

NOTES

OVERCOMING OVERCORRECTION: TOWARDS HOLISTIC
MILITARY SEXUAL ASSAULT REFORM

*Greg Rustico**

INTRODUCTION..... 2028

I. THUMB ON THE SCALE? CURRENT PROCEDURES AND
STRUCTURAL BIASES 2034

 A. *General Procedures*..... 2035

 B. *Sexual Assault-Specific Procedures* 2039

 1. *Victim-Related Reforms*..... 2040

 2. *Accused-Related Reforms*..... 2042

 3. *Commander-Related Reforms* 2045

II. DEMANDING CONVICTIONS? THE INFLUX OF UNLAWFUL
COMMAND INFLUENCE..... 2046

 A. *Traditional UCI Doctrine* 2047

 B. *UCI in the Sexual Assault Context* 2050

 C. *Case Study: The Heritage Brief*..... 2052

III. CREATING AWARENESS OR A PRESUMPTION OF GUILT?
UNINTENDED CONSEQUENCES OF SAPR TRAINING 2055

 A. *Background*..... 2055

 B. *Case Study: Navy SAPR Training Programs* 2057

IV. LASTING CHANGE? THE SHORTCOMINGS OF PROPOSED
REFORMS 2060

 A. *Military Justice Improvement Act*..... 2060

 B. *Victims Protection Act*..... 2062

 C. *Utilizing Specialization: Long-Lasting Reform that
Transcends the Current Debate*..... 2064

 1. *Addressing Accusatory UCI by Altering the
Dispositional Authority* 2064

* J.D. 2016, University of Virginia School of Law; M.Ed. 2013, B.A. 2011, University of Notre Dame. I would like to thank Professor Anne Coughlin for her guidance, support, and feedback during the development of this Note. I would also like to thank Nick Carullo, Jad Khazem, Marc Nowak, Gretchen Jewell, and the other editors of the *Virginia Law Review* for their helpful feedback. All errors are mine.

2. <i>Addressing Adjudicative UCI with Curative Trial Practices and SAPR Reform</i>	2070
CONCLUSION.....	2071

INTRODUCTION

IN 1992, allegations surfaced that eighty-three women and seven men had been sexually assaulted at the thirty-fifth annual Tailhook Symposium, a conference for Navy and Marine Corps pilots.¹ News of the event and the subsequent public outcry prompted the resignation of the Secretary of the Navy and the censure of several admirals.² The scandal spurred the enactment of a reform agenda that preached zero tolerance for sexual assault,³ and the ordeal was described at the time as a “watershed event” that would fundamentally change the military’s culture.⁴

Twenty-three years later, sexual assault remains a pervasive problem.⁵ As the issue gained mainstream attention, most notably in the summer of 2013,⁶ there was justifiable outrage and renewed calls to action. Pundits

¹ Melissa Healy, Pentagon’s Tailhook Report Expected to Detail Obstruction, Cover-Up: Scandal: Separate Inquiry Will Deal with Specific Charges in the Sexual Abuse of Women at an Aviators’ Convention, L.A. Times (Sept. 16, 1992), http://articles.latimes.com/1992-09-16/news/mn-939_1_sexual-harassment [<https://perma.cc/2XAD-8VLS>]; Michael Winerip, Revisiting the Military’s Tailhook Scandal, N.Y. Times (May 13, 2013), <http://www.nytimes.com/2013/05/13/booming/revisiting-the-militarys-tailhook-scandal-video.html> [<https://perma.cc/Q2YN-QDS4>].

² Winerip, *supra* note 1.

³ *Id.*

⁴ Healy, *supra* note 1 (internal quotation marks omitted) (citation omitted).

⁵ See *infra* note 6. Throughout this Note I use the term “sexual assault” to include rape, sexual assault, aggravated sexual contact, abusive sexual contact, stalking, and other sexual misconduct. See 10 U.S.C. §§ 920, 920a, 920b, 920c (2012) (defining sex-related crimes under the Uniform Code of Military Justice).

⁶ See, e.g., Chelsea J. Carter & Ashley Fantz, Obama: Pentagon Leaders ‘Ashamed’ over Sexual Assaults Plaguing Military, CNN (May 17, 2013, 8:07 AM), <http://www.cnn.com/2013/05/16/us/military-sexual-assault> [<https://perma.cc/6JJ8-RU75>]; Darren Samuelsohn, General Out over Sex-Case Decisions, Politico (Jan. 8, 2014, 12:26 PM), <http://www.politico.com/story/2014/01/air-force-sexual-assault-craig-franklin-101900.html> [<https://perma.cc/2WAK-QLV9>]; Jennifer Steinhauer, Sexual Assaults in Military Raise Alarm in Washington, N.Y. Times (May 7, 2013), <http://www.nytimes.com/2013/05/08/us/politics/pentagon-study-sees-sharp-rise-in-sexual-assaults.html> [<https://perma.cc/8PFZ-F5GX>]. In fact, this issue gained traction in popular culture. For instance, sexual assault in the military featured prominently in Season Two of the hit political drama *House of Cards*. The female protagonist, Claire Underwood, revealed that a military officer had sexually assaulted her. She subsequently lobbied for military justice reform, which was a thinly-veiled copy of Senator Gillibrand’s bill. See *House of Cards: Season Two*, Netflix (2014), <https://www.netflix.com/title/70178217>.

and activists spoke out, while politicians and policymakers scrambled to address the problem. Congressional hearings were held,⁷ and legislation was proposed, such as Senator Kirsten Gillibrand's Military Justice Improvement Act⁸ ("MJIA") and Senator Claire McCaskill's Victims Protection Act⁹ ("VPA"), which sought to reform the way sexual assault accusations were managed within the military justice framework.

The impetus behind these bills and much of the outrage in the media was not merely that sexual assault was occurring in our military, but that commanders were using the discretion granted to them under the Uniform Code of Military Justice ("UCMJ") to disregard victims¹⁰ and sweep these accusations under the rug. The military was seen—quite justifiably so—as a harbor for sex offenders. Nevertheless, as the summer wore to a close and the twenty-four-hour news cycle churned out new and different scandals, the national spotlight shifted away from this issue. Both Senator Gillibrand's and Senator McCaskill's legislation failed,¹¹ and the military justice structure was left mostly unchanged.¹²

Though much of the nation largely forgot about the issue of military sexual assault, members of the armed services did not. There was a rapid and concerted effort to root out this problem, which had publically embarrassed the military brass and undermined the military's credibility and reputation. Sexual Assault Prevention and Response ("SAPR") trainings were created and expanded.¹³ Innumerable briefings were given to military members and civilians alike that stressed the importance

⁷ See, e.g., Meredith Clark, *At Military Sexual Assault Hearing, Expect Mostly Men*, MSNBC (Dec. 20, 2013, 6:04 PM), <http://www.msnbc.com/melissa-harris-perry/military-sexual-assault-hearing-expect-mo> [<https://perma.cc/GU8Y-2FLE>].

⁸ S. 967, 113th Cong. (2013).

⁹ S. 1917, 113th Cong. (2014).

¹⁰ For the sake of consistency, the term "victim" is used throughout this Note to refer to those who have been sexually assaulted. Many advocacy groups prefer the term "survivor," see, e.g., Letter to the Editor, *Letter: Sexual Assault Survivors, Not Victims*, N. Tex. Daily (Apr. 8, 2015), <http://ntdaily.com/letter-sexual-assault-survivors-not-victims> [<https://perma.cc/KUH2-6QEW>], but the vast majority of sexual assault statutes and literature use the term "victim." See, e.g., *Victims Protection Act of 2014*, S. 1917, 113th Cong. (2014); *Manual for Courts-Martial, United States*, Mil. R. Evid. 514 (2012) [hereinafter MCM]. Thus, the term "victim" is used merely to ensure consistency with the law rather than to make a value judgment.

¹¹ See *infra* Sections IV.A–IV.B.

¹² Some substantive changes were made to the treatment of sexual assault cases, but the basic framework of military justice remained the same. See *infra* Section I.B.

¹³ See *infra* Part III.

of reporting and prosecution.¹⁴ In fact, President Obama stated publically, “The bottom line is, I have no tolerance for this If we find out somebody’s engaging in this stuff, they’ve got to be held accountable, prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged — period.”¹⁵ These actions and statements were effective: Military members took notice. Reporting and prosecution across all branches of the armed services skyrocketed.¹⁶ The military seemed to be making huge strides in dealing with this systemic issue.

However, in the absence of structural change, a new and troubling problem has emerged. The same discretion that allowed commanders to disregard victims and ignore this issue can also be used to railroad defendants and risks miscarriages of justice.¹⁷ Public statements by high-ranking officials, such as the President and the Commandant of the Marine Corps, serve not only to bring attention to this important issue, but also to influence court-martial members¹⁸ and undermine the presumption of innocence. Such statements pressure commanders to refer any and all charges to trial and encourage court-martial members to convict,¹⁹ which undercuts the procedural rights of the accused.

Unsurprisingly, the data reflect this reality. For instance, from 2011 to 2014, the number of final dispositions rose 55%, while the number of

¹⁴ See *infra* Section II.C.

¹⁵ Craig Whitlock, *Obama Delivers Blunt Message on Sexual Assaults in Military*, Wash. Post (May 7, 2013) (internal quotation marks omitted), <http://wpo.st/FR362> [<https://perma.cc/DH2S-BMDQ>].

¹⁶ Helene Cooper, *Pentagon Study Finds 50% Increase in Reports of Military Sexual Assaults*, N.Y. Times (May 1, 2014), http://www.nytimes.com/2014/05/02/us/military-sex-assault-report.html?_r=0 [<https://perma.cc/MYL2-B27X>]; see also *infra* note 20 and accompanying text (outlining the rise in final dispositions and convictions).

¹⁷ It is important to remember that our justice system is built on the presumption of innocence and the beyond-a-reasonable-doubt standard. We err on the side of innocence because our society has decided that “it is better that ten guilty persons escape, than that one innocent suffer.” 5 William Blackstone, *Commentaries*, bk. IV at *358–59. While the exact ratio is irrelevant, the theory is that false convictions are more objectionable than false acquittals. See generally Joel S. Johnson, Note, *Benefits of Error in Criminal Justice*, 102 Va. L. Rev. 237 (2016) (defending the Blackstone Principle).

¹⁸ In the military justice system, the members of what civilians would call a jury are referred to as “court-martial members” or sometimes “panel members.” See, e.g., MCM, *supra* note 10, R.C.M. 502; *id.* app. 21 at 63. Those terms are used interchangeably throughout this Note.

¹⁹ See Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 Mil. L. Rev. 129, 148–49 (2014).

convictions rose 127%.²⁰ Although an increase in convictions should be expected and perhaps welcomed, statistics as high as these raise concerns about the legitimacy of the military justice system. The desire to appear “out in front” of this problem has led to an emphasis on increasing convictions rather than true cultural change and holistic justice reform.

Many of the reforms enacted and the actions taken in response to the sexual assault scandal were well-meaning and necessary,²¹ but in the absence of broader structural change, they are incomplete and potentially counterproductive. Well-intentioned policies can backfire when they fail to address deep, structural problems. Furthermore, any progress made towards ameliorating sexual assault in the military will prove fleeting if the investigation, prosecution, and trial processes remain entirely within the discretion of commanders who are not well-positioned to manage this complex legal issue. Rather than leaving the disposition of sexual assault cases in the hands of commanders, independent lawyers—more specifically, experienced Judge Advocate General (“JAG”) officers²²—should exercise prosecutorial discretion with regard to not only sexual assault cases, but to all crimes with civilian analogues. Similarly, uniform jury instructions should be drafted to minimize the impact of extrajudicial statements and other outside influences that could affect panel members’ deliberations and, ultimately, the outcome of trials. Lastly, the language of sexual assault prevention programs should be carefully vetted to avoid creating a presumption of guilt among service members. Only after holistic reforms are implemented can both victims and defendants be assured fairness, and only then can we be confident that justice is being done within the military.

²⁰ Compare Dep’t of Def., Sexual Assault Prevention and Response Office, Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2011, at 32, 45 (2012) [hereinafter Sexual Assault Data: 2011], <http://sapr.mil/public/docs/reports/DepartmentofDefenseFiscalYear2011AnnualReportonSexualAssaultintheMilitary.pdf> [<http://perma.cc/8UVU-H3SW>] (2,353 defendants processed and 191 convictions), with Dep’t of Def., Sexual Assault Prevention and Response Office, Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2014 app. A at 9, 29 (2015) [hereinafter Sexual Assault Data: 2014], http://sapr.mil/public/docs/reports/FY14_Annual/FY14_Annual_Report_Appendix_A.pdf [<https://perma.cc/ZKU9-XUEW>] (3,648 defendants processed and 434 convictions).

²¹ See Section I.B. These reforms include streamlined reporting and added protections for victims. See Section I.B.

²² Judge Advocate General (“JAG”) is the title given to uniformed military lawyers.

Victims' advocates should not rest on the fact that prosecutions and convictions are on the rise.²³ As long as discretion remains in the hands of commanders, rather than independent prosecutors, any success will be fleeting. The same discretion that was used in the past to ignore sexual assault could also be used in the future to brush this issue under the rug in an effort to demonstrate results. Past scandals have demonstrated that military members can succumb to the temptation to alter data in order to change the narrative;²⁴ there is no reason to think the same could not happen with sexual assault, especially considering the incredible pressure to demonstrate progress in combating this problem. While prosecutorial discretion remains in the hands of commanders, the temptation remains to disregard victims in order to change perceptions about military sexual assault. An overcorrection has taken place, but the commanders are still behind the wheel. The criminal justice system should not be hitched to the pendulum of public perception. Victims' advocates, the defense bar, and the military brass should support durable reform that insulates the military justice system from the changing winds of public opinion and seek a system anchored in fairness and the pursuit of justice.

This Note brings a different perspective by analyzing the issue of military sexual assault from the often-ignored perspective of defendants, arguing that the military justice system, which once failed victims, is now failing the accused. Besides defense attorneys arguing on behalf of their clients, few have taken this position, and those who have discussed these issues have not provided a sustained discussion of potential reforms.²⁵

²³ Compare Sexual Assault Data: 2011, *supra* note 20, at 45 (191 convictions), with Sexual Assault Data: 2014, *supra* note 20, app. A at 29 (434 convictions).

