Kane, *Up, Up and Out*, N.Y. TIMES (Apr. 20, 2009), http://www.nytimes.com/2009/04/21/opinion/21kane.html?_r=0.

266. *Id.*

267. For a discussion of the necessity of experienced trial counsel and supervisors, see Major Jeffrey A. Gilberg, *The Secret to Military Justice Success: Maximizing Experience*, 220 MIL. L. REV. 1 (2014).

268. REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at 8.

269. *See supra* Part II.C.

prosecution and defense resources" is particularly problematic now given the "substantial additional efforts in recent years to enhance prosecution capabilities."[270]

Unlike most civilian public defender organizations, military defense counsel organizations do not have independent budgets.[271] Rather, they are funded by sources such as the convening authority and their branch's legal command.[272] As a result, defense organizations are neither comparably funded with trial counsel nor adequately funded.[273] Consider, for example, branches that report their yearly spending per attorney.[274] The Army spends $1,407.61 per trial counsel per year, but only $1,033.36 per defense counsel per year.[275] The Marine Corps spends $2,778 per trial counsel per year, but only $1,870 per defense counsel.[276] And the Air Force spends $2,105 per trial counsel per year, but only $1,870 per defense counsel.[277]

Given the lack of funding, defense offices are not adequately staffed with personnel.[278] Moreover, as a direct result of this funding deficit, some defense counsel have reported that the training they receive is "insufficient and unequal" to that received by trial counsel.[279] Indeed, not all military defense counsel have trial experience before handling their first sexual assault case.[280] And, while the DoD gave trial counsel organizations Special Victim Capability,[281] it established no analogous capabilities—like JAGs "solely dedicated to defending those accused of sexual assault offenses"—for defense counsel organizations.[282] Whatever problems would ordinarily result from these difficulties are amplified in the context of adult sexual assault cases because not only will these cases

270. *Id.*

271. *Id.* at 38.

272. *Id.*

273. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 21–25; *see* REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at 8, 38, 158, 161–62.

274. Differences in size between defense and prosecutorial organizations may well account for some of the disparity in highly qualified experts and annual budgets. *See id.* at 114. But that does not explain the difference in the standard amount spent per counsel per year.

275. REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at 158, 161; REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 137.

276. REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at 158, 162; REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 137.

277. REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at 158, 161; REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 137.

278. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 21, 25–26; *see* REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at 8.

279. REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at 38; REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 21–25.

280. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 21, 136 ("Counsel interviewed during site visits and at meetings stated that defense counsel tour lengths may range from 12-24 months. Some defense counsel said they were assigned adult sexual assault cases during their first tour of duty, when they had no prior litigation experience. . . . Some defense counsel told the Response Systems Panel and the Subcommittee that because they do not have independent budgets, their training opportunities were insufficient and unequal to their trial counsel counterparts.").

281. *See supra* Part III.B.3.

282. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 154–55.

disproportionately go to trial,[283] but specialized training is also needed to handle them properly.[284]

C. The Unfairness to the Accused Inherent in the Current Pretrial Process

While the previous Subpart analyzed the overarching problems with the military justice system in the context of sexual assault prosecutions, this Subpart focuses on the unfairness to the accused inherent in the current pretrial process.

1. Pre-Referral Defense Requests for Witnesses, Depositions, and Evidence Must Go Through Trial Counsel and the Convening Authority

In civilian justice systems, a judge or magistrate controls all preliminary trial proceedings from the earliest of a defendant's arrest or indictment.[285] In stark contrast, the military justice system does not allow military judges to become involved until after charges have been referred.[286] Perhaps this difference would not be troubling if defense counsel and trial counsel had to satisfy similar requirements and had "equal opportunity to obtain witnesses and evidence."[287] But this is not the case.

Defense counsel must submit requests for experts, witnesses, depositions, documents, and other evidence, as well as justifications for such requests, through trial counsel and the SJA to the convening authority.[288] Justifications cannot be merely perfunctory. Defense counsel must "submit to the trial counsel a written list of witnesses whose production by the Government the defense requests" and "a synopsis of the expected testimony sufficient to show its relevance and necessity" or "why the witness' personal appearance will be necessary."[289] Further, depending on the practices of each branch, trial counsel alone may, as the convening authority's representative, grant or deny witness requests, although a convening authority must decide expert witness requests.[290] While defense counsel can appeal any adverse decision to a military judge,[291] defense counsel cannot do so until their clients' cases have been referred and will not be able to do so by using an *ex parte* procedure.[292] This means that trial counsel can be present when defense counsel ex-

283. *See supra* Part III.B.4.

284. REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at 38.

285. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 29.

286. *See supra* Part II.C.

287. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 703(a).

288. *See, e.g.*, MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 703(c)(2), (f)(3); *see also* REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 184.

289. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 703(c)(2)(A)–(B)(i–ii).

290. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 703(c)(2), (d); REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 183.

291. *See, e.g.*, MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 703(d).

292. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 29, 183.

plains the defense's theory of relevance.[293] No civilian jurisdiction permits a similar practice.[294]

Trial counsel, on the other hand, may secure favorable witnesses and resources without having to provide defense counsel with an explanation.[295] Trial counsel simply obtain witnesses that they believe to be "relevant and necessary."[296] They need not submit requests to anyone for approval nor demonstrate relevance to anyone.

