TWO-FRONT WAR: THE STRUGGLE FOR LEGITIMACY IN MILITARY SEXUAL ASSAULT ADJUDICATIONS

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In the #MeToo moment of heightened cultural consciousness and increased accountability surrounding sexual assault, military prosecutions of sex offenses face a two-front struggle for legitimacy. Military trials are largely governed by "convening authorities," high-ranking officers in command of a base or unit. Convening authorities exercise significant control over nearly all elements of the court-martial, determining what charges to file, and reviewing findings and dispositions of cases. In some cases, convening authorities are empowered to reduce or set aside the sentence or guilty finding imposed by the court-martial. Allegations of unlawful command influence (UCI) by convening authorities and other high-ranking military officers at both the referral and post-trial review phases of judicial proceedings may result in convictions being overturned and sentences set aside. Even when convictions in these cases are upheld, UCI allegations often garner significant media attention and negatively impact public perceptions of the validity and efficacy of the military justice system. Simultaneously, legislative expansions of the Uniform Code of Military Justice (UCMJ) that seek to enshrine additional survivor protections and curtail commanders' authority in prosecutions of sexual assault and other serious offenses may, perversely, render proceedings less credible. This Article offers a brief exploration of the political and social pressures that catalyzed reform of the military's handling of sexual assault cases. It then proceeds to explore these two delegitimizing influences: the muddled jurisprudence surrounding unlawful command influence and the ways in which the push to "civilianize" military prosecutions of sexual assault have failed to achieve more effective and impartial prosecutions of these offenses. The Article concludes by reviewing statutory reforms proposed in the 2020 National Defense Authorization Act (NDAA) and suggesting an additional change to the court-martial structure—the introduction of standing courts—to enhance the fairness and credibility of judicial proceedings and augment public confidence in the military justice system while respecting the military's unique cultural norms and institutional dynamics.

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I. Introduction

Articles 77 to 134 of the Uniform Code of Military Justice (UCMJ) are known as the "punitive articles."[1] These provisions denote all offenses punishable at court-martial and encompass murder,[2] arson,[3] assault,[4] and other

[1] Chester Ward, *UCMJ—Does It Work? Evaluation at the Field Level, 18 Months' Experience*, 6 Vand. L. Rev. 186, 209 (1953).
[2] Art. 118, UCMJ; 10 U.S.C. § 918.
[3] Art. 126, UCMJ; 10 U.S.C. § 926.

civilian-analog offenses, as well as crimes unique to the military such as mutiny[5] and failure to obey a lawful order.[6] Despite the wide array of criminal conduct covered by the punitive articles, no provision has invited more scrutiny, outrage, or calls for military justice reform than Article 120, which codifies rape and sexual assault offenses,[7] and the cases prosecuted under its auspices. Attempts to amend the military's handling of sexual assault cases have been ongoing for three decades,[8] but the contemporary reform movement is arguably unprecedented in its salience and urgency. The current effort was concurrently catalyzed by the civilian reckoning of #MeToo and a contemporaneous rash of highly publicized military sexual assault cases that evinced both procedural weaknesses and substantive inefficacies in the military justice system's handling of these complaints.[9]

The court-martial itself is a unique judicial entity—ad hoc, transient, and reflective of military cultural norms—governed, both procedurally and substantively, by a high-ranking commander who often lacks significant legal training.[10] Simultaneously, military adjudications exist in an environment in which civilian sociopolitical and cultural pressures exert direct and frequently compelling influence upon command behavior. These extra-military norms and expectations have the potential to induce commanding officers serving as court-martial convening authorities to interfere with decisions of judicial and quasi-judicial adjudicative bodies in ways that undermine the legitimacy of the military justice system by provoking allegations of unlawful influence, even if these interventions are not, ultimately, sufficiently egregious to constitute the statutory offense of unlawful command influence (UCI) under the UCMJ.[11] Federal policy directives and media attention are merely two examples of civilian societal forces that may impact what charges are brought in a military trial, whether an adjudicated sentence is

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[4] Art. 128, UCMJ; 10 U.S.C. § 928.

[5] Art. 94, UCMJ; 10 U.S.C. § 894.

[6] Art. 92, UCMJ; 10 U.S.C. § 892.

[7] *See* R. Chuck Mason, *Sexual Assaults Under the Uniform Code of Military Justice (UCMJ): Selected Legislative Proposals*, CONG. RSCH. SERV. 1 (Sept. 6, 2013), https://fas.org/sgp/crs/natsec/R43213.pdf [https://perma.cc/3HAQ-P322].