²⁴ The idea that the military would seek to manipulate data is not so farfetched. The recent scandal involving misleading reports about the fight against the Islamic State, or ISIS, is telling. See Mark Mazzetti & Matt Apuzzo, *Analysts Detail Claims That Reports on ISIS Were Distorted*, N.Y. Times (Sept. 15, 2015), http://www.nytimes.com/2015/09/16/us/politics/analysts-said-to-provide-evidence-of-distorted-reports-on-isis.html?_r=0 [<https://perma.cc/MA6Z-59VW>].

²⁵ One possible exception is a student piece published shortly before this Note. See Heidi L. Brady, *Note, Justice Is No Longer Blind: How the Effort to Eradicate Sexual Assault in the Military Unbalanced the Military Justice System*, 2016 U. Ill. L. Rev. 193. Brady's piece identifies many of the same deficiencies in the military justice system that are discussed here. The similarities between portions of Brady's piece and this Note add weight and legitimacy to many of the arguments found in this Note, hopefully creating a chorus of support for military justice reform that acknowledges the rights of the accused. However, the pieces are far from identical; Brady reaches different conclusions regarding the path forward, and her policy recommendations are distinct from those found here. Compare *id.* at 240 (calling

Viewing this emotional issue from the perspective of a defendant is not intended to undermine, doubt, or discount victims or the larger problem of sexual assault in both the military and our broader society. Rather, the goal of this Note is to add a new perspective in the hope of spurring more durable, lasting, and balanced reforms. This Note synthesizes problems within the military justice system that, when considered in isolation, may seem insignificant compared to the broader problem of sexual assault. However, when considered in concert, the picture is clear: The military justice system remains deeply broken, but it is not beyond repair. As such, this Note then presents a series of reforms that would ensure a fairer, more stable military justice system for both victims and defendants.

This Note will proceed in four parts. Part I will serve as an overview of the military justice system. A familiarity with the unique features of the military justice system and the court-martial process is vital to understanding these issues. Part I will also analyze some of the procedural changes that have been made in response to the sexual assault epidemic. Part II will summarize the doctrine of unlawful command influence (“UCI”) and examine how it applies to sexual assault in the military. Part III will look more closely at the content of SAPR trainings, which all service members and civilian employees attend on a regular basis, and consider the potential unintended consequences of this training on the military justice system. Finally, Part IV will evaluate the reform proposals put forth by Senator Gillibrand and Senator McCaskill and offer an alternative model that would facilitate a system of justice that is fair to both victims and the accused by placing the disposition of traditional crimes in the hands of independent prosecutors while leaving military-specific crimes in the hands of commanders.

for the Department of Justice to handle military sexual assault cases), with *infra* Subsection IV.C.1 (recommending division of labor between commanders and military prosecutors); compare also Brady, *supra* at 242–44 (recommending altering the role of the military judge in pretrial matters), with *infra* Subsection IV.C.2 (recommending that uniform jury instructions be drafted to assuage fears of unlawful command influence). A full-throated response to her piece is beyond the scope of this Note (as well as the time constraints of publishing). Nevertheless, a few critiques of Brady’s piece and points of distinction have been inserted where possible.

I. THUMB ON THE SCALE? CURRENT PROCEDURES AND STRUCTURAL BIASES

The UCMJ is the constitutive document of nearly all U.S. military law. Passed by Congress under explicit authorization in the U.S. Constitution,²⁶ it defines both the procedural and substantive laws that govern the actions of military members around the globe.²⁷ Initially passed by Congress and signed by President Truman in 1950,²⁸ the UCMJ has undergone various amendments over the past sixty-plus years,²⁹ but its essential structure remains the same. It is divided into twelve subchapters and 146 articles that outline apprehension, investigation, pretrial, trial, and post-trial procedures as well as fifty-seven crimes, ranging from adultery to murder.³⁰

While the UCMJ outlines basic procedures, Article 36 of the UCMJ grants the President the authority to prescribe “[p]retrial, trial, and post-trial procedures . . . generally recognized in the trial of criminal cases in the United States district courts.”³¹ The President has used this authority to supplement the UCMJ by publishing the Manual for Courts-Martial (“MCM”) via executive order.³² The MCM provides specific procedural guidelines, the Rules for Courts-Martial, the Military Rules of Evidence, and detailed commentary.³³ The MCM also contains sample documents and guidance for JAG officers.³⁴

Although many of the military trial procedures are comparable to those of federal or state courts, there are significant differences in the pre- and post-trial procedures that are crucial to one’s understanding of

²⁶ U.S. Const. art. I, § 8, cl. 14 (“To make Rules for the Government and Regulation of the land and naval Forces[.]”).

²⁷ See 10 U.S.C. §§ 801–946 (2012).

²⁸ Truman Signs Code of Service Justice; Bill Provides a Civilian Court of Military Appeals and Safeguards Defendants, *N.Y. Times*, May 7, 1950, at 82.

²⁹ See, e.g., National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, §§ 1061–67, 106 Stat. 2315, 2503–06 (1992) (amending the UCMJ); National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, §§ 801–08, 100 Stat. 3816, 3905–10 (1986) (same).

³⁰ See 10 U.S.C. §§ 801–946 (2012); see also UCMJ art. 134 (2012) (listing adultery as an offense under the UCMJ).

³¹ 10 U.S.C. § 836(a) (2012).

³² The current version of the MCM was published in 2012, but was most recently amended in May 2016. See Exec. Order No. 13,730, 81 Fed. Reg. 33,331 (May 20, 2016).

³³ See generally MCM, *supra* note 10 (outlining the military justice process).

³⁴ See, e.g., MCM, *supra* note 10, apps. 18–20, 22 (providing various sample documents for JAG officers and guidance regarding certain aspects of the Manual for Courts-Martial).

how the military justice system handles sexual assault. Section I.A will outline the basic timeline and structure of a case, from reporting to confirmation of sentence. Section I.B will summarize and evaluate some of the recent reforms that affect the adjudication of sex-related cases.

A. General Procedures

Much like any other criminal law system, the military justice system begins with a report of an alleged crime. In the military context, such a report “shall [be] forward[ed] as soon as practicable . . . to the immediate commander of the suspect.”³⁵ Upon receiving this information, the immediate commander “shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.”³⁶ The format of this inquiry will vary greatly depending upon the accusation that has been made. The commander may conduct the investigation personally, assign members of the command to conduct the investigation, or seek the assistance of civilian or military law enforcement personnel.³⁷

During the pendency of such an inquiry, the commander can choose to order pretrial restraint—including pretrial confinement—of the accused if it is deemed necessary based upon the situation.³⁸ When the initial investigation is complete, the initial disposition of the case is typically left to the discretion of the suspect’s immediate commander.³⁹ The commander may choose one of five initial dispositions: (1) no action; (2) administrative action; (3) nonjudicial punishment; (4) disposition of charges; or (5) forwarding for disposition.⁴⁰

³⁵ Id. R.C.M. 301. Who qualifies as the “immediate commander of the suspect” in this context will vary based upon the branch of service. However, “commander” is defined as “a commissioned officer in command or an officer in charge . . . unless the context indicates otherwise.” Id. R.C.M. 103(5).

³⁶ Id. R.C.M. 303.

³⁷ Id. R.C.M. 303 (discussion section).

³⁸ Id. R.C.M. 304(a) & (c). Pretrial restraint includes conditions on liberty, restriction in lieu of arrest, arrest, and pretrial confinement. Id. R.C.M. 304(a). Pretrial restraint decisions are made based upon the circumstances, but probable cause must be present prior to any pretrial restraint. Id. R.C.M. 304(b)–(c). For more information regarding requirements for and restrictions on pretrial restraint and pretrial confinement, see id. R.C.M. 304–05.

³⁹ Id. R.C.M. 306(a). The commander has the authority to forward the matter to a superior authority for disposition, see id. R.C.M. 306(c)(5), but it is the express policy of the MCM that “[a]llegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition,” id. R.C.M. 306(b).

⁴⁰ Id. R.C.M. 306(c).

The initial disposition of the case is a crucial stage and deserves further explanation. The MCM states that the disposition decision is “one of the most important and difficult decisions facing a commander.”⁴¹ The commander is told to consider circumstances such as the nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused,⁴² availability and admissibility of evidence, the willingness of the victim to testify, possibility of concurrent jurisdiction, and military exigencies.⁴³ In essence, the commander—despite having little to no formal legal training⁴⁴—is asked to play the role of a prosecutor at this stage in the process. He or she is being asked to exercise prosecutorial discretion, but with two major differences: (1) the accused is a member of the commander’s unit; and (2) there is a wider range of dispositions available to a commander than his or her civilian counterpart. While the initial disposition is not the final say on a matter,⁴⁵ in many cases the decision is never reviewed.⁴⁶

Each of the five dispositions has a different set of potential outcomes. If the commander chooses to take no action, any potential charges are dropped.⁴⁷ However, this decision does not bar future action on the matter.⁴⁸ The next option is administrative action, which varies greatly by service branch but includes anything from counseling and withholding of privileges to administrative separation (that is, discharge) and bar to reenlistment.⁴⁹ The third option is nonjudicial punishment (“NJP”), which does not have a clear civilian analogue. NJP is largely beyond the scope of this Note, but it amounts to something akin to a plea deal that includes ad hoc punishment and adjournment in contemplation of dis-

⁴¹ Id. R.C.M. 306(b) (discussion section).

⁴² This factor has been explicitly removed from the commander’s disposition calculus in sexual assault cases. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1708, 127 Stat. 672, 961 (2013).

⁴³ MCM, supra note 10, R.C.M. 306(b) (discussion section).

⁴⁴ Murphy, supra note 19, at 168.

⁴⁵ The initial disposition decision by a commander ordinarily does not bar a different disposition by a superior authority. See MCM, supra note 10, R.C.M. 401(c), 601(f).

⁴⁶ In the context of sex-related offenses, review is now much more likely if a commander decides not to refer charges. See infra notes 111–13 and accompanying text.

⁴⁷ MCM, supra note 10, R.C.M. 306(c)(1).

⁴⁸ Id. R.C.M. 306(c)(1) (discussion section).

⁴⁹ Id. R.C.M. 306(c)(2); id. R.C.M. 306(c)(2) (discussion section).

missal.⁵⁰ The fourth option is the disposition of charges, which will be discussed in the next paragraph. The fifth and final option is forwarding for disposition with a recommendation as to disposition.⁵¹ This often entails forwarding the case to a superior officer who possesses the authority to convene a court-martial.⁵²

If either of the latter two options is chosen (that is, disposition of charges or forwarding for disposition), charges may be preferred against the accused, who must then be notified.⁵³ A preferral of charges is the military equivalent of filing a complaint.⁵⁴ Once charges have been preferred and forwarded to a commander authorized to convene courts-martial, that commander has a series of options based upon the severity of the crime. For lower-level offenses (the equivalent of misdemeanors), the commander can: (1) dismiss the charges; (2) forward the charges to another commander; or (3) refer the charges to a special court-martial or summary court-martial for trial.⁵⁵ For more serious offenses, the commander has the additional option of calling for a preliminary hearing in anticipation of a general court-martial.⁵⁶

A general court-martial cannot be called until a preliminary hearing has been held.⁵⁷ Preliminary hearings, often called “Article 32 hearings,”⁵⁸ are essentially the military equivalent of a grand jury proceeding, albeit with various modifications. For instance, rather than having a judge and grand jury, an Article 32 hearing is typically presided over by

⁵⁰ “Nonjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline . . . without the stigma of a court-martial . . .” *Id.* pt. V, ¶ 1(c).

⁵¹ See *id.* R.C.M. 306(c)(5); *id.* R.C.M. 306(c)(5) (discussion section).

⁵² See *id.* R.C.M. 306(c)(5) (discussion section).

⁵³ See *id.* R.C.M. 307–08; see also *id.* R.C.M. 306(c)(4) (discussion section); *id.* R.C.M. 306(c)(5) (discussion section).

⁵⁴ See generally *id.* R.C.M. 307 (describing the preferral of charges process).

⁵⁵ *Id.* R.C.M. 404(a)–(d); Reporters Comm. for Freedom of the Press, *A Reporter’s Guide to Military Justice 2–3* (2006), <http://www.rcfp.org/rcfp/orders/docs/MILJUSTICE.pdf> [<http://perma.cc/HTU3-UFVV>].

⁵⁶ See MCM, *supra* note 10, R.C.M. 407(a)(5); Reporters Comm. for Freedom of the Press, *supra* note 55, at 2–3. Compare MCM, *supra* note 10, R.C.M. 405 (“pretrial investigation”), with Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,787 (June 22, 2015) (amending to “preliminary hearing”).

⁵⁷ Exec. Order No. 13,696, *supra* note 56, at 35,787.

⁵⁸ This nickname derives from the fact that preliminary hearings (formerly “pretrial investigations”) are mandated by Article 32 of the UCMJ. See 10 U.S.C. § 832, UCMJ art. 32 (Supp. II 2015).

an appointed JAG officer called a “preliminary hearing officer.”⁵⁹ Evidence is presented to the preliminary hearing officer, the accused is present with counsel, and the defense is entitled to both cross-examine witnesses and present evidence.⁶⁰

Following the Article 32 hearing, the preliminary hearing officer prepares a report containing his or her conclusion about whether there exists “probable cause to believe the accused committed the offense(s) listed on the charge sheet or otherwise considered at the preliminary hearing.”⁶¹ The case is then referred to the staff judge advocate of the convening authority (that is, a senior JAG officer who advises a commander⁶²) for final consideration and advice.⁶³ After receiving advice from the staff judge advocate, the commander makes the ultimate disposition decision and can refer the charges to a general court-martial.⁶⁴ In fact, a case can go forward even if the Article 32 officer does not recommend that a certain charge go forward.⁶⁵

General courts-martial resemble modern felony jury trials in many ways, but with some noteworthy differences. A general court-martial is composed of a military judge and a panel of at least five members,⁶⁶ all of whom are active-duty military members.⁶⁷ If an officer is on trial, the court-martial is composed entirely of officers.⁶⁸ If the accused is enlisted, he or she can request that at least one-third of the court-martial panel be enlisted.⁶⁹

Besides these differences, the general court-martial proceeds in largely the same fashion as a civilian trial. The accused is afforded the full panoply of trial rights, including the right to counsel (in this case a JAG

⁵⁹ Exec. Order No. 13,696, *supra* note 56, at 35,788–89.