Moreover, trial counsel have the advantage of nationwide subpoena power—a power that is rarely subjected to judicial oversight.[297] Defense counsel, however, have no subpoena power,[298] unlike some civilian public defenders.[299]

Ultimately, these practices compel defense counsel to disclose more information to the government more quickly than civilian public defenders, and they force defense counsel to reveal information about their theory of the case and witnesses that would otherwise be confidential.[300] Consequently, the "duty and ability" of defense counsel "to provide constitutionally effective representation to their clients" is stymied.[301] As the Comparative Systems Subcommittee aptly noted, these practices create an "obvious imbalance" and "a valid perception that the government [alone] can get whatever it wants whenever it wants in terms of resources, experts and evidence to prove its case, regardless of the cost," as well as imposing "a barrier to effective defense at courts-martial."[302]

2. Defense Counsel Have No Independent, Deployable Investigators

Civilian justice systems typically provide public defenders with their own investigators.[303] Investigators are a critical resource because they "contribute to the efficient disposition of cases" and allow defense counsel to focus on zealously defending their clients.[304] In offices with investigators, the investigators—not defense counsel—have the primary burden of "locating and interviewing witnesses, finding appropriate experts, and finding services to assist the defense in complying with court ordered treatment or services."[305] Dedicated investigators are particularly invaluable in sex crime cases. As Lisa Wayne of the National Association of Criminal Defense Lawyers stated, "I don't know a lawyer in the country

293. *Id.*
294. *Id.* at 183.
295. *Id.* at 184; *see generally* MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 703.
296. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 703(c)(1).
297. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 30.
298. *See id.* at 184.
299. *Id.* at 30.
300. *Id.* at 183.
301. *Id.*
302. *Id.* at 184–85.
303. *Id.* at 156.
304. *Id.* at 156–57.
305. *Id.* at 156.

that does sex offenses without an investigator, except in the military. Really, there is no such thing."[306]

Currently, however, military defense counsel are limited to requesting investigators from the convening authority or, after referral, the military judge—requests that are typically denied.[307] But even if the defense is granted an investigator, whatever information the investigator uncovers is not protected by either the work product doctrine or attorney-client privilege.[308] This, of course, means that the prosecution can access and use any information that an investigator uncovers, including incriminating evidence.[309] Because this puts defense counsel in an untenable position, they are likely to continue performing their own investigations.

This is not a satisfactory alternative. JAGs are trained in the law, not in the latest investigative techniques, and they lack many investigative resources.[310] Moreover, investigations typically entail interviewing witnesses, but civilian defense counsel "never interview witnesses" because "[t]he ABA Standards are clear . . . [i]t is unethical."[311] After all, defense counsel would be placed "in ethically compromising circumstances if he or she [became] the only witness to exculpatory or inconsistent statements."[312]

D. Trial and Sentencing Unfairness to the Accused

The accused in a sexual assault case is also confronted with significant inequities during the trial and sentencing phases of a court-martial.

1. The Jury Pool is Often Tainted

When going to trial, an accused has good cause to be concerned that her jury pool has been tainted by mandatory[313] sexual assault prevention training. It has become increasingly difficult to seat a member panel in a sexual assault case, primarily because "[t]he heavy emphasis on sexual assault prevention training has . . . in some instances, influenced the pool of panel members" and caused them "to draw erroneous legal conclusions."[314]

306. *Id.* at 158 n.757 (citing *Response Systems to Adult Sexual Assault Crimes Panel: Hearing on Training to Prosecute & Defend Sexual Assault Cases Before Coop. Sys. Subcomm.*, United States Dep't of Def. 230 (Jan. 7, 2014) (testimony of Lisa Wayne, NACDL)).

307. *Id.* at 26.

308. *Id.* at 158.

309. *Id.*

310. *Id.*

311. *Id.* at 158 n.757 (citing *Response Systems to Adult Sexual Assault Crimes Panel: Hearing on Training to Prosecute & Defend Sexual Assault Cases Before Coop. Sys. Subcomm.*, United States Dep't of Def. 241 (Jan. 7, 2014) (testimony of Lisa Wayne, NACDL)).

312. *Id.* at 158.

313. *See, e.g.*, *Services' Responses to Request for Information #84*, *supra* note 233, at 5 (Defense Motion to Dismiss (Unlawful Command Influence), United States v. Oscar) ("LTG Campbell brought in the top officers and enlisted leaders from all major Army units in Europe for the [sexual assault] summit.").

314. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 195.

It is, of course, a positive development when good sexual assault prevention training takes root, but this training is often problematic. First, the training is apparently instilling at least some legally relevant misinformation.[315] For example, a particularly widespread misperception stemming from sexual assault prevention training is the idea "that a person cannot legally consent to sexual activity if he or she has consumed even one alcoholic beverage."[316]

Second, as seen in cases like *United States v. Sinclair*[317] and *United States v. Oscar*,[318] jury pools are often compromised when course leaders and senior officers emphasize the "seriousness" of sexual offenses, as well as the "expectation of offender accountability."[319] Given these problems, it is unsurprising that branches such as the Marine Corps report "a significant number of court-martial members were dismissed due to their answers during voir dire."[320]

2. Sentencing Procedures Consistently Diverge from Those in Most Civilian Jurisdictions to the Detriment of the Accused

Sentencing procedures consistently diverge from those in most civilian jurisdictions. As the chart below demonstrates,[321] while one or two features are equally or more protective, in virtually every instance, these differences are to the accused's detriment.

315. *Id.*
316. *Id.*
317. *See supra* Part III.A.
318. *Services' Responses to Request for Information #84*, *supra* note 233, at 1–12 (Defense Motion to Dismiss (Unlawful Command Influence), United States v. Oscar).
319. *Id.* at 7–18.
320. *Id.* at 2.
321. This chart is adapted from REP. OF THE RESPONSE SYS. PANEL, *supra* note 1, at 138. See Part II.C for citations to the relevant Rules for Courts-Martial.

FIGURE 5: COMPARISON OF SENTENCING PROCEDURES IN CIVILIAN COURTS AND COURTS-MARTIAL

	Most Civilian Jurisdictions	Military
Number of members in non-capital cases	Usually 12 jurors	Does not require 12 members; Ranges from 3 to 12 depending on type of court-martial
Jury verdict requirement for findings	Unanimous verdict in all cases	Unanimous verdict in capital cases; Usually 2/3 vote to convict by secret written ballot
Time between verdict and sentencing	Often delayed several weeks pending the completion of presentence report	Almost immediate
Who determines sentence in non-capital cases?	Judge determines sentence in noncapital cases	Sentence is determined by military judge or by members (jury) based on choice of the accused: • Trial before members, sentencing by members • Trial by judge alone, sentencing by judge • Plead guilty, sentencing by members • Plead guilty, sentencing by judge The accused does *not* have the option to select trial by members and then, if convicted, sentencing by military judge
Sentences per count or unitary	Receives sentence on each count for which he/she is convicted	Unitary sentencing, meaning one overall sentence
Sentencing by members/jury	Unanimous verdict in capital cases; Not applicable in most other cases because judge determines sentence in most jurisdictions	Unanimous verdict in capital cases; 3/4 vote for sentence of life imprisonment or confinement for more than ten years; 2/3 vote for any other sentence
Sentencing guidelines	20 States, District of Columbia, and federal courts have sentencing guidelines to inform sentencing process	Each offense carries maximum penalty
Clemency	Governor may grant pardon at end of process	Convening authority may set aside finding of guilt only in limited circumstances, and may not do so for "qualifying offenses" Rights at Service clemency parole boards and right to petition President for clemency