[8] For further discussion of civilian efforts to reform military sexual assault procedures, *see* Part II, *infra*.

[9] *See, e.g.*, ASSOCIATED PRESS, *Panel Criticizes Military on Sexual Assault Cases*, WNYC (Mar. 13, 2013), https://www.wnyc.org/story/275597-blog-panel-criticizes-military-sexual-assault-cases/ [https://perma.cc/N3C9-H7B4].

[10] Convening authorities possess broad authority over both the prosecutorial and judicial aspects of court-martial proceedings. These responsibilities include the power to "refer charges, convene courts-martial, authorize searches, enter into plea agreements, hand-select members, approve or disapprove the production of witnesses, and, in some limited circumstances, approve, disapprove, or modify a court-martial's findings and sentence should a panel of members or a judge find a servicemember guilty." Jacob E. Meusch, *A "Judicial" System in the Executive Branch:* Ortiz v. United States *and the Due Process Implications for Congress and Convening Authorities*, 35 J.L. & POL. 19, 48 (2019).

[11] *See* Part II.D.2, *infra*.

approved or reduced, and even the preliminary decision to convene a court-martial at all.

Extrinsic expectations of procedural legitimacy and adjudicative efficacy reflective of shifts in civilian social values and political priorities also tangibly impact military judicial processes. Recent public scrutiny of the military's handling of sexual assault cases has strengthened federal legislative efforts to vindicate the rights of service members who come forward to disclose offenses perpetrated against them. Congressional reforms enacted pursuant to this mandate have substantially altered several articles of the UCMJ pertaining to court-martial procedure and survivor protections.[12] However, critics of these changes argue that they impermissibly restrict the authority of commanders tasked with maintaining good order and discipline and undermine the credibility of convictions by failing to afford due process to those accused of sexual assault.[13] Whether occasioned by salient civilian cultural norms, political developments, internal command policy, media attention, or some combination thereof, cases dogged by allegations of UCI or politicized decision-making impugn the ability of the military justice system to effectively protect survivors and obtain efficient, impartial, and just outcomes for all involved parties.

This Article begins by examining the sociocultural and political forces that catalyzed civilian dialogue around the issue of military sexual assault. Part II then explores how that scrutiny facilitated legislative efforts to effect reform of the military justice system and the means through which Congress may effectuate those changes.

Parts III and IV address the main systemic threats to the legitimacy of court-martial proceedings: UCI and alleged due process violations resulting from UCMJ reforms that sought to strengthen survivor protections and maintain the integrity of military trials. Part III examines two recent decisions from the Court of Appeals for the Armed Forces (CAAF)—*United States v. Boyce* (2017) and *United States v. Barry* (2018)—to parse contemporary UCI jurisprudence from the military justice system's highest appellate court. Part IV discusses how recent developments in UCI case law and external societal pressures have combined to incite revision and reform of discrete provisions of the UCMJ, specifically Article 120, which codifies

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[12] This Article will focus specifically on Articles 6B, 32, and 60, discussed *infra* in Part IV.

[13] *See, e.g.*, Lindsay L. Rodman, *Fostering Constructive Dialogue on Military Sexual Assault*, 69 JOINT FORCES Q. 25, 26 (2d Quarter 2013) ("[C]ommanders have attempted to accommodate public pressure to prosecute [sexual assault] cases. . . . [C]ommanders feel hamstrung to prosecute sexual assaults to the fullest, regardless of the possibility of success at trial. Political pressure from victims' rights groups have created an environment in which Servicemembers are no longer presumed innocent until proven guilty beyond a reasonable doubt, which is a constitutional travesty. Public complaints that the military does not take sexual assault seriously have prompted overprosecution in cases that would likely not go to trial in the civilian world. This creates a vicious cycle of acquittals in the court-martial system, continuing to compound an optics problem in the military.").

definitions of sexual offenses, and Articles 6B, 32, and 60, which concern survivors' rights, the scope of pre-trial investigations, and post-trial clemency decisions, respectively.

Finally, Part V reflects on contemporary evidence of the military's failure to comprehensively address sexual assault, focusing on the Department of Defense's (DoD) 2018 Annual Report on Sexual Assault in the Military and the 2020 murder of Army Specialist Vanessa Guillén. Examining reforms proposed by the 2020 National Defense Authorization Act (NDAA), Part V goes on to offer further suggestions for reforming the military's approach to sexual assault prosecutions in order to maintain the legitimacy of court-martial proceedings and ensure that the military justice system can effectively achieve justice and protect survivors without inspiring allegations of due process violations or unlawful influence.