⁶⁰ *Id.* at 35,791–92, 35,796.

⁶¹ *Id.* at 35,800.

⁶² See Reporters Comm. for Freedom of the Press, *supra* note 55, at 3.

⁶³ MCM, *supra* note 10, R.C.M. 406.

⁶⁴ *Id.* R.C.M. 407.

⁶⁵ See, e.g., Dan Lamothe & Thomas Gibbons-Neff, Sgt. Bowe Bergdahl to Face Most Serious Kind of Court-Martial in Army Desertion Case, *Wash. Post* (Dec. 14, 2015), <https://www.washingtonpost.com/news/checkpoint/wp/2015/12/14/sgt-bowe-bergdahl-recommended-to-face-general-court-martial-for-desertion/> [<https://perma.cc/A3PZ-J6NQ>] (“The Army has chosen a type of trial that could yield a more severe sentence than what an officer recommended earlier this year.”).

⁶⁶ MCM, *supra* note 10, R.C.M. 501(a)(1).

⁶⁷ *Id.* R.C.M. 502(a)(1).

⁶⁸ *Id.*

⁶⁹ *Id.* R.C.M. 503(a)(2).

officer),⁷⁰ and the Military Rules of Evidence govern.⁷¹ There are opening statements, the prosecution presents its case, the defense presents its case, and at the conclusion of closing arguments, the court-martial members deliberate and reach a verdict. If the panel finds a verdict of guilty, the court-martial members, not the military judge, will make a sentencing decision (after a separate sentencing phase).⁷²

At the close of trial, the accused's commander is notified of the outcome of the trial and, if applicable, any sentence to be served.⁷³ The convicted service member is then given an opportunity to raise any objections to the court-martial and offer mitigating factors.⁷⁴ Once the convicted service member has raised any or no objections, the commander who convened the general court-martial has significant discretion during the post-trial phase.⁷⁵

The convening authority can approve the sentence, order a rehearing, defer punishment, mitigate the sentence, or set aside the guilty finding completely and dismiss the charge.⁷⁶ Moreover, the convening authority may take such action for "any or no reason."⁷⁷ This means that following a preliminary investigation, an Article 32 hearing, and a complete trial, the convening authority has the discretion to make the final decision on both guilt and sentencing.

B. Sexual Assault-Specific Procedures

Although more sweeping proposals, such as the MJIA and the VPA, failed to gain congressional approval,⁷⁸ some sexual assault-related amendments were made to the UCMJ via the 2013 and 2014 annual de-

⁷⁰ Id. R.C.M. 506.

⁷¹ Id. Mil. R. Evid. 1101(a). The Military Rules of Evidence bear a strong resemblance to the Federal Rules of Evidence, including the same numbering scheme. In fact, amendments to the Federal Rules automatically amend parallel provisions of the Military Rules of Evidence by operation of law unless action is taken by the President. Id. Mil. R. Evid. 1102(a).

⁷² Id. R.C.M. 502(a)(2); id. R.C.M. 1001.

⁷³ Id. R.C.M. 1101(a).

⁷⁴ Id. R.C.M. 1105(b).

⁷⁵ See id. R.C.M. 1107(c)–(d).

⁷⁶ Id. It should be noted that before the convening authority takes such action, the staff judge advocate must forward the convening authority a legal recommendation on the situation. Id. R.C.M. 1106(a).

⁷⁷ Id. R.C.M. 1107(d)(1).

⁷⁸ See *infra* Part IV.

fense authorization acts.⁷⁹ Many of these amendments serve as modifications of the general court-martial procedures discussed above in Section I.A. This Section will discuss and analyze some of the more prominent amendments and consider their efficacy. This Section will proceed by discussing the amendments in three thematic groupings: (1) victim-related reforms; (2) accused-related reforms; and (3) commander-related reforms.

1. Victim-Related Reforms

The first and least controversial set of amendments to the UCMJ concerns the rights of victims within the military justice system. The gut-wrenching stories of military sexual assault survivors left little doubt that victims were being mistreated.⁸⁰ Under the new regime, victims of sexual assault are protected in numerous ways. Most notably, a separate Special Victims' Counsel ("SVC") is appointed to represent the victim throughout the process.⁸¹ The SVC officer advocates on behalf of the victim and—among other roles—acts as an intermediary between the victim and the attorney for the accused.⁸²

Additionally, victims are given a greater role in both pre- and post-trial decision making. For instance, the convening authority must now consult the victim of an alleged sex-related offense prior to making a decision about whether to refer the charges to a court-martial for trial.⁸³ Furthermore, the victim's preference with regard to civilian versus military prosecution must be considered, and the victim must be notified of any charging decisions made in civilian or military court.⁸⁴ Victims must also be afforded an opportunity to "submit matters for consideration" prior to any decision by the convening authority to modify a sentence

⁷⁹ Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, §§ 531–40, 128 Stat. 3292, 3362–71 (2014) [hereinafter National Defense Authorization Act for Fiscal Year 2015]; National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1701–09, 127 Stat. 672, 952–62 (2013).

⁸⁰ See, e.g., Sara Corbett, *The Women's War*, N.Y. Times Mag. (Mar. 18, 2007), <http://www.nytimes.com/2007/03/18/magazine/18cover.html> [<https://perma.cc/AM5J-VPCS>] (describing the grisly details of sexual assault in the military and the mistreatment of victims).

⁸¹ National Defense Authorization Act for Fiscal Year 2015 § 533, 128 Stat. at 3366–67; National Defense Authorization Act for Fiscal Year 2014 § 1716(a), 127 Stat. at 966–67.

⁸² See 10 U.S.C. § 846(b) (Supp. II 2015) (requiring that the counsel for the accused must "make any request to interview the victim through the Special Victims' Counsel").

⁸³ National Defense Authorization Act for Fiscal Year 2015 § 534(b), 128 Stat. at 3367.

⁸⁴ *Id.* § 534(b) & (d).

after court-martial.⁸⁵ Additionally, victims can no longer be compelled to testify at Article 32 hearings,⁸⁶ and retaliation against service members who report criminal offenses is strictly proscribed.⁸⁷ Lastly, the convening authority shall not consider any “matters that relate to the character of a victim” in making a disposition decision.⁸⁸

Many, if not most, of these victim-related reforms are improvements upon the old system. It is critical that the military justice system respect the rights of victims as they navigate the complex and emotionally tumultuous process of reporting their assault and potentially facing the alleged perpetrator. Preventing character-of-the-victim evidence from clouding the convening authority’s decision making and allowing for victim input are reasonable accommodations to the unique aspects of sex-related crimes. These reforms incorporate the spirit behind various rape-shield laws that are found in civilian courts that seek to “safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping.”⁸⁹ Such reforms also acknowledge the fact that a victim’s character is irrelevant to the determination of whether a sexual assault occurred.

But these victim-centered reforms present potential drawbacks.⁹⁰ For example, requiring victim input about disposition is potentially problematic. While it is true that victims are not given the authority to make charging decisions, Congress has clearly indicated that their opinions should weigh heavily on the convening authority’s decision. One can envision a situation in which a convening authority feels pressured to refer charges to court-martial despite a weak case and considerable doubts.⁹¹ Victims’ advocates may argue that sending weak cases to trials that end in acquittals still helps vindicate the desires of the victim, but there are also situations in which such trials leave victims feeling worse than they did before trial. Moreover, such trials damage the reputation of the accused, despite an acquittal.⁹²

⁸⁵ National Defense Authorization Act for Fiscal Year 2014 § 1706, 127 Stat. at 960–61.

⁸⁶ *Id.* § 1702(a).

⁸⁷ *Id.* § 1709.

⁸⁸ *Id.* § 1706(b).

⁸⁹ Fed. R. Evid. 412 advisory committee’s note to 1994 amendment.

⁹⁰ See Brady, *supra* note 25, at 216–18 (discussing the emphasis on victim-centric reforms).

⁹¹ Murphy, *supra* note 19, at 149.

⁹² See Johnson, *supra* note 17, at 274.

Furthermore, referring weak cases to court-martial increases the chances of false convictions, especially considering the current intense focus on the number of successful sexual assault prosecutions each commander achieves.⁹³ Although acknowledging and incorporating victim preference throughout the process is important, it is equally important to be wary of the potential pitfalls of tilting the scales in a way that makes referring charges the default. Lastly, proscribing compelled victim testimony at Article 32 hearings, which seems well-intentioned, comes at a cost. While protecting the victim from harsh questioning, this policy simultaneously strips the accused's right to cross-examination.⁹⁴ Reforms that—although intended to support and aid victims—disrupt the military justice system and threaten the rights of the accused should be approached with caution.

2. *Accused-Related Reforms*

The next set of reforms implemented over the past few years is focused on the rights of the accused throughout the process. The first and least controversial amendment is the removal of a five-year statute of limitations on cases of sexual assault.⁹⁵ As a result, a person charged with sexual assault under the UCMJ can be “tried and punished at any time without limitation.”⁹⁶ The removal of a statute of limitations brings the UCMJ in line with many of its civilian counterparts.⁹⁷ Similarly, the sentence of a person found guilty of sexual assault must now at mini-

⁹³ See *infra* Part II.

⁹⁴ Murphy, *supra* note 19, at 154–55. Because an Article 32 hearing is not a trial, the Sixth Amendment's Confrontation Clause does not attach. See U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . to be confronted with the witnesses against him . . .”).

⁹⁵ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1703, 127 Stat. 672, 958 (2013).

⁹⁶ 10 U.S.C. § 843(a) (Supp. II 2015).

⁹⁷ See, e.g., Alaska Stat. § 12.10.010(a)(4) (2014); Del. Code Ann. tit. 11, § 205(e) (2015); Md. Code Ann., Cts. & Jud. Proc. § 5-106(b) (LexisNexis 2013) (covering misdemeanors punishable by imprisonment in penitentiary); Neb. Rev. Stat. Ann. § 29-110(8) (LexisNexis 2016); N.Y. Crim. Proc. Law § 30.10(2)(a) (Consol. 2014); see also Brittany Ericksen & Ilse Knecht, Nat'l Ctr. for Victims of Crime, Statutes of Limitations for Sexual Assault: A State-by-State Comparison (Aug. 21, 2013), <http://victimsofcrime.org/docs/DNA%20Resource%20Center/sol-for-sexual-assault-check-chart---final---copy.pdf?sfvrsn=2> [<https://perma.cc/BUH3-2U9B>] (summarizing the statutes of limitations for sexual assault in all fifty states and D.C.).

mum include dismissal or dishonorable discharge,⁹⁸ and that person is barred from reenlisting or commissioning.⁹⁹

The accused's rights at the Article 32 hearing have also been constrained. The accused is no longer able to present all noncumulative evidence; rather, cross-examination and evidence must be relevant to the limited purposes of the hearing.¹⁰⁰ There has also been a swift repudiation of the so-called "good soldier defense."¹⁰¹ Under the old regime, the convening authority could consider the general military character of the accused in making a disposition decision,¹⁰² and such evidence could be admitted at trial, if it was a pertinent character trait.¹⁰³ Now, the character of the accused is removed from the initial disposition decision. In addition, Congress has determined that there is no circumstance in which a defendant's general military character is a pertinent trait in a military sexual assault case. As a result, the evidence of general military character is no longer admissible in sexual assault cases—regardless of whether it would be pertinent to the facts of a particular case.¹⁰⁴

These accused-related reforms appear on their face to improve the military justice system by removing unnecessary defendant advantages, but they too create potential problems. Requiring dismissal or dishonorable discharge is sensible, and it is the likely outcome of a sexual assault conviction regardless. Similarly, the removal of a statute of limitations brings the military in line with many state jurisdictions.¹⁰⁵ The removal of general military character evidence from sexual assault courts-martial, however, is not necessarily a net positive. While our trial courts are generally wary of character evidence,¹⁰⁶ we have traditionally al-

⁹⁸ National Defense Authorization Act for Fiscal Year 2014 § 1705, 127 Stat. at 959–60.

⁹⁹ *Id.* § 1711.

¹⁰⁰ Murphy, *supra* note 19, at 155.

¹⁰¹ See National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 536, 128 Stat. 3292, 3368 (2014) (barring general military character evidence in cases of sexual assault offenses); National Defense Authorization Act for Fiscal Year 2014 § 1708, 127 Stat. at 961 (removing character of the accused from the initial disposition decision).

¹⁰² MCM, *supra* note 10, R.C.M. 306(b) (discussion section).

¹⁰³ *Id.* app. 22 at 34.

¹⁰⁴ See sources cited *supra* note 101.

¹⁰⁵ See *supra* note 97.

¹⁰⁶ See Fed. R. Evid. 404 (prohibiting the use of character evidence except in specific circumstances).

lowed criminal defendants to admit character evidence in order to protect the general rule that courts should err on the side of innocence.¹⁰⁷

Other character evidence of a defendant's pertinent trait remains admissible in sexual assault courts-martial as long as the pertinent trait is *not* general military character.¹⁰⁸ This ban is overinclusive; it creates a blanket prohibition in lieu of trusting a judge to determine whether the relevance of a defendant's good military character outweighs the danger of prejudice.¹⁰⁹ General military character *can* be a pertinent trait to a charge of sexual assault because military character can include a broad swath of traits—anything from general discipline to respect for fellow service members—but such evidence is now categorically excluded. Although general military character may not be highly probative, it is often relevant and should not be *automatically* excluded. For instance, one can imagine a case where, based on the facts, a judge felt that discussion of a defendant's good military character (such as following orders) could rebut the prosecution's theory that the defendant committed a sexual assault when he had been ordered to be elsewhere. While it may often be inadmissible, judges are capable of deciding such evidence questions on a case-by-case basis. In an attempt to avoid the unpopular "good soldier defense" from freeing a guilty sex offender, Congress has taken a meaningful trial right from *all* defendants, regardless of the circumstances of the case. Accused-related reforms such as these may not represent massive infringements on constitutional rights (and many of them may be steps in the right direction), but small changes such as these reflect a larger culture that seeks convictions at the expense of due process.