Appeals Process	Normally not granted automatic review; offender must file for review at next higher court	All sentences with punitive discharge or one year or greater confinement receive automatic appellate court review; all other cases automatically reviewed by judge advocate

For example, the burden that must be met to convict the accused is lower in the military than it is in most civilian jurisdictions because a unanimous member verdict is only required in capital cases.[322]

Further, while civilian courts hold sentencing hearings typically "weeks or months after trial or acceptance of a guilty plea," sentencing in the military justice system occurs virtually immediately after a verdict.[323] This does have the beneficial effects of allowing the military to move swiftly, punishing and removing offenders from their units, and allowing panel members to return to their duties.[324] But the loss of this extra time also makes it more difficult for the accused to gather relevant information and witnesses that could help reduce their sentence—a fact of particular concern because defense organizations are already short on personnel and do not have their own investigators.[325]

Moreover, while most civilian jurisdictions hand down a sentence for each count of which an offender is convicted, the military employs unitary sentencing, adjudging one sentence for all counts combined.[326] While this promotes efficiency and is a simpler method of sentencing, "this procedure may lead to less careful consideration of each and every offense of conviction and disparity in outcomes."[327]

Unitary sentences are even more problematic in light of the fact that Congress has greatly restricted the convening authority's clemency power in Article 120 cases.[328] A convening authority is no longer allowed to "provide relief from forfeitures of pay to dependents of convicted Service members," and it is unclear whether the convening authority may still grant clemency to a Service member who is convicted of both Article 120 offenses and other offenses.[329] Even more troubling is the fact that the change to Article 60 effectively prevents any post-trial relief from being granted to convicted Service members who are not punitively discharged or confined for one year. This is because the only way such Ser-

322. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 921.

323. *See* MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 1001(a)(2); REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 217.

324. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 1001–07; *see also* REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 218.

325. *See supra* Parts III.B.6, C.2.

326. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 1006(c); REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 218.

327. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 219.

328. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(b), 127 Stat. 955-58 (2014); Spilman, *supra* note 126.

329. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 38.

vice members could access appellate review would be through an Article 69 review requested by the Office of the Judge Advocate General.[330]

Finally, unlike forty-four states and the federal criminal justice system, the military permits panel members to adjudge a sentence.[331] It is generally accepted that members' sentences "vary widely" and are "unpredictable."[332] Unfortunately, due to the absence of "uniform, offense-specific sentencing data," this understanding cannot be empirically verified.[333] Nonetheless, this intuition is consistent with reported experience.[334] Moreover, widely divergent member sentences are likely inevitable given the lack of expertise and information that members are given.[335] Panel members have neither training nor experience in sentencing and receive few instructions.[336] As Major General Kenneth Hodson, a former Army Judge Advocate General, noted: "I have never had a convening authority complain about a sentence imposed by a judge," but "[s]entences adjudged by court members are adjudged pretty much in ignorance, and they tend to vary widely for the same or similar offenses. They amount almost to sentencing by lottery."[337]

At least one statistical analysis in the civilian context supports this notion. It demonstrated that jury sentences are not only harsher than judge-imposed sentences, but also they are more "erratic" and unreliable.[338] It is therefore unsurprising that the American Bar Association has determined that the "[i]mposition of sentences is a judicial function[;] . . .

330. *Id.*

331. *See* MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 1001–07.

332. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 222 & n.1014.

333. *Id.* at 220.

334. *Id.* at 222.

335. For a detailed discussion of why panel sentencing is problematic, see, e.g., Captain Megan N. Schmid, *Military Justice Edition: This Court-Martial Hereby (Arbitrarily) Sentences You: Problems with Court Member Sentencing in the Military and Proposed Solutions*, 67 A.F. L. REV. 245, 267–68 (2011); see also Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159 (2000); Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-Martia*l, 58 NAVAL L. REV. 39 (2009); James K. Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 Mil. L. Rev. 1, 29–37 (1994).

336. *Id.* at 224; *see also* United States v. Rinehart, 8 C.M.A. 402, 406 (1957) (stating that members may not "rummage through a treatise on military law"); DEP'T OF THE NAVY, 2014 NAVY-MARINE CORPS ELECTRONIC MILITARY JUDGES' BENCHBOOK, 2–5–20 SENTENCING INSTRUCTIONS (2014) ("There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion."), *available at* https://www.jagcnet.army.mil/Portals/USArmyTJ.nsf/(JAGCNetDocID)/Electronic+Benchbook?OpenDocument; James A. Young, III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91, 111 (2000).

337. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 222 n.1014.

338. Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. U. J. URB. & CONTEMP. L. 3, 37–40 (1994).

[t]he jury's role in a criminal trial should not extend to determination of the appropriate sentence."[339]

IV. RECOMMENDATION

While Part III noted the procedural due process problems that the current system has created in an Article 120 case, this Part argues that, given these problems, the military justice system should be rebalanced by strengthening protections for the accused. This Note does not purport to provide an exhaustive list of corrective measures.[340] Instead, it focuses on four changes that would significantly reduce the risk of unlawful command influence, enhance system legitimacy, and strengthen an accused's due process rights.[341]

A. Defense Organizations Must Be Adequately Resourced with Funds and Personnel, Including Independent, Deployable Investigators

To ensure the military justice system's fairness and legitimacy, defense organizations must be sufficiently resourced with funds and personnel so that they can effectively and efficiently represent accused Service members, who are entitled to free, independent military defense counsel.[342] Specifically, defense organizations must have budgets that can support adequate training for defense counsel and allow these organizations to be staffed with independent investigators. Because units may be deployed overseas, these investigators must also be deployable. There is a general consensus that this is necessary, although, inexplicably, this consensus has not yet been acted upon.[343]

To ensure adequate funding, defense organizations should have their own budgets. It may be possible to ensure adequate resourcing by letting defense organizations continue to receive funding from other sources, such as their branch legal command or a convening authority, and roughly equalizing their budgets with those of trial counsel.[344] Alter-

339. AM. BAR ASSOC., ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING, STANDARD 18-1.4 (3d ed. 1994), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_sentencing_blk.html#1.4.