II. Contemporary Civilian Response to Military Sexual Assault

A. Civilian Catalyst: The Invisible War

The 2012 release of *The Invisible War*, Kirby Dick's Emmy-winning documentary about sexual assault in the U.S. Armed Forces, was instrumental in bringing the military justice system's treatment of sexual misconduct allegations to the forefront of twenty-first century American social consciousness. The film showcased one story of sexual assault from each service branch; in most of the cases examined, perpetrators did not face prosecution or disciplinary consequences, while survivors encountered professional reprisals, struggled to access necessary recovery resources, and were sometimes forced out of service altogether.[14] The documentary provoked national outrage, catalyzed unprecedented legislative reforms to the UCMJ, and, in concert with the "Me Too" movement, originated by Tarana Burke, helped launch a national dialogue around sexual harassment and assault that culminated five years later in the viral 2017 #MeToo hashtag and advocacy campaign.[15]

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[14] The Invisible War (Chain Camera Pictures 2012).

[15] *See generally* Matthew Burris, *Thinking Slow about Sexual Assault in the Military*, 23 Buff. J. Gender, L. & Soc. Pol'y 21 (2014); Tricia D'Ambrosio-Woodward, *Military Sexual Assault: A Comparative Legal Analysis of the 2012 Department of Defense Report on Sexual Assault in the Military: What It Tells Us, What It Doesn't Tell Us, and How Inconsistent Statistic Gathering Inhibits Winning the "Invisible War,"* 29 Wis. J.L. Gender, & Soc'y 173 (2014); John Loran Kiel Jr., *Not Your Momma's 32: Explaining the Impetus for Change Behind Key Provisions of the Article 32 Preliminary Hearing*, 2016 Army Law 8 (2016); Alexandra Iorfino, *Military Justice: Whether a Systematic Overhaul of the Uniform Code of Military Justice Is Required to Combat the Sexual Assault "Epidemic,"* 20 Nexus 45 (2014–15). *See also* Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. Times (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/9D52-W6HT]; Abby Ohlheiser, *Meet the woman who coined 'Me Too' 10 years ago—to help women of color*, Chi. Trib. (Oct. 19, 2017), https://

The veracity of *The Invisible War* was deeply contested by numerous members of the Armed Forces.[16] However, the aggregate impact of the film and several contemporaneous, highly publicized military sexual assault cases clouded by allegations of UCI, insufficient process afforded to the accused, and inadequate survivor protections created a coherent narrative of crisis around the military justice system's handling of sexual assault that empowered legislative calls for reform.[17] Among the cases that helped catalyze this movement were the courts-martial of Brigadier General Jeffrey Sinclair and Lieutenant Colonel James Wilkerson,[18] the alleged rape of a student at the United States Naval Academy by three members of the school's football team,[19] and dozens of allegations of sexual harassment and assault made by service members attending Air Force basic training at Lackland Air Force Base.[20]

B. Military Sexual Assault: 1990–2012

The documentary and concomitant high-profile courts-martial gave civilian and legislative efforts around military justice reform heightened credibility and urgency. However, calls to strengthen the institutional response to sexual assault and enhance adjudicative efficacy and fairness had been ongoing for two decades by the time *The Invisible War* was released. The 1990s saw a spate of military sexual assault cases that foreshadowed the courts-martial of accomplished, prominent senior officers like General Sinclair and Lieutenant Colonel Wilkerson. Noteworthy incidents included allegations of rape and sexual assault against Army training instructors by female trainees at Aberdeen Proving Ground and Fort Leonard Wood in 1996,[21] a 1997 com-

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www.chicagotribune.com/lifestyles/ct-me-too-campaign-origins-20171019-story.html [https://perma.cc/8B8C-VRGK].

[16] Burris, *supra* note 15, at 39–41; *see also* Robert E. Murdough, *Barracks, Dormitories, and Capitol Hill: Finding Justice in the Divergent Politics of Military and College Sexual Assault*, 223 Mil. L. Rev. 233, 243 n.45 (2015).

[17] *See id.* at 27.

[18] See discussion *infra* Part II.

[19] *See* Melinda Henneberger & Annys Shin, *Aggressive tactics highlight the rigors of military rape cases*, Balt. Sun (Sept. 1, 2013), https://www.baltimoresun.com/maryland/anne-arundel/annapolis/bs-md-navy-rape-trial-20130901-story.html [https://perma.cc/EK7E-FT55] (originally published in the Washington Post); *infra* Part IV.A.