¹⁰⁷ See *id.* 404(a)(2) (outlining exceptions to the general prohibition on character evidence for criminal defendants); George Fisher, *Evidence* 234–35 (2d ed. 2008) (discussing why criminal defendants are allowed to offer otherwise inadmissible character evidence); see also 5 Blackstone, *supra* note 17, bk. IV at *358 (“[I]t is better that ten guilty persons escape, than that one innocent suffer.”). See generally Johnson, *supra* note 17 (defending the Blackstone Principle).

¹⁰⁸ See MCM, *supra* note 10, Mil. R. Evid. 404(a)(1); see also National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 536, 128 Stat. 3292, 3368 (2014).

¹⁰⁹ See Exec. Order No. 13,643, 78 Fed. Reg. 29,559, 29,575 (May 15, 2013) (allowing military judges to “exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence”).

3. *Commander-Related Reforms*

The final set of sexual assault-related amendments to the UCMJ focuses on the discretion of convening authorities. Foremost among these reforms is the removal of the convening authority's post-trial discretion to set aside guilty verdicts for serious offenses.¹¹⁰ Beyond stripping the convening authority of some post-trial discretion, these reforms also provide greater oversight of the decisions of convening authorities. For example, a convening authority's decision not to refer charges of a sex-related offense is now reviewable by a superior authority.¹¹¹ Furthermore, the performance reviews of all commanders now include an assessment of whether that officer created a command climate that "properly manage[s]" allegations of sexual assault.¹¹² Lastly, the Department of Defense has been instructed to maintain detailed records of the frequency and outcome of all sexual assault complaints.¹¹³

Much like the other reforms discussed, these convening authority-focused amendments have potential benefits. For instance, the removal of some post-trial discretion from the convening authority is essentially an exercise in common sense. Although this change probably has very little impact in practice,¹¹⁴ it is a positive step in dealing with the problem of sexual assault because victims no longer have to fear that a hard-fought conviction will be reversed. Likewise, greater review of commander disposition decisions and increased recordkeeping appear to be steps in the right direction because they bring increased oversight and transparency.

Many of these reforms, however, may have unforeseen consequences. For example, when a convening authority knows that any decision not to refer charges will be reviewable and that his or her performance evaluation depends upon "properly manag[ing]" sexual assault,¹¹⁵ his or her

¹¹⁰ 10 U.S.C. § 860(c)(3)(B) (Supp. II 2015). The convening authority retains post-trial discretion when an offense carries a maximum sentence of less than two years' confinement and dismissal was not ordered by the court-martial. *Id.* § 860(c)(3)(D). The convening authority is explicitly stripped of post-trial discretion in sexual assault cases. *Id.*

¹¹¹ National Defense Authorization Act for Fiscal Year 2015 § 541, 128 Stat. at 3371–72.

¹¹² *Id.* § 508.

¹¹³ *Id.* § 542.

¹¹⁴ This is assuming that convening authorities rarely overturned the guilty verdicts or reduced the sentences of service members convicted of sexual assault. But see Samuelsohn, *supra* note 6 (discussing a case where an Air Force officer overturned a jury verdict in a sexual assault case).

¹¹⁵ National Defense Authorization Act for Fiscal Year 2015 § 508, 128 Stat. at 3357.

judgment may be affected. While ostensibly these evaluations would include instances where charges were frivolously referred, the underlying pressure is to charge. Between public statements, media attention, and congressional action (both enacted and proposed), commanders can read the writing on the wall—and that writing says to obtain convictions. It becomes safer to simply refer charges in nearly all cases, even if doing so is objectively imprudent. Tying an individual's performance evaluation to charging decisions establishes a norm of, "when in doubt, prosecute." In the eyes of some, this is a favorable norm, but such a norm could easily revert back to, "when in doubt, dismiss the charges," if in a few years—after the twenty-four-hour news cycle dust has settled and the military brass want to change the narrative (perhaps to demonstrate progress in combating sexual assault).¹¹⁶ This should give victims' advocates reason to be concerned.

While oversight is undoubtedly an improvement, without establishing an independent and impartial decision maker, oversight really only moves discretion up the chain of command rather than eliminating that commander discretion altogether. In the end, these commander-related reforms represent shallow, transient changes that do not produce durable, systematic reform. They may help produce "results" (that is, convictions) in the short term, but they leave in place the same discretion that allowed sexual assault to fester for years. Reformers have won the proverbial battle, but failed to win the war.

II. DEMANDING CONVICTIONS? THE INFLUX OF UNLAWFUL COMMAND INFLUENCE

The military justice system differs from the civilian justice system in numerous ways, perhaps most notably in the relationship between the parties involved. The convening authority, the military judge, the trial counsel,¹¹⁷ the defense counsel, the accused, and the court-martial members are all part of the same branch of the armed forces. All parties report to and take orders from the same Commander-in-Chief, Secretary of Defense, and other senior military officers. Moreover, the members of the court-martial (that is, the jurors) are often the subordinates of the

¹¹⁶ See *supra* notes 23–24 and accompanying text.

¹¹⁷ "Trial counsel" is the title given to a military prosecutor. See, e.g., MCM, *supra* note 10, R.C.M. 502(d)(1).

convening authority. It almost goes without saying that this arrangement is vulnerable to considerable impropriety.

Unsurprisingly, the UCMJ explicitly states that “[n]o authority . . . may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court.”¹¹⁸ Furthermore, the UCMJ provides that “[n]o person . . . may attempt to coerce or . . . influence the action of a court-martial . . . in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.”¹¹⁹ This doctrine is known as UCI,¹²⁰ and it has been a persistent concern of military justice since its inception.¹²¹ The impetus behind it is the fear that the court-martial process will be influenced and biased by pressures from outside the courtroom.¹²² Public statements by high-ranking military officials and midlevel commanders, as well as an increased emphasis on military sexual assault, have raised concerns about unintentional UCI, which undermines the legitimacy of the military justice system with regards to sexual assault.¹²³

This Part consists of three sections. Section II.A will provide a brief overview of the traditional UCI doctrine. Section II.B will consider some of the prominent arguments about the role of UCI in the context of sexual assault. Finally, Section II.C will summarize and analyze a recent instance of UCI in a sexual assault case as an example of how UCI is undermining the adjudication of sexual assault in the military.

A. Traditional UCI Doctrine

Command influence has been described as “the mortal enemy of military justice,”¹²⁴ and UCI has been a vulnerability of the military justice

¹¹⁸ 10 U.S.C. § 837(a), UCMJ art. 37(a) (2012).

¹¹⁹ *Id.*

¹²⁰ See, e.g., *United States v. Thomas*, 22 M.J. 388, 393–94 (C.M.A. 1986).

¹²¹ The Articles of War, which were passed by the Continental Congress in 1775 and established the military justice system, contained a provision that appeared to prohibit a form of UCI. See 2 *Journals of the Continental Congress: 1774–1789*, at 114 (Worthington Chauncey Ford ed., 1905) (entry for June 30, 1775) (making it a crime for commanders to obstruct justice by failing to bring charges).

¹²² See *Thomas*, 22 M.J. at 393–94.

¹²³ For an additional discussion of UCI in military sexual assault cases, see Brady, *supra* note 25, at 223–29.

¹²⁴ *Thomas*, 22 M.J. at 393.

system since its creation.¹²⁵ In fact, the current UCI prohibition—which can be found in Title 10 of the U.S. Code, Section 837—was initially passed in 1948, two years before the UCMJ was enacted.¹²⁶ UCI arises when commanders, whether intentionally or unintentionally, exert influence on the military justice process.¹²⁷ It is a unique feature of the hybrid military justice system that seeks to strike a balance between command control and impartial justice.¹²⁸ When UCI is found to have occurred, the appropriate remedy may range from a complete dismissal of charges with prejudice¹²⁹ to a retrial,¹³⁰ depending upon the circumstances.

The United States Court of Military Appeals defines UCI broadly as covering “a multitude of situations in which superiors have unlawfully controlled the actions of subordinates in the exercise of their duties under the UCMJ.”¹³¹ UCI has been further delineated into two distinct forms: (1) accusatory UCI and (2) adjudicative UCI.¹³² Accusatory UCI concerns the decision to bring charges and refer those charges to a court-martial. A commander is expected to make charging decisions in light of all the facts and circumstances in “the interest of justice.”¹³³ “[A]n accuser may not refer a case to trial and . . . a commander may not be coerced into preferring charges.”¹³⁴ Adjudicative UCI, on the other hand, involves pressure that is inflicted *during* the trial process—for example, interfering with judges, counsel, members, or witnesses.¹³⁵

A crucial aspect of UCI is that it need not be direct, and it need not be intentional.¹³⁶ In fact, “even the appearance of unlawful command influ-

¹²⁵ See 2 Journals of the Continental Congress, *supra* note 121, at 114.

¹²⁶ Compare Selective Service Act of 1948, Pub. L. No. 80-759, § 233, 62 Stat. 604, 639 (showing UCI prohibition enactment in 1948), with *supra* note 28 (showing enactment of UCMJ in 1950).

¹²⁷ *United States v. Lewis*, 63 M.J. 405, 415 (2006).

¹²⁸ See Colonel James F. Garrett et al., *Lawful Command Emphasis: Talk Offense, Not Offender; Talk Process, Not Results*, Army Law., Aug. 2014, at 4, 10.

¹²⁹ See, e.g., *United States v. Gore*, 60 M.J. 178, 189 (2004) (affirming a dismissal with prejudice as within the discretion of a military judge).

¹³⁰ See, e.g., *United States v. Levite*, 25 M.J. 334, 340 (C.M.A. 1987) (reversing judgment following a finding of UCI, but allowing a retrial).

¹³¹ *United States v. Hamilton*, 41 M.J. 32, 36 (C.M.A. 1994).

¹³² *United States v. Weasler*, 43 M.J. 15, 17–18 (1995).

¹³³ MCM, *supra* note 10, R.C.M. 306(b) (discussion section).

¹³⁴ *Weasler*, 43 M.J. at 19 (citing *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992)); accord Garrett et al., *supra* note 128, at 10.

¹³⁵ Garrett et al., *supra* note 128, at 10.

¹³⁶ See *United States v. Lewis*, 63 M.J. 405, 415 (2006).

ence at courts-martial” is seen as problematic.¹³⁷ The courts have constructed an objective test: “[T]he appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.”¹³⁸ As a result, the case law involving UCI and the appearance of UCI is wide-ranging and the inquiry is often fact intensive.

Take for instance, *United States v. Ashby*, a case involving the death of several civilians when a Marine jet struck the cables of a gondola.¹³⁹ Following the event but prior to trial, the commander chided the unit and implied that the incident was caused because the crew was flying too low, in violation of the rules.¹⁴⁰ The commander, however, never specifically mentioned the case or whether anyone should testify.¹⁴¹ Using the objective test outlined above, the Court of Appeals for the Armed Forces held that there was no UCI.¹⁴²

On the other hand, consider the case of *United States v. Toon*, which involved a commander who issued a letter warning his subordinates that he would not grant clemency to convicted drug dealers.¹⁴³ Irrespective of the “laudable objective of the commander” to deal with drug trafficking,¹⁴⁴ the Army Court of Military Review held that UCI was present, despite a trial judge’s instruction that the commander’s statement was not intended to influence court members.¹⁴⁵

These cases demonstrate that it is difficult to precisely define UCI; it has a bit of an “I know it when I see it” flavor.¹⁴⁶ The ultimate decision about whether an individual case is tainted by UCI will be case specific and fact intensive. Nevertheless, it remains clear that actions and statements by commanders—regardless of rank—that significantly influence the decision making of a convening authority or the members of a court-

¹³⁷ *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979).

¹³⁸ *Lewis*, 63 M.J. at 415.

¹³⁹ 68 M.J. 108, 112 (2009).

¹⁴⁰ *Id.* at 126.

¹⁴¹ *Id.*

¹⁴² *Id.* at 128–29.

¹⁴³ 48 C.M.R. 139, 140–41 (A.C.M.R. 1973).

¹⁴⁴ *Id.* at 142.

¹⁴⁵ *Id.* at 143.

¹⁴⁶ See Justice Stewart’s famous concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

martial will be considered UCI, and this can lead to the dismissal of charges or a retrial.

B. UCI in the Sexual Assault Context

While UCI has always been a prominent issue in military law, the recent attention paid to sexual assault cases has led to a flurry of litigation over alleged UCI. This Section will consider some of the prominent arguments made regarding modern sexual assault cases and UCI, as well as their counterarguments. It will then summarize some recent cases that bear directly on this issue. This is a rapidly developing area of law, so more decisions on this topic will likely be published in the coming months and years. Nevertheless, these arguments and cases demonstrate that UCI is undermining the military justice system's ability to properly manage and adjudicate sexual assault cases.

The primary allegations of UCI in sexual assault cases stem from statements made by military officials at all levels, including the President himself. At an East Room event in May 2013, President Obama said, "I don't want just more speeches or awareness programs or training but, ultimately, folks look the other way. . . . If we find out somebody is engaging in this stuff, they've got to be held accountable — prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period. It's not acceptable."¹⁴⁷ At another press conference, he stated that sexual assault in the military is "dangerous to our national security" and "undermines [the] trust" that the American people place in the military.¹⁴⁸ He then added that "it is shameful and disgraceful, . . . and has made the military less effective than it can be."¹⁴⁹

Secretary of Defense Chuck Hagel echoed these sentiments, telling West Point graduates that sexual assault in the military was a "profound betrayal" and a "scourge [that] must be stamped out."¹⁵⁰ Comments such

¹⁴⁷ Michael D. Shear, *Obama Calls for 'Moral Courage' at Naval Academy Graduation*, N.Y. Times (May 24, 2013) (internal quotation marks omitted), <http://www.nytimes.com/2013/05/25/us/politics/obama-naval-academy-commencement.html> [https://perma.cc/X6EM-ZQJQ].

¹⁴⁸ Tom Vanden Brook & David M. Jackson, *Obama Says Sexual Assault Crisis Hurts National Security*, USA Today (May 16, 2013, 6:41 PM) (internal quotation marks omitted), <http://www.usatoday.com/story/news/politics/2013/05/16/obama-hagel-military-sexual-assaults/2165763/> [https://perma.cc/FXU2-TMSD].