340. Many additional changes could be made beyond those recommended here. For instance, R.C.M. 702 could be clarified so that defense counsel has the right to conduct a deposition of an alleged victim that chose not to testify at an Article 32 hearing. Member verdicts could be required to be unanimous in all cases. Article 60 could be re-amended to return at least some of the convening authority's clemency power. And judges with the power to make a binding dismissal of charges could preside over Article 32 hearings. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 30.

341. Additional guidelines and training for commanders will also advance these goals. *See* Mitsie Smith, Note, *Adding Force Behind Military Sexual Assault Reform: The Role of Prosecutorial Discretion in Ending Intra-Military Sexual Assault*, 19 BUFF. J. GENDER L. & SOC. POL'Y 147 (2011).

342. An accused is entitled to a free defense counsel during a pretrial confinement hearing, Article 32 investigation, court-martial, administrative separation board, and any appeals *E.g.*, *Defense / Personal Representative Services Addendum*, U.S. NAVY JUDGE ADVOCATE GENERAL CORPS, http://www.jag.navy.mil/legal_services/defense_services_addendum.htm#accused_right_counsel (last visited Nov. 19, 2015).

343. *See* REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 154–58.

344. *See id.* at 154.

nately, adequate resourcing could be ensured by branch Secretaries.[345] Yet these last two approaches do not further the independence of defense organizations, unlike the first approach, which some defense counsel specifically prefer.[346] Moreover, giving defense organizations their own budgets would create a stronger public perception of fairness, particularly because many civilian public defender offices have their own budgets.[347]

Defense offices must also be staffed with independent, deployable investigators. Two alternatives have been proposed: (1) investigators could be placed in defense counsel offices, but their supervisory and evaluation chains would remain in trial counsel organizations;[348] or (2) civilian investigators could be hired by defense organizations as either full time employees or contractors.[349] While either option would be workable, the second one is preferable because it furthers the defense's independence from prosecutorial control and better promotes the perception of fairness.

B. Giving Dispositional Authority to Independent Prosecutors

An even more fundamental change is needed: giving dispositional authority in Article 120 cases to independent prosecutors, not convening authorities.[350] This would mean that, after conducting an Article 32 hearing, investigating officers would submit their reports to a prosecutor who would make a binding decision as to whether charges should be dismissed or the case should be referred to court-martial, non-judicial punishment, or an administrative separation board. This is necessary because "[o]nly a system that does not involve the commander in the most serious cases can effectively minimize [unlawful command influence] in the military justice system."[351]

Theoretically, JAGs or military judges could be given dispositional authority.[352] This solution, however, does nothing to combat the prevalence, nor reduce the risk, of unlawful command influence because JAGs and judges are still military officers subject to the chain of command, U.C.M.J., and military promotional structure. As a matter of fact, far from being immune from unlawful command influence problems, military attorneys can actually *create* them, as *United States v. Sinclair* and

345. *See id.* at 154.
346. *See id.* at 156.
347. *Id.* at 158.
348. *Id.*
349. *Id.*
350. *See supra* Part II.C. For a strong defense and criticism of the commander-centric model, see generally Joseph W. Bishop, Jr., *The Case for Military Justice*, 62 MIL. L. REV. 215, 216–21 (1973); Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps*, 28 SW. U. LAW REV. 481, 512–34 (1999).
351. Murphy, *supra* note 27, at 152.
352. *See id.* at 134. Similarly, Senator Kirsten Gillibrand's failed Military Justice Improvement Act, S. 967, 113th Cong. (2013), "called for the removal of certain offenses from command authority." *Id.* at 132.

other cases demonstrate.[353] For the same reasons, it would be problematic to give dispositional authority to anyone subject to the military chain of command.

The better solution, then, would be to remove dispositional authority from DoD personnel altogether.[354] Department of Justice ("DOJ") prosecutors would likely be the best candidates to receive this authority. At least some Assistant U.S. Attorneys have extensive experience prosecuting sex offenses.[355] Further, it is eminently feasible for the DoD and DOJ to work together, as JAGs often serve as Special Assistant U.S. Attorneys.[356] And Congress has already expressed a desire to have them work closely together on sexual assault issues. For example, VPA § 5 would require DoD and DOJ personnel to extensively collaborate on preventing and responding to sexual assaults.[357]

Objections to this change are not insurmountable. True, giving dispositional authority to outside prosecutors could create some difficulty in prosecuting Article 120 offenses when units are deployed. Yet DOJ prosecutors would only be making a referral decision based on a written record. And it is difficult to imagine plausible scenarios wherein a unit lacks the ability to conduct outside communications, but charges against a Service member must be preferred immediately and an Article 32 hearing must also be conducted without delay.

Some might also object to treating Article 120 cases differently than other cases in this regard. But, patently, the military and Congress already treat sexual assault cases differently.[358] Moreover, it makes sense to treat these cases differently because, as Part III demonstrated, Article 120 cases carry unusual risks of problems such as overprosecution and unlawful command influence.[359]

The most serious objection to removing dispositional authority from convening authorities is the fact that Congress is clearly loath to interfere with a commander's prosecutorial discretion. Most prominently, the Senate recently considered, and narrowly rejected, a bill that would have removed prosecutorial discretion from convening authorities and given it to JAGs.[360]

Congress is certainly correct to proceed cautiously when deciding whether to remove prosecutorial discretion from commanders. Com-

353. *See supra* Part III.A.