[20] *See, e.g.*, Chris Lawrence, *31 victims identified in widening Air Force sex scandal*, CNN (June 29, 2012), https://www.cnn.com/2012/06/28/justice/texas-air-force-scandal/index.html [https://perma.cc/N2P6-V48S] (describing multiple instances of sexual harassment and assault by male instructors of female trainees at Air Force basic training).

[21] *See* Jessica A. Turchik & Susan M. Wilson, *Sexual Assault in the US Military: A Review of the Literature and Recommendations for the Future*, 15 Aggression & Violent Behav. 267, 267 (2010); Peter T. Kilborn, *Sex Abuse Cases Sting Pentagon, But the Problem Has Deep Roots*, N.Y. Times (Feb. 10, 1997), https://www.nytimes.com/1997/02/10/us/sex-abuse-cases-sting-pentagon-but-the-problem-has-deep-roots.html [https://perma.cc/GQ5U-8L2L].

plaint against the Sergeant Major of the Army[22] by Brenda Hoster, a high-ranking female soldier,[23] and, most famously, the Navy's 1991 Tailhook scandal, in which eighty-three women and seven men alleged that they had been harassed or assaulted by drunken Naval and Marine Corps aviators at the association's annual convention in Las Vegas.[24]

A decade after Tailhook, media attention to sexual assault in the military spiked again. In response to a tip from an anonymous 2003 email that asserted a "significant sexual assault problem" at the United States Air Force Academy "that had been ignored by the Academy's leadership,"[25] an investigation conducted by the Department of Defense's Inspector General found that, of the 579 female Air Force cadets surveyed, "43 claimed they were victims of rape or attempted rape, 109 asserted that they were sexually assaulted at least once, and 397 . . . said they had experienced some form of sexual harassment while at the Academy."[26] Later the same year, *The Denver Post* published a three-part report entitled *Betrayal in the Ranks*, documenting the incidence of military sexual assault and the systemic failures of a "[military] justice system that readily shields offenders from criminal punishment" by pressuring survivors to remain silent or failing to prosecute perpetrators despite the existence of sufficient evidence to proceed to court-martial.[27]

The sexual assault scandals of the 1990s and early 2000s brought the military justice system into the collective consciousness of both Congress and the civilian public and inspired the advocacy efforts upon which post-2012 reforms were premised.[28] After Tailhook, then-Chief of Naval Operations Admiral Frank Kelso II, who had been present at the convention and

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[22] The most senior enlisted member of the Army. At the time of her allegations, Hoster was a Sergeant Major in the Army, the highest rank for an enlisted service member in the branch, but nonetheless outranked by the accused in his individual capacity.

[23] *See* Turchik & Wilson, *supra* note 21, at 267; Zoë Carpenter, *20 Years Ago, an Army Veteran Reported a Sexual Assault. She's Still Waiting for Justice*, NATION (Feb. 24, 2014), https://www.thenation.com/article/archive/nearly-two-decades-after-speaking-veteran-waits-sexual-assault-reform/ [https://perma.cc/W8RV-RQ3E].

[24] Lisa M. Schenck, *Informing the Debate about Sexual Assault in the Military Services: Is the Department of Defense its Own Worst Enemy?*, 11 OHIO ST. J. CRIM. L. 579, 587 (2014).

[25] AIR FORCE INSPECTOR GENERAL, AIR FORCE INSPECTOR GENERAL SUMMARY REPORT CONCERNING THE HANDLING OF SEXUAL ASSAULT CASES AT THE UNITED STATES AIR FORCE ACADEMY (Sept. 14, 2004), https://web.archive.org/web/20090513235422/http://www.af.mil/shared/media/document/AFD-060726-033.pdf [https://perma.cc/8F5H-TH6M].

[26] Colleen Dalton, *The Sexual Assault Crisis in the United States Air Force Academy*, 11 CARDOZO WOMEN'S L.J. 177, 180 (2004).

[27] *See generally* Amy Herdy & Miles Moffeit, *Betrayal in the Ranks*, DENVER POST (Nov. 16–18, 2003), https://extras.denverpost.com/justice/tdp_betrayal.pdf [https://perma.cc/8LD8-SJZ6].