¹⁴⁹ *Id.* (internal quotation marks omitted).

¹⁵⁰ Arlette Saenz, *Chuck Hagel to West Point Cadets: Sexual Assault Is a 'Profound Betrayal'*, ABC News (May 25, 2013) (internal quotation marks omitted), <http://abcnews.g>

as these have been repeated and supplemented down the chain of command.¹⁵¹ While civilians may see these statements as harmless political speech, military members are legally bound by the chain of command, and these statements could easily be construed as orders that must be followed.

Statements like these are well intentioned and serve a valuable purpose in bringing attention to military sexual assault, but they nonetheless complicate the operation of the military justice system. More specifically, they may constitute accusatory UCI because these and similar statements can be reasonably interpreted to imply that convictions are a priority, or at least in the best interest of the military. In fact, the Department of Defense has recognized the implication of various statements of this nature and tried to soften the blow,¹⁵² but experience has proven that often the bell cannot be un-rung. In fact, the statements of two anonymous commanders demonstrate that this pressure to prosecute is real. The first commander made it clear that when he is confronted with a sexual assault case in the current climate, he feels compelled to refer it to a court-martial, even if he thinks it is not a good case.¹⁵³ The second commander confessed that he too felt pressure to prosecute nearly all cases because the decision not to prefer charges can hurt his statistics and create a red flag on his record.¹⁵⁴ This reality is borne out by the data: The percentage of substantiated cases that are preferred to court-martial rose 113% from 2007 to 2014.¹⁵⁵ Commanders appear to have received the message from above and are acting accordingly.

The pressure to obtain convictions does not cease after the convening authority refers charges to a court-martial. The members of the court-martial (that is, the judge and the jurors) are well aware of the current expectation from above, which creates fertile ground for adjudicative UCI. Although extensive voir dire has been used in an attempt to miti-

o.com/blogs/politics/2013/05/chuck-hagel-to-west-point-cadets-sexual-assault-is-a-profound-betrayal/ [https://perma.cc/526Y-U3TF].

¹⁵¹ One particularly troubling case involved the Commandant of the Marine Corps giving a presentation twenty-five times that explicitly endorsed increased prosecutions. See *infra* Section II.C.

¹⁵² 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> [https://perma.cc/M2QJ-8V2Y].

¹⁵³ Murphy, *supra* note 19, at 149.

¹⁵⁴ *Id.*

¹⁵⁵ See Sexual Assault Data: 2014, *supra* note 20, app. A at 25.

gate this problem,¹⁵⁶ the reality remains that nearly every court-martial member is aware of how sexual assault is tainting the military.

Court-martial members, most of whom are highly educated commissioned officers, understand the public-perception ramifications of acquittal and undoubtedly want to do what is best for the military and nation that they serve. It is easy to conceive of how this pressure can implicitly undermine the impartiality of the trial process and the presumption of innocence. The next Section demonstrates one such example of how the current climate surrounding sexual assault in the military can infiltrate the court-martial process.

C. Case Study: The Heritage Brief

Even if one does not accept the argument that comments by high-ranking officials such as President Obama or Secretary Hagel—in conjunction with the general public uproar—are sufficient to establish UCI, consider the example of Commandant of the Marine Corps General James Amos. By early 2012, it was becoming clear that sexual assault within the military was a rampant problem. Hoping to address this problem directly, Commandant General Amos developed an educational briefing entitled the “Heritage Brief,” which was, in the words of Amos, “intended . . . to be an efficient and effective way for me to communicate to my Marines about our ethos. . . . I wanted to get our ‘moral compass’ back to True North.”¹⁵⁷

Over the next three months, Amos toured Marine bases and installations, delivering the briefing twenty-five times,¹⁵⁸ reaching “the bulk of [the] Corps’ leadership.”¹⁵⁹ The Heritage Brief was squarely aimed at bringing attention to the problem of sexual assault, and the message was particularly powerful because it came directly from the Commandant of the Marine Corps, the senior-most Marine officer.

¹⁵⁶ See, e.g., *United States v. Olcott*, No. NMCCA 201300228, 2014 CCA LEXIS 818, at *14–15 (N-M. Ct. Crim. App. Oct. 30, 2014) (describing the discussion of SAPR during voir dire); *United States v. Lugo*, No. NMCCA 201200102, 2013 CCA LEXIS 40, at *4 (N-M. Ct. Crim. App. Jan. 29, 2013) (same).

¹⁵⁷ Response to Court Ordered Interrogatories at 2, *United States v. Jiles*, No. NMCCA 201200062, 2014 CCA LEXIS 151 (N-M. Ct. Crim. App. Mar. 6, 2014).

¹⁵⁸ *Id.* at 1–2.

¹⁵⁹ Commandant Gen. James F. Amos, U.S. Dep’t of Navy, White Letter No. 3-12 (Jul. 12, 2012) [hereinafter Amos White Letter] (on file with author).

Commandant General Amos's speeches were understandably forceful and shockingly blunt. He hoped to "prick the soul of the institution and wake it up."¹⁶⁰ The problem was that the same Marines hearing the Heritage Brief were making charging decisions and serving as court-martial members within the military justice system. When the Commandant of the Marine Corps says, "I know fact from fiction. The fact of the matter is, 80 percent of those [accusations] are legitimate sexual assault . . . and if you do not believe in the statistics . . . I am going to make a believer out of you,"¹⁶¹ that sends a clear message about the kinds of verdicts he expects. Furthermore, when the senior-most Marine officer says, "If you have a Marine that is not acting right, . . . then get rid of him; it is as simple as that,"¹⁶² any good Marine making a sentencing decision knows how to follow that order. In fact, Amos recognized the potential influence that his comments could have on the operation of military justice: "My lawyers don't want me to talk about this, but I'm going to anyway. . . . The defense lawyers love when I talk about this, because then they can throw me under the bus later on and complain about unlawful command influence."¹⁶³

Near the end of Amos's tour, he began to take the concerns of his lawyers a bit more seriously. On July 12, 2012, he issued White Letter 3-12 to all Marine commanders, in which he stated, "I am not directing or suggesting specific administrative or military justice actions be taken absent compliance with established law."¹⁶⁴

This attempt at a "curative measure"¹⁶⁵ proved futile; defense motions claiming UCI were filed in numerous sexual assault cases following the

¹⁶⁰ Response to Court Ordered Interrogatories, *supra* note 157, at 2.

¹⁶¹ Hope Hodge Seck, *Court Overturns 18-Year Rape Sentence Tainted by Heritage Brief*, *Army Times* (May 24, 2014) (alteration in original) (internal quotation marks omitted), https://deomi.org/contribute/LibraryResources/documents/DEOMI_News_Links_20140530.pdf [<https://perma.cc/8QWQ-GCTE>]; EO/EEO News Highlights, *Def. Equal Opportunity Mgmt. Inst.*, <https://www.deomi.org/LibraryResources/CurrentEOEONewsLinks.cfm> [<https://perma.cc/3SDX-N6N9>].

¹⁶² James Joyner, *More on Unlawful Command Influence*, *Outside the Beltway* (June 8, 2014), <http://www.outsidethebeltway.com/more-on-unlawful-command-influence/> [<https://perma.cc/5LVK-9ZNY>].

¹⁶³ Michael Doyle, *Tough Talk by Marine Commandant James Amos Complicates Sexual-Assault Cases*, *McLatchy Newspapers* (Sept. 13, 2012, 6:29 PM) (internal quotation marks omitted), <http://www.mcclatchydc.com/news/nation-world/national/national-security/article24736978.html> [<https://perma.cc/4RZW-7ZXF>].

¹⁶⁴ Amos White Letter, *supra* note 159.

¹⁶⁵ *United States v. Howell*, No. NMCCA 201200264, 2014 CCA LEXIS 321, at *10 (N.M. Ct. Crim. App. May 22, 2014).

Heritage Brief. Although some of the early claims of UCI were unsuccessful,¹⁶⁶ the United States Navy-Marine Corps Court of Criminal Appeals found, in *United States v. Howell*, that the Heritage Brief constituted the appearance of UCI.¹⁶⁷ In finding the appearance of UCI, the court in *Howell* was forced to reverse an eighteen-year sentence, though it allowed for a retrial.¹⁶⁸ Subsequent UCI cases based upon the Heritage Brief have been highly fact-specific, often turning upon whether the trial judge sufficiently ameliorated the UCI created by the brief through extended voir dire or jury instructions.¹⁶⁹ Regardless of the outcome of individual cases, the rash of appeals created by the Heritage Brief has been a burden on the military justice system, a blemish on the integrity of the process, and a sign that UCI in the sexual assault context is a growing problem.

The story of Commandant General Amos and the Heritage Brief represents the catch-22 that is created by the current structure of the military justice system. Military officials, from the President down to unit commanders, recognize that sexual assault must be addressed, yet their zeal for educating their subordinates and prosecuting perpetrators threatens the rights of the accused. Furthermore, UCI risks the reversal of hard-fought convictions, which may cause emotional strife for victims. The outcome of the Heritage Brief is proof that statements have consequences when they are made within the chain of command. Furthermore, if UCI was present within the Marine Corps in 2012—long before military sexual assault hit the mainstream media—claims of UCI in the present day appear eminently more credible. As a result, defendants across the globe are forced into a system that, in the pursuit of swift justice and

¹⁶⁶ See, e.g., *United States v. Jiles*, No. NMCCA 201200062, 2014 CCA LEXIS 151, at *9–11 (N-M. Ct. Crim. App. Mar. 6, 2014) (holding that the military judge had taken sufficient curative measures to remove the UCI, including conducting extensive voir dire and granting three additional peremptory challenges to the defense); *United States v. Easterly*, No. NMCCA 201300067, 2014 CCA LEXIS 40, at *27 (N-M. Ct. Crim. App. Jan. 31, 2014) (finding that the Heritage Brief did not affect sentencing).

¹⁶⁷ 2014 CCA LEXIS 321, at *2–4, *36–37.

¹⁶⁸ *Id.* at *24, *38; Seck, *supra* note 161.

¹⁶⁹ See, e.g., *United States v. Russo*, No. NMCCA 201300324, 2014 CCA LEXIS 851, at *6–7 (N-M. Ct. Crim. App. Nov. 18, 2014) (finding that the trial judge's sua sponte instruction to disregard any comments by the Commandant was sufficient to cure UCI); *United States v. Olcott*, No. NMCCA 201300228, 2014 CCA LEXIS 818, at *13–17 (N-M. Ct. Crim. App. Oct. 30, 2014) (holding that supplemental member questionnaires and the use of two peremptory challenges remedied the appearance of UCI).

results, disregards the presumption of innocence, a bedrock principle of the criminal justice system.

III. CREATING AWARENESS OR A PRESUMPTION OF GUILT? UNINTENDED CONSEQUENCES OF SAPR TRAINING

A. Background

Beyond reforms to the military justice system, one of the most significant actions taken to quell sexual assault in the military has been the proliferation of awareness, prevention, and response trainings. The process began in 2004 with a directive from then-Secretary of Defense Donald Rumsfeld to Dr. David S. Chu, then-Under Secretary of Defense for Personnel and Readiness, to review the process for treatment and care of victims of sexual assault in the military.¹⁷⁰ This review culminated in a sexual assault prevention and response policy that became permanent in October 2005, which is managed by the Sexual Assault Prevention and Response Office (“SAPRO”).¹⁷¹

Each branch is tasked with implementing their own training programs, but the SAPRO serves as the “single point of authority for sexual assault policy and provides oversight to ensure that each of the Service’s programs complies with DoD policy.”¹⁷² The intricacies of the Department of Defense Sexual Assault Prevention and Response Policy are beyond the scope of this Note, but they are well summarized by the SAPRO mission statement: “The Department of Defense prevents and responds to the crime of sexual assault in order to enable military readiness and reduce — with a goal to eliminate — sexual assault from the military.”¹⁷³

The efforts to implement this policy have been wide ranging, from creating telephone hotlines for victims to developing extensive training modules—commonly called “SAPR” trainings.¹⁷⁴ The efforts of the SAPRO and its counterparts in the respective branches are critical in the fight against sexual assault in the military. Preventing sexual assault

¹⁷⁰ U.S. Dep’t of Def., Sexual Assault Prevention and Response Office, Mission & History, <http://www.sapr.mil/index.php/about/mission-and-history> [https://perma.cc/7X7T-SPFL].

¹⁷¹ Id.

¹⁷² Id.

¹⁷³ U.S. Dep’t of Def., Sexual Assault Prevention & Response Office, About SAPRO, <http://www.sapr.mil/index.php/about> [https://perma.cc/R3ZP-DFNN].

¹⁷⁴ Id.; see, e.g., *infra* notes 177, 184 and accompanying text.

from occurring through bystander intervention and providing safe spaces for victims to tell their stories are crucial steps towards creating real cultural change in the military.

Concerns have begun to surface, however, about the content, ubiquity, and implications of many of these training modules. Military and civilian defense attorneys have pointed out that the same service members who are digesting countless hours of sexual assault awareness and response training on a regular basis are also serving as court-martial members in sexual assault cases.¹⁷⁵ In fact, since the vast majority of court-martial members are officers,¹⁷⁶ many of these court-martial members have not only attended SAPR courses but also taught SAPR courses to their subordinates.¹⁷⁷

This intimate relationship with the topic of sexual assault leads to understandable doubts about the ability of such members to act impartially when sitting on court-martial panels. Whether considered a form of UCI or simply jury bias, this appears to be another possible instance of unintended consequences: Trainings intended to snuff out sexual assault may undermine the ability of the military to adjudicate such cases equitably.

Since each branch of the military is responsible for creating their own SAPR trainings and these trainings are voluminous, it is not possible to analyze them all in this Note. Rather, this Part aims to consider both the content and the potential implications of a few training modules in order to demonstrate that SAPR trainings may be unintentionally tainting the jury pool and stacking the deck against defendants. In fact, military judges have already recognized this problem and have attempted to use curative measures such as extensive voir dire, additional peremptory challenges, and targeted jury instructions.¹⁷⁸ Although it is impossible to prove how SAPR trainings affect the decision making of court-martial

¹⁷⁵ See, e.g., *United States v. Howell*, No. NMCCA 201200264, 2014 CCA LEXIS 321, at *1, *10–11, *36–37 (N-M. Ct. Crim. App. May 22, 2014) (holding that the Heritage Brief, a sexual assault awareness presentation, created UCI); supra Section II.C.