354. Concededly, this might create difficulties with budget coordination.

355. *See*, *e.g.*, U.S. Attorney's Office, D.C., *Sex Offense and Domestic Violence Section*, JUSTICE.GOV, http://www.justice.gov/usao/dc/divisions/superior_court_sex_offense_dv.html (last visited Oct. 12, 2015).

356. *See, e.g.,* U.S. NAVY JAG CORPS, GUIDE TO THE U.S. NAVY JAG CORPS 7, *available at* http://www.jag.navy.mil/careers_/careers/docs/JAG_Guide(May%202012).pdf.

357. Victim's Protection Act of 2014, S. 1917, 113th Cong. § 5 (2014).

358. *See supra* Part III.B.3.

359. *See supra* Part III.B.4–5.

360. 160 CONG. REC. S1374 (daily ed. Mar. 10, 2014) (statement of Sen. Barbara Mikulski); 160 CONG. REC. S1348–49 (daily ed. Mar. 6, 2014) (preventing an up-or-down vote on S. 1752 by a vote of 55–45); Niels Lesniewski, *Senate Blocks Gillibrand's Military Sexual-Assault Bill*, ROLL CALL (Mar. 6, 2014), http://blogs.rollcall.com/wgdb/senate-votes-on-dueling-sexual-assault-proposals/?dcz=.

manders must maintain good order and discipline within their units and historically have played essential roles in effectuating change in their commands during periods of military cultural change.[361] Removing prosecutorial discretion could fundamentally impair these functions. Therefore, this Note only argues that dispositional authority—the most problematic area—should be carved off from a commander's authority. The convening authority would otherwise generally[362] be permitted to retain his or her historic role in sexual assault cases.

Additionally, the arguments noted above are essentially arguments about how to best preserve military effectiveness and effectuate desirable cultural norms. While important, such considerations alone should not determine how a justice system operates when the system is creating problems of a constitutional magnitude. As Senator Kirsten Gillibrand noted, Congress must remember that, "at the end of the day, you want to have as close to an unbiased system as possible. . . . [You] want justice to be blind. That's the whole point. And in today's system, it is not blind."[363]

Unfortunately, Congress is not yet concerned with injustice to an accused. After killing the bill that would have removed the convening authority's prosecutorial discretion, the Senate then passed[364]—and the House considered[365]—a bill that "provid[ed] additional support to victims."[366] The Senate had one overriding reason for its policy choice: "We are here to protect victims today. We certainly want a system with due process, but this is about having more victims coming forward."[367] The Senate specifically noted that, to ensure justice, Israel, the United Kingdom, Canada, and Australia had removed the convening authority's prosecutorial discretion in cases comparable to our Article 120 cases and placed it in the hands of trained military prosecutors.[368] Those systems removed prosecutorial discretion from the chain of command to help ameliorate unlawful command influence problems and protect the rights of the accused.[369] U.S. legislators were distinctly unimpressed by these ra-

361. REP. OF THE ROLE OF THE COMMANDER SUBCOMM., *supra* note 1, at 2, 101. For a detailed discussion of the pros and cons of changing the commander's role in sexual assault cases, see *id.* at 91–114.

362. The commander should, however, have his pretrial authority to make decisions on defense requests for witnesses and other evidence curtailed. *See infra* Part IV.B.

363. REP. OF THE ROLE OF THE COMMANDER SUBCOMM., *supra* note 1, at 96–97.

364. 160 CONG. REC. S1377 (daily ed. Mar. 10, 2014).

365. *All Actions: S.1917—113th Congress (2013-2014)*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/senate-bill/1917/all-actions (last visited Oct. 12, 2015).

366. 160 CONG. REC. S1374 (daily ed. Mar. 10, 2014) (statement of Sen. Barbara Mikulski).

367. 160 CONG. REC. S1348 (daily ed. Mar. 6, 2014) (statement of Sen. Kelly Ayotte).

368. REP. OF THE ROLE OF THE COMMANDER SUBCOMM., *supra* note 1, at 100; *see* Lindsay Nicole Alleman, *Who is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, DUKE J. COMP. & INT'L L. 169 (2006) (citing the National Institute of Military Justice commission that surveyed military justice systems in U.K, Australia, India, Ireland, Mexico, South Africa, Canada, and Israel).

369. REP. OF THE ROLE OF THE COMMANDER SUBCOMM., *supra* note 1, at 101, 176.

tionales.[370] Presently, then, Congress remains firmly focused on increasing reporting and prosecutions of sexual assaults and protecting alleged victims, as opposed to protecting the rights of the accused.[371]

Yet, given the trends of increased reporting and prosecutions of military sexual assaults,[372] Congress may soon become amenable to further protecting the rights of the accused, especially if reform efforts are focused on only removing dispositional authority.

Change is particularly likely to occur if military leaders do not oppose it—something they appear increasingly willing to do. For example, General Mark Welsh, the U.S. Air Force Chief of Staff, told reporters that he was "open" to such a plan.[373] Further, when commenting on the defeat of the Senate bill that would have removed prosecutorial discretion from the chain of command, General Martin Dempsey, the Chairman of the Joint Chiefs of Staff, stated that if the military is unable to make a demonstrable difference in sexual assaults within a year, "I'm not going to fight [prosecutorial discretion] being taken away from us."[374]

C. Military Judges Should Be Given the Authority to Rule on Pretrial Matters from the Earliest of Pretrial Confinement or Preferral of Charges

The third change that the military justice system needs to make is to give military judges the authority to rule on pretrial matters from the earliest of pretrial confinement or preferral of charges.

Expanding the role of the military judge has long been viewed as a desirable change.[375] Most notably, a 2004 study ordered by the Army Judge Advocate General recommended that military judges should play a major role in pre-referral proceedings, concluding that "a [military judge's] supervisory role earlier in the military justice process . . . will

370. 160 CONG. REC. S1341 (daily ed. Mar. 6, 2014) (statement of Sen. Carl Levin) (stating that "when [our military] allies made the change—not to protect victims but to increase the rights of the accused—it did not lead to any increase in the reporting of assaults").