[28] *See* Schenck, *supra* note 24, at 587 ("Each military service faced media scrutiny in the 1990s, resulting in sexual assault becoming an issue for the DoD to address.").

witnessed sexual misconduct there,[29] called the scandal a "watershed event that . . . brought about cultural change" and resulted in the resignation of the Secretary of the Navy and the censure of other high-ranking military officials.[30] Catalyzed by the events the 1991 convention, the Senate Armed Services Committee began including questions on sexual violence policies and prevention during the hearings of military officers nominated for top leadership roles.[31] Following the Air Force Academy investigation and the *Denver Post* report, the Department of Defense permanently established the Sexual Assault Prevention and Response (SAPR) Office and implemented "[c]omprehensive multidisciplinary" sexual assault training.[32] The Department credited these innovations with a 24% increase in sexual assault reporting and an 11% increase in criminal investigations compared to the prior calendar year.[33]

In the same month that Adm. Kelso took early retirement due to his involvement in the Tailhook scandal,[34] the Navy also released a new manual entitled *Commander's Handbook—A Tool Kit for Prevention of Sexual Harassment*, which aimed to educate commanding officers and troops on recognizing and preventing sexual harassment and assault.[35] However, Adm. Kelso's own career trajectory underscores deficiencies in the institutional response to sex offenses and foreshadows the contemporary systemic illegitimacy that continues to plague the military justice system. In a court-martial prosecution of several high-ranking officers involved in the Tailhook scandal, the presiding military judge, Captain William Vest, investigated Adm. Kelso's role in the convention itself.[36] Capt. Vest found that Adm. Kelso,

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[29] Admiral Kelso took early retirement as a result of his knowledge of and inaction to prevent or correct the misconduct that occurred at Tailhook. He appeared before the Senate Armed Services Committee, which was tasked with determining whether he should retire as a four-star admiral or be reduced in rank to two stars. The full Senate ultimately voted to approve his retirement with four stars. Thomas Crosbie & Jensen Sass, *Governance by Scandal? Eradicating Sexual Assault in the US Military*, 37 POLITICS 117, 125 (2017).

[30] Charles Doe, *Pentagon Report on Navy Tailhook Wants Action Against 168 Officers*, UPI (Apr. 23, 1993), https://www.upi.com/Archives/1993/04/23/Pentagon-report-on-Navy-Tailhook-wants-action-against-168-officers/1152735537600/ [https://perma.cc/V57H-DTMK]; *see also* Michael Winerip, *Revisiting the Military's Tailhook Scandal*, N.Y. TIMES (May 13, 2003), http://www.nytimes.com/2013/05/13/booming/revisiting-the-militarys-tailhook-scandal-video.html [https://perma.cc/5FU9-YL2U].

[31] Crosbie & Sass, *supra* note 29, at 125–26.

[32] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON MILITARY SERVICES SEXUAL ASSAULT FOR CALENDAR YEAR 2006 ii (Mar. 15, 2007), https://www.sapr.mil/public/docs/reports/2006-annual-report.pdf [https://perma.cc/294A-6WDK].

[33] *Id.* at iii.

[34] Gilbert A. Lewthwaite, *Kelso Retiring to End Tailhook Uproar*, BALT. SUN (Feb. 16, 1994), https://www.baltimoresun.com/news/bs-xpm-1994-02-16-1994047024-story.html [https://perma.cc/M598-F4QY].

[35] N.Y. TIMES NEWS SERV., *Navy to Go by the Book on Sex Harassment*, CHI. TRIB. (Apr. 10, 1994), https://www.chicagotribune.com/news/ct-xpm-1994-04-10-9404100210-story.html [https://perma.cc/9HVR-HSMD].

[36] WILLIAM H. MCMICHAEL, THE MOTHER OF ALL HOOKS: THE STORY OF THE U.S. NAVY'S TAILHOOK SCANDAL 292 (1997).

who had personally referred the charges to court-martial, had a "more than official" interest in the litigation because multiple credible witnesses had confirmed that he observed sexual misconduct occurring at the convention, and that he had "manipulated the initial investigative process . . . for [his] own personal ends."[37]

In a stunning indictment of the UCI perpetrated by the Chief of Naval Operations, Capt. Vest wrote that UCMJ Article 1(9)[38]

> dictates that any military commander convening a court-martial calling a subordinate to account for an act of misconduct in violation of the UCMJ must be free from any suspicion of involvement, directly or indirectly, in the same or any related act of misconduct . . . This is a matter of fundamental fairness.[39]

A week after Capt. Vest released his findings, Adm. Kelso requested early retirement from the Navy.[40] Although he faced a potential reduction in rank as a result of his involvement in Tailhook, a sharply divided Senate ultimately voted fifty-four to forty-three to allow him to retire with four stars.[41]

C. Military Sexual Assault: 2012–2013

The dual fallibilities of the military's perceived failure to address sexual assault allegations impartially and effectively and the deleterious effects of UCI, as highlighted by Adm. Kelso's case, have persisted over the past decade, despite the reform efforts of the prior twenty years. More recently, the Department of Defense's Annual Report of Sexual Assault in the Military for Fiscal Year 2012 evinced inconsistencies between the frequency of sexual harassment and misconduct and the number of incidents officially reported.[42] This disjunction appeared to once again impugn the military's handling of

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[37] GREGORY VISTICA, FALL FROM GLORY: THE MEN WHO SANK THE U.S. NAVY 379 (1995).