¹⁷⁶ See supra notes 68–69 and accompanying text.

¹⁷⁷ Officers and senior enlisted service members are responsible for conducting SAPR trainings for their subordinates. See U.S. Dep't of Navy, *Take the Helm: Sexual Assault Prevention and Response Training for the Fleet (SAPR-F): Facilitation Guide FY12/13*, at 1, 3 (n.d.) (on file with author) [hereinafter *SAPR-F Facilitation Guide*] (describing the program as “command-delivered training for the Navy’s Fleet—E6 and below”).

¹⁷⁸ See, e.g., *United States v. Olcott*, No. NMCCA 201300228, 2014 CCA LEXIS 818, at *13–15 (N-M. Ct. Crim. App. Oct. 30, 2014) (describing the discussion of SAPR during voir dire); *United States v. Lugo*, No. NMCCA 201200102, 2013 CCA LEXIS 40, at *4–6 (N-M. Ct. Crim. App. Jan. 29, 2013) (same).

members, the very implication that outside sources are influencing the court-martial process is problematic.¹⁷⁹ It is important for policymakers and military judges to recognize the role that SAPR trainings play, not only in stemming the tide of sexual assault in the military, but also in the military justice system.

B. Case Study: Navy SAPR Training Programs

In response to the growing problem of sexual assault, the Department of Defense developed a strategic plan to which the branches, including the Navy, aligned their respective plans.¹⁸⁰ The Navy's plan includes leadership-only training ("SAPR-L"), fleet-wide training ("SAPR-F"), bystander intervention training, and the integration of sexual assault topics into other trainings such as leadership development trainings.¹⁸¹ These formal trainings are supplemented by "stand-down" meetings held to reinforce the seriousness of this problem.¹⁸² Each of these modules entails a mix of videos, discussions, and handout materials.¹⁸³ The topics covered include defining sexual assault, defining consent, practicing bystander intervention, and outlining the reporting process.¹⁸⁴ These trainings have become so pervasive that, by November 2014, it was estimat-

¹⁷⁹ See *supra* note 137 and accompanying text (discussing the appearance of UCI).

¹⁸⁰ See generally Chuck Hagel, U.S. Sec'y of Def., U.S. Dep't of Def., *Sexual Assault Prevention and Response Strategic Plan* (Apr. 30, 2013), http://www.sapr.mil/public/docs/reports/SecDef_SAPR_Memo_Strategy_Atch_06052013.pdf [<https://perma.cc/H4AT-6ML3>] (outlining the SAPR strategic plan).

¹⁸¹ U.S. Dep't of Navy, OPNAV Instr. 1742.1c, *Navy Sexual Assault Prevention and Response (SAPR) Program 2-13* (Aug. 13, 2015), <http://www.navy.mil/docs/OPNAVINST-1752-1C.pdf> [<https://perma.cc/ST9C-Y4QG>]; Navy Personnel Command, U.S. Dep't of Navy, *Sexual Assault Prevention and Response (SAPR) Training*, http://www.public.navy.mil/bupers-npc/support/21st_Century_Sailor/sapr/Pages/training.aspx [<https://perma.cc/4D9L-4KAY>].

¹⁸² See SAPR-F Facilitation Guide, *supra* note 177, at 6.

¹⁸³ See, e.g., *id.* at 1–2; U.S. Dep't of Navy, *Sexual Assault Prevention and Response Training for the Fleet: Supporting Material* (n.d.) (on file with author) [hereinafter *SAPR-F Brochure*]; U.S. Dep't of Navy, *Sexual Assault Prevention and Response Training for Navy Leaders: Supporting Material* (n.d.) (on file with author) [hereinafter *SAPR-L Brochure*].

¹⁸⁴ See SAPR-F Facilitation Guide, *supra* note 177, at 1–2; U.S. Dep't of Navy, *Take the Helm: Sexual Assault Prevention and Response Training for Leaders (SAPR-L): Facilitation Guide FY12*, at 1–2 (n.d.) (on file with author) [hereinafter *SAPR-L Facilitation Guide*]; sources cited *supra* note 183.

ed that roughly 300,000 individuals, the vast majority of whom were service members, had attended one or more SAPR trainings.¹⁸⁵

In addition to discussing legal definitions and bystander intervention, these trainings bear much of the same forceful language about stamping out the epidemic of sexual assault that led the United States Navy-Marine Corps Court of Criminal Appeals to find UCI in *United States v. Howell*.¹⁸⁶ For instance, one SAPR brochure begins with, “[s]exual assault in our Navy undermines teamwork, morale, unit cohesion, and operational readiness,” which is undoubtedly true, but it continues, “[i]t is each and every Sailor’s *responsibility* to adhere to [the ‘zero tolerance’] policy and *do their part to eliminate this crime within our ranks*.”¹⁸⁷ Furthermore, one flyer quotes then-Secretary of Defense Leon Panetta:

Sexual assault has no place in this department. It is an affront to the basic American values we defend, and it is *a stain on the good honor* of the great majority of our troops . . . [W]e have to *spare no effort* in order to protect them against this heinous crime.¹⁸⁸

Similarly, that same flyer says, “[s]uccess will only be achieved with an *all hands, top-to-bottom, concerted effort to eliminate sexual assault* from our ranks.”¹⁸⁹ Other statements include: “[F]ocus on eliminating this crime,”¹⁹⁰ “[H]old the line on a zero-tolerance policy,”¹⁹¹ and “Do YOU have the COURAGE to step up and do what is right?”¹⁹²

While no individual statement here is problematic, their collective message is clear: All sailors should take action to end the sexual assault epidemic. What is not clear is whether this directive to take action applies to the military justice system. This message could easily be con-

¹⁸⁵ Memorandum with Attachments from Ray Mabus, Sec’y of Navy, to Under Sec’y of Def. for Personnel & Readiness 11 (Nov. 5, 2014), http://sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Enclosure_2_Navy.pdf [<https://perma.cc/V7UY-KAFL>].

¹⁸⁶ For a discussion of *United States v. Howell*, see *supra* notes 167–68 and accompanying text.

¹⁸⁷ SAPR-F Brochure, *supra* note 183 (emphasis added).

¹⁸⁸ U.S. Dep’t of Navy, Sexual Assault Prevention and Response for the Fleet (SAPR-F) Talking Points (n.d.) [hereinafter SAPR-F Flyer] (emphasis added) (quoting U.S. Sec. Def. Leon Panetta) (internal quotation marks omitted), http://www.public.navy.mil/bupers-npc/support/21st_Century_Sailor/sapr/Documents/SAPR-FTalkingPoints_29Nov12_smoth_FINAL.pdf [<https://perma.cc/6AZR-4JWX>].

¹⁸⁹ *Id.* (emphasis added).

¹⁹⁰ SAPR-L Facilitation Guide, *supra* note 184, at 5.

¹⁹¹ *Id.* at 1.

¹⁹² SAPR-F Facilitation Guide, *supra* note 177, at 16.

strued (or misconstrued) as encouraging the referral of charges and the finding of guilty verdicts, which corrupts the impartiality of the military justice system and could constitute UCI.

In other instances, training materials contain statements of questionable validity that erode the presumption of innocence. For example, one training guide advises: “If a Sailor asks about the prevalence of false reporting, facilitators should explain that there is no data to suggest that ‘many’ or ‘most’ sexual assault allegations are false.”¹⁹³ While it is true that false reporting is not the norm, it is potentially misleading to state that *no* data suggests that *many* sexual assault allegations are false. Even the National Center for the Prosecution of Violence Against Women, an organization that strives to give victims a voice, acknowledges that as many as 8% of reports are false.¹⁹⁴ Furthermore, the military’s own data finds that 15-17% of reports between 2011 and 2014 were eventually determined to be “unfounded, meaning false or baseless,” including over 500 unfounded reports in 2014 alone.¹⁹⁵ While lawyers may quibble about whether 15% or even 8% constitutes “many,” it is misleading to dismiss the idea of false reporting so summarily in SAPR trainings. Such blanket statements oversimplify a complex issue and foster a presumption of guilt that may cloud the judgment of the roughly 300,000 sailors who have received this message and are eligible to sit on court-martial panels.¹⁹⁶

While much of the content contained in SAPR trainings is accurate and valuable—in fact, SAPR trainings are an excellent model for organizations and universities that are working to develop sexual assault prevention and response programs—the problem lies in the fact that these trainings do not occur in a vacuum. The same sailors and officers being told time and time again that sexual assault is a crisis that undermines the military and needs to be stamped out are sitting on court-martial panels and making charging decisions.

¹⁹³ *Id.* at 12.

¹⁹⁴ Kimberly A. Lonsway et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 3 *Voice* 1, 2 (2009), http://ndaa.org/pdf/the_voice_vol_3_no_1_2009.pdf [<https://perma.cc/3PR4-W49C>]; Nat’l Sexual Violence Res. Ctr., *Publications*, <http://www.nsvrc.org/publications/articles/false-reports-moving-beyond-issue-successfully-investigate-and-prosecute-non-s> [<https://perma.cc/BAZ7-5MJE>].

¹⁹⁵ *Sexual Assault Data: 2014*, *supra* note 20, app. A at 34.

¹⁹⁶ See *supra* note 185.

It is worth noting that the tenor and tone of these trainings bear a striking resemblance to the “Heritage Brief,” which was found to constitute UCI.¹⁹⁷ In fact, SAPR trainings are potentially more influential because they bear the added institutional imprimatur of the entire U.S. Navy, which is far more forceful than one officer. For this reason, these trainings run a serious risk of fomenting accusatory and adjudicative UCI.

Critics may respond by arguing that the current SAPR trainings are necessary because eliminating such training programs would reinstitute a system in which the deck is stacked against victims. This, however, is a false choice. SAPR trainings do not need to be phased out; they need to be improved. Although SAPR trainings possess the flaws discussed above, those flaws could be rectified by more closely monitoring and more thoroughly vetting SAPR trainings.¹⁹⁸ Addressing the problem of sexual assault should not involve choosing sides between victims and the accused; it should focus on developing a system that is deliberative, fair, and effective.

IV. LASTING CHANGE? THE SHORTCOMINGS OF PROPOSED REFORMS

As the prevalence of sexual assault in the military has gained national attention, policymakers and politicians have responded with a flurry of legislative reform proposals. Chief among these are the MJIA, sponsored by Senator Kirsten Gillibrand, and the VPA, sponsored by Senator Claire McCaskill.

While neither of these bills has been signed into law, they have had a profound impact on the debate about military justice and sexual assault. In fact, many of the reforms discussed above in Section I.B were taken directly from these two pieces of proposed legislation. This Part will begin by summarizing and critiquing both the MJIA and the VPA and conclude with some recommendations for future reforms.

A. Military Justice Improvement Act

The MJIA was initially introduced in May 2013 by Senator Kirsten Gillibrand, but it has been subsequently amended and reintroduced on at

¹⁹⁷ See *supra* Section II.C.

¹⁹⁸ See *infra* Subsection IV.C.2.

least four other occasions.¹⁹⁹ Although amendments to the bill will be discussed in greater detail, the general structure of the proposal remained the same throughout all five iterations. If the MJIA had passed, the authority to make disposition (that is, charging) decisions would have been taken away from commanders and placed in the hands of a senior military attorney.²⁰⁰ While this was the most prominent feature of the MJIA, the bill also contained other proposals such as removing the consideration of general military character from the initial disposition decision,²⁰¹ requiring a court-martial to be called into session within ninety days after charges are referred,²⁰² and adding explicit retaliation and obstruction of justice crimes to the UCMJ.²⁰³

The MJIA's most significant—and controversial—proposal was altering the initial disposition procedure (that is, the charging decision). Under the initial version of the MJIA, the disposition decision regarding any charge that carried a maximum punishment of at least one year of confinement (that is, imprisonment) would be made by a senior JAG officer, rather than a commander.²⁰⁴ The MJIA also provided that various minor or military-specific offenses would be excluded from the new regime, thus preserving commanders' charging authority for such crimes.²⁰⁵ The list of exclusions was slowly expanded over the subsequent versions to include failure to obey an order and general article offenses, as well as conspiracy and attempts to commit other excluded offenses.²⁰⁶ The idea of removing the disposition authority from commanders generated considerable backlash from senior military offi-

¹⁹⁹ Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013); see also Military Justice Improvement Act of 2014, S. 2992, 113th Cong. (2014); Military Justice Improvement Act of 2014, S. 2970, 113th Cong. (2014); Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2013); Military Justice Improvement Act of 2015, S. Amend. 1578, 114th Cong., 161 Cong. Rec. S3717 (daily ed. June 3, 2015).

²⁰⁰ See sources cited *supra* note 199.

²⁰¹ S. 967 § 3.

²⁰² *Id.* § 5.

²⁰³ S. 2992 §§ 6–7.

²⁰⁴ S. 967 § 2(a)(1), (3). A commander is a commissioned officer who is in a command position, such as over a unit or installation. A senior JAG's role is not to command, but to provide, among other things, legal advice to such commanders.

²⁰⁵ See *id.* § 2(a)(2).

²⁰⁶ Compare S. 2992 § 2(a)(3) (retaining commander charging authority over failure to obey an order, general article offenses, and conspiracy and attempts to commit other excluded offenses), with S. 967 § 2(a)(2) (retaining commander charging authority over various minor and/or military-specific offenses but not failure to obey an order, general article offenses, or conspiracy or attempts to commit other excluded offenses).

cials,²⁰⁷ and the bill ultimately failed.²⁰⁸ The MJIA failed to demonstrate a clear rationale for determining which crimes are suitable for commanders to handle and which crimes should be under the purview of an independent prosecutor.