371. REP. OF THE ROLE OF THE COMMANDER SUBCOMM., *supra* note 1, at 113.

372. DEP'T OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013, *supra* note 5, at 2–5 (citing the National Institute of Military Justice commission's survey of military justice systems in the U.K, Australia, India, Ireland, Mexico, South Africa, Canada, and Israel).

373. Jennifer Hlad, *Welsh: Open to All Options to Stop Military Sexual Assault*, STARS & STRIPES (May 17, 2013), http://www.stripes.com/welsh-open-to-all-options-to-stop-military-sexual-assault-1.221302.

374. General Martin E. Dempsey, *Gen. Dempsey's Bloggers Roundtable Interview on Sexual Assault in the Military*, JOINT CHIEFS OF STAFF (Apr. 10, 2014), http://www.jcs.mil/Media/Speeches/tabid/3890/Article/571952/gen-dempseys-bloggers-roundtable-interview-on-sexual-assault-in-the-military.aspx; Larisa Epatko, *Military Deserves 'Scrutiny' on Sexual Assaults, General Dempsey Says*, PBS (Mar. 7, 2014), http://www.pbs.org/newshour/rundown/military-deserves-scrutiny-sexual-assaults-general-dempsey-says/.

375. *See, e.g.*, Frederic I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary–A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 638–39 (1994); U.S. DEP'T OF THE ARMY, MILITARY JUSTICE REVIEW 1, 3 (2004) (on file with the Response Systems Panel), *available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140312_ROC/Materials/02_Army_MilJusticeReview2004_ExecutiveSummary.pdf.

likely enhance[] the fairness and efficiency of our system."[376] To effectuate this, the study proposed the following amendment to the U.C.M.J.:

> Upon preferral of charges or imposition of pretrial restraint, the military judge shall exercise overall judicial supervisory authority for all procedural aspects of the case. Under such procedural regulations as may be prescribed by the Secretary concerned, this shall include, but not be limited to, the authority to review confinement decisions of military magistrates, to issue search authorizations, direct the scientific testing of evidence, order inquiry into the mental capacity or mental responsibility of the accused, and to issue no-contact orders and other protective orders as appropriate.[377]

With light editing, this amendment could be used to ensure the system's fairness and protect the accused's due process rights. First, as the Comparative Systems Subcommittee aptly noted, "pretrial restraint" should be replaced with "pretrial confinement" in order to avoid a rash of motions that would waste valuable judicial resources any time that a commander placed a liberty restriction on a Service member.[378] Second, a judge must expressly be given the authority to authorize requests and issue subpoenas for experts, witnesses, documents, and other evidence, using *ex parte* proceedings when necessary.[379] This would give defense counsel the option of avoiding providing the convening authority or trial counsel with confidential information that they would prefer not to disclose.[380]

The limitations of this approach are not outweighed by its benefits. True, this approach would increase the burdens on military judges substantially and may well require an expansion in size of the military trial judiciary.[381] But these pretrial procedures are critical aspects of cases. Further, as a general matter, the proposed additional judicial responsibilities are not unduly burdensome or civilian jurisdictions would not uniformly place them on judges.[382] Surely, an expansion of the duties and numbers of the trial judiciary is a small price to pay for ensuring an accused's constitutionally guaranteed rights and building public trust in the fairness and legitimacy of the military justice system.[383]

Giving military judges additional responsibilities and duties could also be viewed as taking control and authority away from commanders, trial counsel, and SJAs.[384] But these changes would not automatically strip commanders of their authority and control. They would simply provide an elective judicial bypass.[385] Moreover, as Part III explained, the

376. U.S. DEP'T OF THE ARMY, MILITARY JUSTICE REVIEW, *supra* note 363, at 3.
377. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 181–82 (citations omitted).
378. *Id.* at 182 n.831.
379. *See id.* at 183, 185.
380. *See supra* Part III.C.1.
381. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 181.
382. *See generally id.*
383. *See* discussion *supra* Part III.C.
384. *See* REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 181.
385. *Id.* at 180.

military justice system currently operates to an accused's detriment in an adult rape case.[386] As a result, a truly neutral decision maker with "meaningful oversight"[387] capabilities is necessary to protect an accused's due process rights and counteract overzealous prosecution.

Finally, changing a military judge's responsibilities would require significant amendment to the Rules for Courts-Martial and several U.C.M.J. Articles.[388] For example, the rules and Articles regulating pretrial punishment,[389] pretrial confinement,[390] no-contact orders,[391] inquiries into mental capacity,[392] contempt power,[393] depositions,[394] production of witnesses and evidence,[395] and the responsibilities of the military judge,[396] would all have to be expanded.[397] Yet this objection has little force given the sweeping changes to sexual assault cases that Congress has recently enacted.[398] If the last three NDAAs can contain over one hundred new requirements primarily benefiting an alleged victim,[399] surely these few Articles and rules can be changed in order to ensure fairness for the accused.

D. Unitary Sentencing Should Be Eliminated and a Military Judge Should Be the Sole Sentencing Authority in Noncapital Cases

The last change that this Note proposes is altering sentencing procedures to eliminate unitary sentencing and to make a military judge the sole sentencing authority in noncapital cases.

1. Unitary Sentencing Should Be Discarded

Currently, the military justice system uses unitary sentencing, meaning that the sentences for all specifications (counts) for which a Service member is convicted are aggregated.[400] The military, however, should impose a sentence for each offense for which a Service member is found guilty.[401]

386. *See supra* Part III.C.
387. *See generally* REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE, *supra* note 1, at 181.
388. *Id.*
389. U.C.M.J. art. 13; MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 304.
390. U.C.M.J. art. 10; MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 305.
391. U.C.M.J. art. 13(a); *see generally* MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 304(a), 305(a).
392. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 706.
393. U.C.M.J. art. 48, 66, 98; MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 801, 809(a)(2).
394. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 702.
395. *Id.* at 703.
396. *Id.* at 801.
397. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 183.
398. *See supra* Part III.B.3.
399. EXEC. SUMMARY: REP. TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE, *supra* note 187, at 14.
400. *See generally* Jackson v. Taylor, 353 U.S. 569 (1957); United States v. Weymouth, 43 M.J. 329, 336 (C.A.A.F. 1995).
401. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 229.