[38] Defining the term "accuser"; Admiral Kelso was a "command accuser" in this case because he had referred the charges to court-martial. *See* MCMICHAEL, *supra* note 36, at 292.

[39] *Id.*

[40] Lewthwaite, *supra* note 34.

[41] Admiral Kelso was allowed to retire with his full four stars rather than being reduced in rank and forced to retire at a lower pay grade as a two-star admiral with an accompanying reduction in retirement benefits. A bipartisan bloc of all seven female senators voted not to allow him to retire as a four-star admiral. *See* Sara Engram, *Pulling Rank*, BALT. SUN (Apr. 24, 1994), https://www.baltimoresun.com/news/bs-xpm-1994-04-24-1994114134-story.html [https://perma.cc/4XE4-QGDV].

[42] *See generally* DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012 VOLUME ONE (May 3, 2013), https://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf [hereinafter DEP'T OF DEF. ANNUAL REP. ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012 VOL. ONE] [https://perma.cc/SH89-ZDK8] (presenting analysis and data concerning sexual assault for Fiscal Year 2012).

sexual assault cases and further empowered legislative advocates seeking to reform the military justice system.[43] The report confirmed the ubiquity of sexual misconduct in the armed forces and suggested a general reluctance to report its occurrence.[44] Among other findings, 26,000 surveyed service members reported experiencing unwanted sexual contact during the investigated timespan, but only 3,374 official reports were filed, calling the effectiveness of the system's protective and prosecutorial mechanisms into question.[45]

Air Force Judge Advocate Major Matthew Burris characterized civilian animus toward the military's handling of sexual assault in the early 2010s by writing that "it is difficult to imagine a more effective advertisement against the efficacy of the military justice system or the DoD's sexual assault prevention and response program than the 'sexual assault crisis' narrative" advanced by elected officials and activists seeking to alter military procedure around sex offense prosecutions.[46] This narrative was strengthened by the history of high-profile military sexual assault scandals dating back to Tailhook, statistical evidence presented in the 2012 *Annual Report*, the personal experiences of the service members profiled in *The Invisible War*, and several highly public military sexual assault trials in the early 2010s.[47]

The civilian salience of *The Invisible War* was intensified by a contemporaneous spate of military sexual assault cases that attracted significant media attention and further eroded public confidence in the system's ability to address the problem in a manner that was both effective and free from bias. In late 2012, five women accused a senior, highly decorated Army officer of a litany of sexual assault offenses.[48] The subsequent court-martial, which

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[43] *See* James Joyner & James W. Weirick, *Sexual Assault in the Military and the Unlawful Command Influence Catch-22*, War on the Rocks (Oct. 7, 2015), https://warontherocks.com/2015/10/sexual-assault-in-the-military-and-the-unlawful-command-influence-catch-22/ [https://perma.cc/YK3T-6CPX].

[44] The reluctance surrounding reporting likely reflects pervasive aspects of military culture that transcend the specific context of sexual assault. Roger Canaff, a civilian prosecutor who served as an expert consultant to the United States Army to assist in investigating and prosecuting sexual assault cases, ascribes this reticence to a "military culture [that] takes away a sense of individuality and encourages compliance," as well as to a "sense that speaking up could disrupt a mission or unit." *Jeffery Sinclair and Sexual Assault in the Military*, The Takeaway (Mar. 18, 2014), https://www.wnycstudios.org/podcasts/takeaway/segments/jeffrey-sinclair-case-and-sexual-assault-military [https://perma.cc/9R8V-WNW7].

[45] Dep't of Def. Annual Rep. on Sexual Assault in the Military: Fiscal Year 2012 Vol. one, *supra* note 42, at 12, 18.

[46] Burris, *supra* note 15, at 27.

[47] *See* Joyner & Weirick, *supra* note 43; *see also* Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 Mil. L. Rev. 129, 132–33 (2014).