Although the MJIA as a whole failed to clear the Senate, several of its policies were eventually implemented. For instance, the proposal to remove general military character from the disposition decision was incorporated into the National Defense Authorization Act for Fiscal Year 2014.²⁰⁹ The desire to create a separate offense of retaliation was also vindicated when it was incorporated into Article 92 of the UCMJ.²¹⁰ Lastly, the MJIA's ban on post-conviction dismissal was codified, at least with respect to sex-related crimes and other serious offenses.²¹¹ Nevertheless, as long as the charging authority remains with commanders, the bulk of the MJIA remains unenacted, and Senator Gillibrand has vowed to continue fighting for further reform.²¹²

B. Victims Protection Act

Senator Claire McCaskill was among the chief opponents of the MJIA.²¹³ Rather than simply opposing Senator Gillibrand's bill, Senator

²⁰⁷ Zoë Carpenter, Military Stifling Support for Sexual Assault Reforms, High-Ranking Officer Says, *Nation* (Nov. 15, 2013), <https://www.thenation.com/article/military-stifling-support-sexual-assault-reforms-high-ranking-officer-says> [<https://perma.cc/5AFD-GK6Z>]; James Kitfield, Why Do Senior Officers Call Sexual-Assault Reform a 'Slippery Slope'?, *Atlantic* (Aug. 16, 2013), <http://www.theatlantic.com/national/archive/2013/08/why-do-senior-officers-call-sexual-assault-reform-a-slippery-slope/278759> [<https://perma.cc/6ARB-N8RC>].

²⁰⁸ Amanda Marcotte, What Happened to the Military Sexual Assault Bill in the Senate on Thursday?, *Slate: The XX Factor* (Mar. 7, 2014, 10:57 AM), http://www.slate.com/blogs/xx_factor/2014/03/07/military_sexual_assault_bills_claire_mccaskill_defeats_kirsten_gillibrand.html [<https://perma.cc/67X2-WENZ>].

²⁰⁹ Compare S. 967 § 3 (calling for the removal of general military character from the disposition decision), with National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1708, 127 Stat. 672, 961 (2013) (modifying the MCM to eliminate general military character from the disposition decision).

²¹⁰ National Defense Authorization Act for Fiscal Year 2014 § 1709, 127 Stat. at 962.

²¹¹ 10 U.S.C. § 860(c)(3)(B) (Supp. II 2015).

²¹² Felicia Schwartz, Hagel Urges Sexual Assault Cases Stay in Military Command Structure, *Wall St. J.* (Jan. 16, 2015, 4:43 PM), <http://www.wsj.com/articles/hagel-urges-sexual-assault-cases-stay-in-military-command-structure-1421444631> [<https://perma.cc/7D3G-QGWG>].

²¹³ Dan Friedman, Gillibrand's Bid to Curb Sex Assaults in Military Under Fire, *N.Y. Daily News* (Nov. 24, 2013, 1:31 AM), <http://www.nydailynews.com/news/national/gillibrand-bid-curb-sex-assaults-military-fire-article-1.1527185> [<https://perma.cc/GF7S-MV3Z>].

McCaskill presented an alternative, the VPA.²¹⁴ The VPA, as the name suggests, was directed at the narrow issue of sexual assault rather than broader military justice reform.²¹⁵ Due to its narrower scope, the VPA did not face significant opposition in the Senate. Just four days after the MJIA failed to break a filibuster, the VPA passed the Senate nearly unanimously.²¹⁶ Despite overwhelming support in the Senate, the VPA failed to reach the floor of the House and died in committee.²¹⁷ Nevertheless, much like the MJIA, some components of the VPA were enacted via other statutes.²¹⁸

Although it did not pass outright, it is worth considering some of the VPA's proposals. The first substantive provision proposed by the VPA concerned reviewing commanders' decisions not to refer charges of sex-related offenses.²¹⁹ Under the current system, when a commander decides not to refer charges in a sex-related case and her staff judge advocate is in agreement, the next superior commander authorized to convene a general court-martial reviews the case. When a commander decides not to refer charges despite a recommendation by her staff judge advocate to do so, the secretary of the respective military branch reviews the case.²²⁰ The VPA would have provided that this review also be conducted if a senior trial counsel assigned to the case (that is, a military prosecutor) recommended referral.²²¹ This kind of additional review provides little benefit while only strengthening the pressure to refer

²¹⁴ Victims Protection Act of 2014, S. 1917, 113th Cong. (2014); Marcotte, *supra* note 208.

²¹⁵ S. 1917 ("To provide for additional enhancements of the sexual assault prevention and response activities of the Armed Forces.").

²¹⁶ See 160 Cong. Rec. S1377 (daily ed. Mar. 10, 2014); Marcotte, *supra* note 208. The vote on the bill was 97-0. Only Senators McCain, Harkin, and Kirk did not vote. 160 Cong. Rec. S1377.

²¹⁷ All Bill Information (Except Text) for S.1917 – Victims Protection Act of 2014, Congress.gov, <https://www.congress.gov/bill/113th-congress/senate-bill/1917/all-info?resultIndex=2> [<https://perma.cc/37RX-9DQW>]; S. 1917 (113th): Victims Protection Act of 2014, GovTrack, <https://www.govtrack.us/congress/bills/113/s1917> [<https://perma.cc/D4PE-FLV7>].

²¹⁸ Compare, e.g., National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 534, 128 Stat. 3292, 3367–68 (2014) (requiring victim consultation for and consideration of preference for civilian or military jurisdiction), with S. 1917 § 3 (proposing the same).

²¹⁹ S. 1917 § 2; National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1744, 127 Stat. 672, 980–82 (2013).

²²⁰ National Defense Authorization Act for Fiscal Year 2014 § 1744, 127 Stat. at 980–82.

²²¹ S. 1917 § 2.

charges even in weak cases,²²² which increases the risk of false convictions. Commanders already feel undue pressure to refer all cases to trial;²²³ adding more layers of review would only increase that pressure.

In addition to review of commander discretion, the VPA proposed that victims should have a say in the disposition decision and that commander evaluations should include assessment of commanders' management of sexual assault claims.²²⁴ These proposals were enacted in December 2014 through the annual defense authorization.²²⁵ As discussed above in Section I.B, these reforms, while ostensibly beneficial to victims, place further pressure on commanders to prosecute any and all claims of sexual assault. Rather than transferring prosecutorial discretion from commanders to neutral lawyers, these reforms effectively eliminate any discretion whatsoever. Commanders are left with no choice but to prosecute or risk negative evaluations.²²⁶

These policies, while well intentioned and tough on sexual offenders, threaten the rights of the accused in the pursuit of addressing a spate of sexual assault scandals. Without structural changes, targeted legislation such as the VPA threatens to do more harm than good by tampering with the procedural rights of defendants.

C. Utilizing Specialization: Long-Lasting Reform that Transcends the Current Debate

1. Addressing Accusatory UCI by Altering the Dispositional Authority

Both the MJIA and the VPA were unsuccessful because they were too focused on the narrow issue of sexual assault. They failed to recognize the broader context of the military justice system. Even the MJIA, which recommended some broad reforms, was focused primarily on the narrow issue of sexual assault. Disagreement over sweeping reforms, such as removing the charging authority from commanders, reflects the inherent tension between the two goals of military justice. On the one hand, the military justice system functions as the military's criminal justice sys-

²²² See *supra* notes 153–54 and accompanying text.

²²³ See *supra* notes 153–54 and accompanying text.

²²⁴ S. 1917 § 3.

²²⁵ National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, §§ 508, 534, 128 Stat. 3292, 3357, 3367–68 (2014).

²²⁶ See *supra* notes 153–54 and accompanying text.

tem.²²⁷ On the other hand, the military justice system also serves to “assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment.”²²⁸

The pursuit of justice and the maintenance of good order and discipline are often supplemental, but that is not always the case. Just as a good parent does not call the police when he catches his son staying awake past his bedtime, a prudent commander does not demand a court-martial when her subordinate shows up late (although she could).²²⁹ Where the military justice system goes astray is in mixing military offenses with universal crimes and forcing them into a single system. That is why both a system of complete commander control and one of complete prosecutor control are equally unsatisfying.

Although other nations have civilianized their military justice systems,²³⁰ placing the dispositional authority entirely in the hands of civilian prosecutors would be ill-advised for numerous reasons. Chief among these is the issue of jurisdiction. While many military bases are located within the United States, a significant number of installations are overseas.²³¹ The vast and rapidly changing geographic scope of the military is among the reasons why separate military justice systems such as the UCMJ exist.²³² Asking civilian prosecutors to handle cases that occur across the globe would be unduly expensive and convoluted.²³³ In addition, civilianizing the military justice system would undermine the dual purposes of the military justice system: that is, achieving criminal justice and maintaining good order and discipline. Civilian prosecutors have no

²²⁷ See MCM, *supra* note 10, pt. I, ¶ 3 (“The purpose of military law is to promote justice . . .”).

²²⁸ *Id.*

²²⁹ See 10 U.S.C. § 886 (2012) (providing court-martial for a person who “fails to go to his appointed place of duty at the time prescribed”).

²³⁰ Murphy, *supra* note 19, at 165; cf. Brady, *supra* note 25, at 240 (recommending placing the disposition authority in the hands of the Department of Justice rather than JAG officers).

²³¹ See David Vine, *Where in the World Is the U.S. Military?*, *Politico* (July/Aug. 2015), <http://www.politico.com/magazine/story/2015/06/us-military-bases-around-the-world-119321> [<https://perma.cc/PM2E-YB3C>].

²³² Louis B. Nichols, *The Justice of Military Justice*, 12 *Wm. & Mary L. Rev.* 482, 485–86 (1971) (“A system of criminal justice must be an integral part of the armed forces because they may be deployed anywhere in the world on short notice. They cannot depend, for example, on United States criminal courts which are many thousands of miles away and, for the most part, already bogged down. The administration of justice must be possible within a combat zone as well as on a peacetime installation.”).

²³³ See *id.*

vested interest in, or appreciation for, military-specific crimes, such as failure to obey an order or disrespect towards a superior officer.

In the civilian criminal justice system, the vast majority of prosecutors are members of the community in which they serve, rather than distant administrators of justice.²³⁴ This structure appears to reflect a belief that prosecutors serve best when they are tied to their communities,²³⁵ and that same principle applies equally to the military justice system. Farming out dispositional authority to civilian prosecutors would create a disconnect between the military justice system and the members of the military. Civilianizing the entire military justice system would risk throwing the proverbial baby out with the bathwater by tearing down a system that could otherwise be restructured.

Some have sought to mitigate these issues by arguing that civilian attorneys could be employed only for military sexual assault cases,²³⁶ but such a distinction is untenable. The same problems that would arise from civilianizing the entire military justice system (discussed above) apply to the sexual assault context. Furthermore, treating only sexual assault cases separately would create a strange dichotomy within the military justice system. Sexual assault cases would be singled out for adjudication by an entirely separate judicial body, while all other crimes—including serious crimes like murder, espionage, and desertion—would remain within the military justice system.²³⁷ Such an arrangement ignores the deeper structural issues regarding the disposition of cases within the military justice system, which are discussed below.

A more appropriate solution would be a modified version of the MJIA's idea to divide the disposition authority between commanders and military prosecutors, a compromise between complete commander control and no commander control. Such a structure would infuse inde-

²³⁴ Nat'l Research Council, *What's Changing in Prosecution? Report of a Workshop 7* (Philip Heymann & Carol Petrie eds., 2001) ("In all but two states, each county in the state elects a local prosecutor . . ."); *id.* ("One United States Attorney is appointed to serve in each of 93 judicial districts.").

²³⁵ See generally Anthony V. Alfieri, *Community Prosecutors*, 90 *Calif. L. Rev.* 1465 (2002) (expanding upon the implicit belief that prosecutors are most successful when they are integrated in the communities that they serve).

²³⁶ Brady, *supra* note 25, at 239–42.

²³⁷ In addition, the civilianization of one aspect of the military justice system could be seen as a path towards complete civilianization. If the prosecution of sexual assault is civilianized, the next logical step would be to civilianize other crimes if problems arise. This civilianization process would undermine the dual purposes of the military justice system discussed above.

pendent decision making into the system while preserving a role for commanders to maintain good order and discipline. Unlike proposals that civilianize aspects of the military justice system, dividing the disposition authority between prosecutors and commanders allows the military to maintain control of its criminal justice system while simultaneously ameliorating concerns about UCI. As long as military prosecutors are assured independent prosecutorial discretion, they are certainly capable of making disposition decisions without the need for civilian intervention.²³⁸

Although JAG prosecutors are members of the military, the system can be structured in such a way that they are given sufficient prosecutorial discretion and independence.²³⁹ By virtue of their position, JAGs are less prone to UCI because they operate in a somewhat separate sphere and possess unique independence. For instance, JAG officers already serve as a useful independent check on the use of military force. JAGs that practice operational law are often called upon to advise commanders on whether a particular military action is compliant with U.S. and international law,²⁴⁰ and they are frequently challenged by commanders who disagree with their findings.²⁴¹ There is little reason to believe that JAG officers who practice criminal law are not capable of similar independent judgment. In fact, trial counsel (that is, military prosecutors) are bound by similar rules of professional responsibility as their civilian counterparts.²⁴² Arguing that JAG officers are incapable of making inde-

²³⁸ Contra Brady, *supra* note 25, at 239–40 (questioning the ability of military prosecutors to act independently).

²³⁹ For example, evaluating these JAG prosecutors based upon the quality of their work, not the number of convictions they obtain, would provide greater independence.

²⁴⁰ See, e.g., Lieutenant Colonel Richard P. DiMeglio, Training Army Judge Advocates to Advise Commanders as Operational Law Attorneys, 54 B.C. L. Rev. 1185, 1185–88 (2013) (describing a quintessential operational law question that requires JAGs to provide “independent and candid advice”); A. Edward Major, Law and Ethics in Command Decision Making, *Mil. Rev.*, May–June 2012, at 61, 67, http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20120630_art011.pdf [<https://perma.cc/NZ2B-VDA A>] (“The chairman of the Joint Chiefs of Staff has directed that attorneys will review all operations plans and participate in targeting meetings of military staffs.”).

²⁴¹ Major, *supra* note 240, at 64 (“[C]ommanders almost always assert their freedom to challenge the opinion of the [JAG officer] . . .”).