There are overwhelming advantages to abandoning unitary sentencing. First, it facilitates transparency because the sentencing authority would "directly and publicly address . . . the punishment that fits a particular crime."[402] This is particularly desirable when an accused is charged with a mixture of felony-level offenses (e.g., rape) and misdemeanor-level offenses (e.g., underage drinking).[403] A unitary sentence in such a case could obscure whether a Service member was properly being held accountable for a sexual assault.[404]

Second, this change could result in trials and charges that are more focused.[405] Essentially, "the legally relevant criminal transaction [would be] given fuller attention in place of a series of charges that may confuse or distract the trier of fact."[406]

Additionally, this solves one of the problems resulting from Congress restricting the convening authority's clemency power in Article 120 cases.[407] Because an accused is often convicted of an Article 120 offense along with non-sexual offenses over which the convening authority still has clemency power, it is unclear whether a convening authority may exercise its clemency power on non-sexual offenses if only one sentence is adjudged for all counts.[408] If the sentences were separate, however, the convening authority could clearly exercise its authorized clemency power on non-Article 120 offenses.

Moreover, dispensing with unitary sentencing could reduce the number of cases that an appellate court remands for a sentencing rehearing.[409] These rehearings burden victims because they must appear at them, which can prevent emotional closure for these individuals.[410] They can also impose large systemic costs because rehearings may "be time consuming, costly and logistically challenging because witnesses move, deploy, and separate from the Service."[411]

Concededly, the Service branches generally oppose this change, arguing that it would complicate sentencing and that more studies of its po-

402. *Services' Responses to Request for Information #149*, RESPONSE SYSTEM PANEL (Apr. 11, 2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q149.pdf.

403. *Id.*

404. *See id.*

405. *Id.*

406. *Id.*

407. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672 (2013). Admittedly, however, this would not solve all of the likely unintended results of Congress altering Article 60. Unless Congress re-amended Article 60, a convening authority would not be able to "provide relief from forfeitures of pay to dependents of convicted Service members." REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 38. Moreover, Service members who are not punitively discharged or confined for one year would still effectively be unable to receive any post-trial relief because the only way they could access appellate review would be by an Article 69 review requested by the Office of the Judge Advocate General. *Id.* at 38.

408. *See* REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 229.

409. *Id.*

410. *Id.*

411. *Id.*

tential impacts are needed.[412] All proposals would benefit from more study, but given the major difficulties with the current system outlined above, that objection alone should not be a basis for sustaining unitary sentencing. Moreover, while non-unitary sentencing would be more difficult for a member panel,[413] this Note proposes that *judges* become the sole sentencing authority in noncapital cases.[414] Adjudging sentences for each offense for which a Service member is convicted is certainly not a task beyond the expected competence of judges. After all, judges hand down sentences for each count in civilian systems all the time.[415]

2. Military Judges Should Be the Sole Sentencing Authority in Noncapital Cases

In addition to eliminating unitary sentencing, sentencing practices should be amended so that only judges are the sentencing authority in noncapital cases.[416] There are significant advantages to this change.

First, judges have more legal training and experience than panel members do. Judges are highly qualified attorneys and military officers who are carefully chosen by their branch's Judge Advocate General for their excellence in both capacities, their legal knowledge and experience, and their judicial temperament.[417] Judges generally have experience in sentencing and are trained to select sentences that reflect the particular nature of a given charge.[418] Panel members, on the other hand, need not have any legal experience whatsoever[419] and typically have no experience with adjudging sentences—a deficit that can rarely be rectified through jury instructions.[420] As members have complained, sentencing itself is difficult and complex, particularly because a court-martial may try all offenses allegedly committed by an accused at once, regardless of whether the offenses are related to each other,[421] and there are wide ranges of po-

412. *Services' Responses to Request for Information #149*, *supra* note 402.

413. *See id.*

414. *See infra* Part IV.D.2.

415. *See supra* Fig.5.

416. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 228. Some members of the Response Systems Panel, as well as the Service branches, reject this position, typically on the grounds that more studies are needed before dispensing with member sentencing and that this change takes away an accused's option to be sentenced by a member panel. *See id.* at 227 n.1055, 228; *see also Services' Responses to Request for Information #148*, RESPONSE SYS. PANEL 60–64 (Apr. 11, 2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q148.pdf; *Services' Responses to Request for Information #84*, *supra* note 225, at 2.

417. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 224; *see* U.C.M.J. art. 26(a)–(b); MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 502(c).

418. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 224.

419. *See generally* U.C.M.J. art. 25(a)–(c)(1); United States v. Gutierrez, 11 M.J. 122, 125 (C.M.A. 1981) (Everett, C.J., concurring).

420. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 225.

421. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 307(c)(4); REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 225.

tential punishments.[422] The combination of little or no legal or sentencing experience on the part of members and the often-confusing nature of sentencing indicate that sentencing disparity may well result from continuing to allow member sentencing.[423]

Second, judge-only sentencing is less administratively burdensome than member sentencing is. Members are detailed to serve on the member panel,[424] which means that panel members must be absent from their ordinary duty stations for the duration of court proceedings. As a result, "ordinary military training and operations" are disrupted.[425] If military judges were to become the sole sentencing authorities, this disruption would be for a shorter time period.[426]

Moreover, both public and victim confidence in the military justice system may be undermined by permitting member sentencing to continue.[427] Convening authorities detail Service members whom they believe to be the "best qualified for the duty" to serve on member panels.[428] Regardless of whether the convening authority details Service members in a completely unbiased and fair manner, this power, combined with the extensive role that the convening authority plays in pretrial, trial, and post-trial proceedings,[429] may create "the perception of unfairness."[430] If an accused believes that the convening authority would unfairly interfere with the trial, he may choose a trial by a military judge alone.[431] But an alleged victim has no such recourse if they believe that the convening authority is not fair.[432] Further, the public may question the convening authority's panel selections regardless of the outcome of the trial. If the sentence is lenient, the public may believe that the convening authority detailed members who would be lenient.[433] If the sentence is exceptionally harsh, the public may question the military justice system's fairness.[434] These sentences may also affect the confidence that victims of sexual assault have in the system, which may, in turn, affect a victim's willingness to report assaults.[435]

422. Potential sentences include reprimand, death, forfeiture of pay and allowances, fines, reduction in pay grade, restriction to specified limits, confinement, hard labor without confinement, punitive separation, and bad conduct discharge. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 1003(b).

423. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 225; *see also* Immel, *supra* note 325, at 186–87; Kisor, *supra* note 310, at 56.

424. MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 503(a).

425. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 226.

426. *Id.*

427. *Id.*

428. U.C.M.J. art. 25(d)(2).

429. *See supra* Part II.A.

430. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 226; *see also* Brigadier General John S. Cooke, *The Twenty Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 25 (1998).

431. *See* MANUAL FOR COURTS-MARTIAL, *supra* note 40, at 805(b).

432. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 226.

433. *Id.*

434. *Id.*

435. *Id.* at 227; *see also* STAFF OF THE VICTIM SERVS. SUBCOMM., REPORT OF THE VICTIM SERVICES SUBCOMMITTEE TO THE RESPONSE SYSTEM TO ADULT SEXUAL ASSAULT CRIMES PANEL 42–47 (May 2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/03_VSS/VSS

There are, however, those who believe that the military community as a whole prefers sentencing by members. They argue that the military community may view such sentencing as particularly fair because members are in the best position to assess a specific command climate and how the accused's alleged offense impacts it.[436] Yet this argument overlooks the fact that judges *are* attuned to offenses' command impact, even if such judgments can best be made by one possessing combat experience, because judges can deploy and often have operational positions before becoming members of the judiciary.[437] Others argue that member sentencing should be retained because it helps future leaders gain more knowledge of the court-martial process and therefore become better leaders.[438] But these interests are already furthered by permitting members to participate in trials, "and eliminating *sentencing* by members does not preclude or diminish such participation."[439]

Perhaps the most important objection to this change is that eliminating the option to choose sentencing by members could be viewed as taking away an important right of the accused.[440] Despite the fact that an accused will often choose trial before members,[441] and therefore sentencing by a member panel,[442] it is entirely possible that the accused was only choosing a trial by members, as opposed to expressing a sentencing preference.[443] Because an accused's forum selection determines both who will conduct the trial and the sentencing, it is impossible to determine what the accused was actually expressing a preference for by selecting member sentencing.[444] Importantly, judge-only sentencing in noncapital cases would still permit trial before members. But it would also ensure that an accused would receive a sentencing authority with the most experience, expertise, and emotional detachment—a sentencing authority who is most likely to consistently render fair decisions that reinforce perceptions of system legitimacy by the victim, the accused, and the general public.

_Report_Final.pdf; Marlene Higgins, Note, *The Air Force Academy Scandal: Will the "Agenda for Change" Counteract the Academy's Legal and Social Deterrents to Reporting Sexual Harassment and Assault?*, 26 WOMEN'S RTS. L. REP. 121 (2005).

436. *See* REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 227.

437. *Id.* at 227 n.1057. Also, enlisted members of the same unit are prohibited from serving on the member panel. U.C.M.J. art. 25(c)(1).

438. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 228.

439. *Id.* (emphasis in original).

440. *Id.* at 227.

441. *Id.*

442. *See supra* Fig.5.

443. REP. OF THE COMPARATIVE SYS. SUBCOMM., *supra* note 1, at 227 n.1058.

444. *Id*. at 228 n.1062.

V. CONCLUSION

The military justice system has been radically altered over the last few years, as Congress, the President, and DoD personnel have sought to limit the prevalence of and punish military sexual assaults. While sexual assault within the military is undoubtedly a serious problem that must be addressed, the military's response to the epidemic of sexual assaults in its ranks raises profound procedural due process concerns for those accused of such crimes.

These due process problems stem from the military justice system's unique structure and the incentives in sexual assault cases. The military has adopted an exceptionally victim-centric and aggressive approach to eliminating sexual assaults that places tremendous internal and external pressure on commanders to swiftly and severely punish any and all alleged sexual offenders. Commanders have responded by pushing sexual assault cases with poor profiles to courts-martial. Unfortunately, an accused will face inequities throughout the pretrial, trial, and sentencing phases of these court-martials. And defense counsel, unlike the prosecution, will be forced to operate in a mother-may-I system that consistently places them at a significant disadvantage.

These problems are exacerbated by factors calling into question the fairness and legitimacy of the system. Individuals who have themselves committed sexual misconduct have been placed in charge of prosecuting and preventing sexual assault. The military's decision-making process, even when nominally open, is markedly opaque. Further, members of the chain of command have sent signals as to expected results in sexual assault cases down the chain of command, while others, including JAGs, have more directly interfered with cases. As a result, at least the potential for unlawful command influence permeates the proceedings.

Unfortunately, these problems "will not end in this current climate of constant effort to eradicate sexual assault."[445] Consequently, the military justice system must enhance the accused's due process rights in order to ensure system legitimacy, justice, and a fair trial.

This Note has proposed four ways that this could be done that would also significantly reduce the risk of unlawful command influence, enhance system legitimacy, and strengthen an accused's due process rights. Specifically, the military justice system should be altered so that: (1) defense organizations are provided with adequate funding and personnel, including independent, deployable investigators; (2) disposition authority is given to independent prosecutors; (3) military judges are given the authority to rule on pretrial matters from the earliest of pretrial confinement or preferral of charges; and (4) sentencing practices are changed so that unitary sentencing is eliminated and military judges are

445. Murphy, *supra* note 27, at 182 ("[T]he problem of [unlawful command influence], overemphasis on victim concerns to the detriment of the accused, and further amendments to the U.C.M.J. will not end in this current climate of constant effort to eradicate sexual assault.").

the sole sentencing authority in noncapital cases. More changes may be necessary, but these changes would interfere with current practices to the minimum extent necessary to ensure an accused's due process rights in sexual assault cases. They would also substantially ensure that the military justice system operates as it should—providing justice to both the accused and the alleged victim.