[48] Samantha Stainburn, *Jeffery Sinclair, US Army Brigadier General, Accused of Sex Crimes against Five Women*, PRI (Nov. 6, 2012), https://www.pri.org/stories/2012-11-06/jeffrey-sinclair-us-army-brigadier-general-accused-sex-crimes-against-five-women [https://perma.cc/S3GE-KSAJ]; David Zucchino, *Judge Rules Army Command Interfered in Sinclair Sex Assault Case*, L.A. Times (Mar. 10, 2014), https://

convened at Fort Bragg, North Carolina, was only the third of an Army general in over sixty years.[49] Brigadier General Jeffery Sinclair, a career Army officer and veteran of both Operation Enduring Freedom and Operation Iraqi Freedom, was charged with twenty six violations of the UCMJ, including adultery, pursuing inappropriate sexual relationships with two junior female Army officers, possessing pornography while deployed, sexual assault, and forcible sodomy.[50] When doubts arose regarding the credibility of his primary accuser,[51] Brig. Gen. Sinclair offered to plead guilty to some of the lesser specifications alleged in the indictment on the condition that the prosecution agreed to drop the most serious sexual assault charges.[52]

In December 2013, the Fort Bragg convening authority, Lieutenant General Joseph Anderson, received a letter from the accuser's military attorney, known in the Army as a special victims' counsel (SVC). After receiving the letter, Lt. Gen. Anderson opted to reject Brig. Gen. Sinclair's proposed plea offer.[53] The SVC's letter invoked general policy and reputational justifications for rejecting the plea deal: she wrote that "[a]llowing the accused[54] to characterize this relationship [with the alleged victim] as a consensual affair would only strengthen the arguments of those individuals that believe the prosecution of sexual assault should be taken away from the Army."[55]

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www.latimes.com/nation/nationnow/la-na-nn-sinclair-judge-rules-military-interfered-20140310-story.html [https://perma.cc/CJ9D-YU3J].

[49] Craig Whitlock, *Sordid Details Spill Out in Rare Court-Martial of a General*, WASH. POST (Aug. 14, 2013), http://www.washingtonpost.com/world/national-security/sordid-details-spill-outin-rare-court-martial-of-a-general/2013/08/14/f6c89c68-008d-11e3-a661-06a2955a5531_story.html [https://perma.cc/3WHB-VFFQ].

[50] Stainburn, *supra* note 48.

[51] The prosecution dropped the charges of sexual assault and sodomy against Brig. Gen. Sinclair when they learned that his accuser, a subordinate Army officer with whom he had allegedly conducted a three-year extramarital affair, had continued their relationship after the alleged assault. An attorney advisor to the alleged victim disputed characterization of the affair as consensual and voluntary, arguing that Brig. Gen. Sinclair "literally sabotaged [the alleged victim's] career by altering her orders to keep her under his command and refusing her many requests to be transferred." Bill Chappell, *Army General Pleads Guilty to Adultery; Other Charges Dropped*, NPR (Mar. 17, 2014), https://www.npr.org/sections/thetwo-way/2014/03/17/290901081/army-general-pleads-guilty-to-adultery-other-charges-dropped [https://perma.cc/T45E-NPW3]. He described Brig. Gen. Sinclair's accuser as "trapped and bullied by one of the highest ranking officers in the United States Army." *Id.*

[52] Brig. Gen. Sinclair also requested retirement at a reduced rank. *See* Alan Blinder & Richard A. Oppel Jr., *Faulting Army, Judge Puts off Assault Case*, N.Y. TIMES (Mar. 10, 2014), https://www.nytimes.com/2014/03/11/us/judge-in-generals-assault-case-weighs-claim-that-prosecution-was-tainted.html [https://perma.cc/KL7F-M8M4].

[53] *See id.* In March 2014, Lt. Gen. Anderson testified in Judge Pohl's subsequent investigation into the presence of UCI in Brig. Gen. Sinclair's case that "the [SVC]'s opposition was the principal factor in his decision to reject General Sinclair's plea offer." *Id.*

[54] Defendants at court-martial are referred to as "the accused." For grammatical and readability purposes, the terms "defendant" and "the accused" are used interchangeably in this article.

[55] Alan Blinder & Richard A. Oppel Jr., *How a Military Sexual Assault Case Foundered*, N.Y. TIMES (Mar. 12, 2014), https://www.nytimes.com/2014/03/13/us/how-a-military-sexual-assault-case-foundered.html [https://perma.cc/V3QP-PUTJ].