²⁴² Compare Model Rules of Prof'l Conduct r. 3.8 (Am. Bar Ass'n 2016) (outlining recommended rules for prosecutors), with Dep't of Navy, Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General, 80 Fed. Reg. 68,388, 68,399–400 (Nov. 4, 2015) (to be codified at 32 C.F.R. pt. 776) (providing sim-

pendent prosecutorial decisions underestimates the professionalism and independence of the JAG Corps.

Although the MJIA's idea to divide the disposition decision was prudent, its method for allocating crimes between commanders and prosecutors missed the mark. The MJIA focused first on the severity of a crime—essentially separating felonies and misdemeanors—and then made exceptions for military-specific crimes.²⁴³ But because many of the excepted military crimes carry the most serious penalties such as execution,²⁴⁴ the initial delineation seemed illogical. If commanders are capable of handling capital military crimes, why distinguish between serious and nonserious offenses in the first instance? The exceptions, while prudent, swallowed the initial rule. The reality is that commanders are perfectly capable of handling charging decisions over serious crimes—assuming the crimes at issue are connected to military discipline and good order.

A more logically consistent approach is to ignore the severity of the crime altogether and look instead to the nature of the crime, essentially skipping straight to the second step of the MJIA formulation. Simply put: The UCMJ should be amended so that crimes with civilian analogues are governed by military prosecutors, while military-specific crimes are governed by commanders. The rationale behind such a distinction is specialization, a concept familiar to every branch of the military. Just as jet pilots are not asked to steer submarines, commanders should not be asked to handle the disposition of traditional crimes such as burglary, murder, arson, and sexual assault.

Likewise, lawyers should not be asked to handle military-specific crimes such as failure to go (tardiness), contempt toward officials (insubordination), or malingering (faking sickness to avoid duty). Crimes such as these are chiefly concerned with discipline, good order, and efficiency, and they are best handled by commanders rather than prosecutors; they have little place in a criminal justice system. Delineating between traditional crimes and military crimes satisfies the dual aims of military justice: Commanders maintain a role in promoting good order,

ilar rules for Navy trial counsel—that is, JAG prosecutors—as the ABA recommends for civilian prosecutors).

²⁴³ See *supra* Section IV.A.

²⁴⁴ See, e.g., 10 U.S.C. § 885 (2012) (authorizing the death penalty for desertion during a time of war).

while lawyers deal with acts that are criminal in the civilian world as well as in the military.²⁴⁵

Such a distinction also acknowledges the fact that violations of the UCMJ, by virtue of being a federal statute, are federal crimes. Alternatives to court-martial, such as administrative action or nonjudicial punishment, give commanders the option to use a violation as a teaching moment rather than slapping a federal conviction on a service member's record for something as trivial as tardiness or insubordination.²⁴⁶ Commanders would still maintain the authority to convene a court-martial for repeat offenders or more serious violations of military-specific crimes, but they could often handle cases without requiring the full force of the criminal law, which is what they already do under the current system.

Conversely, just as civilian prosecutors routinely negotiate plea deals, military prosecutors could offer the accused the option to be referred to their commander for nonjudicial punishment or administrative action where appropriate (for example, minor crimes like petit theft or public drunkenness). This system would relieve military commanders from the burden of making prosecutorial decisions about traditional crimes, while simultaneously preserving the appropriate amount of commander discretion for military-specific crimes. In so doing, it would vindicate the dual aims of the military justice system without sacrificing the rights of victims or those accused.

It is worth noting, of course, that independent prosecutorial discretion is not a panacea. All prosecutors, whether military or civilian, run the risk of being improperly influenced by outside factors not germane to the case at hand. However, transferring the disposition power from commanders to independent prosecutors is a step in the right direction.²⁴⁷ This approach is akin to appointing a special prosecutor in a civilian case in order to ensure objectivity or selecting U.S. Attorneys by appointment rather than election. Defining the ideal criminal justice system is beyond the scope of this Note, but working to insulate prosecutorial decision making from outside pressures would ameliorate some of the

²⁴⁵ Drawing the line between civilian and military crimes would be largely straightforward, but there would certainly be some liminal cases. A comprehensive listing is beyond the scope of this Note.

²⁴⁶ See Murphy, *supra* note 19, at 172–75 (criticizing the fact that minor military offenses can result in federal convictions on service members' records).

²⁴⁷ *Contra* Brady, *supra* note 25, at 239–40 (dismissing the ability of military prosecutors to act independently).

current concerns about defendants' rights. While prosecutorial discretion is imperfect, it takes the decision out of the chain of command, thereby reducing fears of manipulation and accusatory UCI.

2. Addressing Adjudicative UCI with Curative Trial Practices and SAPR Reform

Although altering the dispositional authority mitigates accusatory UCI, it does not solve the problem of adjudicative UCI,²⁴⁸ which can be difficult to definitively detect because it is based on the subjective judgment of actual court-martial members (that is, jurors). Nevertheless, as long as trials are held via courts-martial, concerns will linger that court-martial members may feel external pressure to convict, based either upon comments by military officials or the implications of extensive SAPR training and public perception.²⁴⁹

In order to address this problem, a set of uniform jury instructions could be crafted to counteract the potential prejudicial effects of SAPR trainings, media attention, and public statements of both civilian leadership and high-ranking military officials. Appellate courts have already held that extensive voir dire and proper jury instructions given to court-martial members can cure adjudicative UCI.²⁵⁰ Reproducing effective jury instructions that properly mitigate fears of UCI would help ensure that courts-martial are fair and impartial tribunals that seek the truth rather than particular outcomes. In fact, the available data suggest that such curative measures have been working: Although the proportion of cases sent to trial has increased dramatically, the trial-conviction rate has held fairly constant.²⁵¹ These trial practices could be expanded and

²⁴⁸ See *supra* Part II.

²⁴⁹ See *supra* Part III.

²⁵⁰ See, e.g., *United States v. Russo*, No. NMCCA 201300324, 2014 CCA LEXIS 851, at *7 (N-M. Ct. Crim. App. Nov. 18, 2014) (describing jury instructions as mitigating UCI); *United States v. Olcott*, No. NMCCA 201300228, 2014 CCA LEXIS 818, at *13 (N-M. Ct. Crim. App. Oct. 30, 2014) (describing the discussion of SAPR during voir dire); *United States v. Lugo*, No. NMCCA 201200102, 2013 CCA LEXIS 40, at *7 (N-M. Ct. Crim. App. Jan. 29, 2013) (same).

²⁵¹ Compare Sexual Assault Data: 2014, *supra* note 20, app. A at 29 (74% conviction rate), with Sexual Assault Data: 2011, *supra* note 20, at 45 (80% conviction rate).

standardized across the military to help ensure that all defendants are receiving due process.²⁵²

In addition to curative trial practices, fears of adjudicative UCI can be addressed by carefully monitoring the language and tone of SAPR trainings. Although training is an invaluable tool in the fight against sexual assault, it is critical that such trainings do not erode the presumption of innocence or send misleading messages about sexual assault. One solution would be to have SAPR trainings reviewed and approved by senior JAG defense officers, as well as senior JAG prosecutors. Granting both sides access to SAPR trainings would serve to bolster a sense of fairness and ensure that the trainings themselves do not contain bias. Furthermore, senior military officials should clarify some of their public statements by reaffirming the importance of our deliberative criminal justice system.

While no single reform can guarantee a fair trial, these proposals would help ensure that trials remain fair and impartial, thus vindicating the rights of both victims and those accused by reducing the risk of adjudicative UCI.

CONCLUSION

There is little doubt that sexual assault in the military is an epidemic. The statistics are baffling,²⁵³ and the stories are eye-opening.²⁵⁴ Action needs to be taken to address this pervasive problem, but, much like other societal epidemics such as the Ebola virus in America, terrorism, or cyberbullying, we run the risk of reacting rashly or with malice, which can ultimately prove counterproductive. Knee-jerk reactions to past crises have led to unnecessary financial costs, wasted efforts, and even loss

²⁵² The content of such jury instructions are beyond the scope of this Note, but ideally these instructions would be crafted by a committee comprised of prosecutors, defense attorneys, and victims' advocates.

²⁵³ See Cooper, *supra* note 16; Military Sexual Assault Fact Sheet, Protect our Defenders, <http://www.protectourdefenders.com/factsheet/> [https://perma.cc/G79Y-TJZ9]; Incidents of Rape in Military Much Higher Than Previously Reported, *Mil. Times*, <http://www.militarytimes.com/story/military/pentagon/2014/12/04/pentagon-rand-sexual-assault-reports/19883155/> [https://perma.cc/TEL4-DE5S].

²⁵⁴ See, e.g., James Dao, Assault-Prevention Officer in Air Force Is Arrested, *N.Y. Times* (May 6, 2013), <http://www.nytimes.com/2013/05/07/us/air-force-officer-who-led-sexual-assault-prevention-efforts-arrested.html> [https://perma.cc/X89Q-BM7C]; Samuelsohn, *supra* note 6.

of life.²⁵⁵ In the modern Information Age, where stories go viral and society seems ever ready to rush to judgment, our courtrooms must remain deliberative and impartial.

Public outcry and political grandstanding regarding sexual assault in the military has produced some reforms, but they are ultimately incomplete and potentially counterproductive because they fail to address the underlying weakness in the military justice system: the commander's charging discretion.²⁵⁶ Although some commander discretion has been curtailed, the fact remains that military officers with a myriad of different incentives and priorities—along with limited legal training—are making charging decisions, the same decisions that would be made by experienced prosecutors in the civilian context.

The same commander discretion that was previously used to cover up sexual assault is being used today to prosecute at all costs; the pendulum has swung from one extreme to the other. Meanwhile, courts-martial are staffed by service members who have been told repeatedly that sexual assault is a blemish on the military that must be purged no matter what. A climate has developed that railroads defendants and undermines the integrity of the entire military justice system.

²⁵⁵ Academic literature is replete with examples of overreaction that proved counterproductive. For instance, studies have found that following 9/11, people who would have otherwise flown to a destination chose to drive. This led to increased traffic on the road and over 1,000 additional car accident fatalities. Michael Sivak & Michael J. Flannagan, *Consequences for Road Traffic Fatalities of the Reduction in Flying Following September 11, 2001*, 7 *Transp. Res. Part F: Traffic Psychol. & Behav.* 301, 301–04 (2004). Similarly, the hysteria in the United States regarding the Ebola virus led to school closures, questionable quarantines, and even a costly Coast Guard mission to retrieve a blood sample from a woman loosely connected to one Ebola patient. Lena H. Sun et al., *Ebola's Lessons, Painfully Learned at Great Cost in Dollars and Human Lives*, *Wash. Post* (Dec. 28, 2014), https://www.washingtonpost.com/national/health-science/ebolas-lessons-painfully-learned-at-great-cost-in-dollars-and-human-lives/2014/12/28/dcc8c50a-87c2-11e4-a702-fa31ff4ae98e_story.html [<https://perma.cc/7X9Y-8C3Z>]; see also Sam Stein et al., *One Year Ago Today, America Collectively Lost Its Mind About Ebola*, *Huffington Post* (Sept. 30, 2015, 4:35 PM), http://www.huffingtonpost.com/entry/ebola-anniversary_560c24e2e4b0af3706df053a [<https://perma.cc/73WL-HHXJ>] (recounting the hysteria in the United States surrounding the Ebola panic in 2014). Many are also beginning to question the reaction to cyberbullying. See *Are We Overreacting to Cyberbullies?*, *Ass'n for Psychol. Sci.: Observations* (May 13, 2014), <http://www.psychologicalscience.org/index.php/publications/observer/obsonline/are-we-overreacting-to-cyberbullies.html> [<https://perma.cc/34UT-MMLP>]; Carmen Gentile, *Student Fights Record of 'Cyberbullying'*, *N.Y. Times* (Feb. 7, 2009), <http://www.nytimes.com/2009/02/08/us/08cyberbully.html> [<https://perma.cc/XX3H-E3UR>].

²⁵⁶ See *supra* Part IV.

Legislators and policymakers should reconsider systematic reform, rather than reactionary tactics and shallow, quick fixes. Most notably, removing the charging decision from commanders for traditional criminal cases and placing it in the hands of well-trained, impartial military prosecutors would relieve commanders of this unnecessary burden, strengthen the legitimacy of the military justice system, and ensure that defendants' and victims' rights are protected.

By removing commander discretion only in regard to crimes with civilian analogues, commanders could maintain their traditional role in the military justice system and vindicate their desire to handle military-specific crimes, which are chiefly concerned with good order and discipline. And referring "real crimes" to a neutral third party simply acknowledges the benefits of specialized legal training, brings the military justice system in concert with its civilian counterparts, and ensures that all claims are processed through a fair system. At the same time, minor reforms such as additional voir dire, uniform jury instructions, and more thorough vetting of SAPR trainings can help avoid the risk of adjudicative UCI in cases that are referred to courts-martial.

In the end, it is difficult to know at this time whether innocent service members are being convicted of sexual assault. UCI inevitably requires some speculation, and although a number of convictions have been overturned, the appellate and post-conviction processes are slow. Nevertheless, in the era of *Serial*, *Making a Murderer*, and other high-profile exonerations,²⁵⁷ we have seen that false convictions do happen, and they harm not only the individuals who are falsely convicted but also the perception of the justice system as a whole. All parties have something to gain by ensuring that the military justice system is fair and just.

What we do know at this time is that a climate has developed in the military justice system that is decidedly antidefendant. This antidefendant climate is borne out in the data, the comments of commanding officers, and the content of SAPR trainings. Prosecuting sexual assault is a laudable and worthwhile goal, but it must be done in a way that respects our constitutional principles. Rather than using current public attention and political will to simply encourage convictions—which amounts to a shortcut—policymakers and politicians should consider systematic and

²⁵⁷ See John Patterson, *From Serial to Making a Murderer: Documentaries Renew Hope for Justice*, *Guardian* (Aug. 13, 2016, 10:16 AM), <https://www.theguardian.com/culture/2016/aug/13/making-murderer-serial-jinx-crime-documentaries-brendan-dassey> [<https://perma.cc/LA4G-CAHG>] (outlining a number of high-profile innocence cases).

holistic reforms that will have a lasting impact on the military culture. The scales of justice ought not tilt in one direction or another based upon the winds of public perception; victims and defendants alike deserve a system that is grounded in equity and imbued with fairness. They deserve an impartial court of law.