Lt. Gen. Anderson's decision caused the Army judge, Colonel James Pohl, to halt the trial and rule that rejection of the plea deal constituted UCI by the convening authority.[56] Based on his finding that UCI had impermissibly impacted the initial plea process, Judge Pohl gave Brig. Gen. Sinclair an opportunity to renegotiate the deal.[57] The general ultimately pled guilty to some of the lesser specifications alleged in the indictment, including inappropriate relationships with junior female officers and mistreating his accuser.[58] All charges necessitating placement on a sex offender registry were dropped.[59] Brig. Gen. Sinclair was "reprimanded, fined $20,000 . . . reduced to the rank of lieutenant colonel[,] and forced to retire."[60]

Shortly before Brig. Gen. Sinclair's plea deal was rejected, the convening authority of the Third Air Force, Lieutenant General Craig Franklin, set aside the conviction of Lieutenant Colonel James Wilkerson, a "superstar" Air Force fighter pilot[61] convicted at court-martial of groping a sleeping female houseguest at his home near an Italian Air Force base.[62] Despite the appearance of bias in the decision to overturn Lt. Col. Wilkerson's sentence,

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[56] Zucchino, *supra* note 48.

[57] Associated Press, *U.S. Army General's Attorneys to Try for New Plea Deal in Sexual Assault Case*, N.Y. Daily News (Mar. 11, 2014), https://www.nydailynews.com/news/national/u-s-army-general-lawyers-new-plea-deal-sexual-assault-case-article-1.1717731 [https://perma.cc/5YWL-QAQY].

[58] *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, 213 (2016), at 213–14; Kelly Twedell, *U.S. Army General Gets Fine, No Jail in Sex Case*, Reuters (Mar. 20, 2014), https://www.reuters.com/article/us-usa-courtmartial-sinclair/u-s-army-general-gets-fine-no-jail-in-sex-case-idUSBREA2J0XV20140320 [https://perma.cc/5ECT-KF6P].

[59] Marlena Baldacci et al., *Judge OKs Plea Deal in Brigadier General's Court-Martial*, CNN (Mar. 17, 2014), https://www.cnn.com/2014/03/17/justice/jeffrey-sinclair-court-martial-plea/index.html [https://perma.cc/UVW9-JNJ7].

[60] Brady, *supra* note 58, at 213–14. Reductions in rank are a punitive measure that may be imposed by a court-martial or nonjudicial military disciplinary authority. They carry both reputational and financial disincentives and are accompanied by a reduction in pay grade for service members who are reduced in rank but continue to serve or a diminution in retirement benefits for service members whose conduct does not result in a discharge characterization (such as a dishonorable or other than honorable discharge) that precludes benefit eligibility entirely. Reduction in rank for general officers by even one pay grade is extremely rare. General Sinclair was reduced two ranks to the rank of Lieutenant Colonel, the first instance in over a decade that the Army imposed this punishment on a general officer. *See* David Zucchino, *Army Demotes Gen. Jeffery Sinclair Two Ranks for Sexual Misconduct*, Balt. Sun (June 20, 2014), https://www.baltimoresun.com/la-na-nn-army-sinclair-demoted-20140620-story.html [https://perma.cc/888Y-WRD6]; Lolita C. Baldor, *General Reduced 2 Grades in Sex Misconduct Case*, Seattle Times (June 21, 2014), https://www.seattletimes.com/nation-world/general-reduced-2-grades-in-sex-misconduct-case/ [https://perma.cc/4ZQT-9Z23].

[61] Spencer Ackerman, *Air Force's Accountability for Sexual Assault: Not Promoting Convicted Officer*, Wired (Mar. 8, 2013), https://www.wired.com/2013/03/air-force-assault/ [https://perma.cc/ELS2-9SCM].

[62] Nancy Montgomery, *Senator Asks AF Leaders to Consider Firing General in Wilkerson Case*, Stars & Stripes (Mar. 6, 2013), https://www.stripes.com/news/air-force/senator-asks-af-leaders-to-consider-firing-general-in-wilkerson-case-1.210700 [https://perma.cc/US9H-KE78].

expunge the conviction from his record, and return him to active duty, Lt. Gen. Franklin had absolute discretion under the UCMJ as codified at that time "to modify the findings and sentence of a court-martial."[63] CAAF reaffirmed this ability in *United States v. Boyce*, a subsequent sexual assault case in which Lt. Gen. Franklin's conduct as the convening authority again raised allegations of UCI.[64]

This statutory authorization notwithstanding, Lt. Gen. Franklin's decision to set aside Lt. Col. Wilkerson's conviction exacerbated extant civilian outrage regarding the military's perceived mishandling of sexual assault cases and hastened the introduction of purportedly corrective legislation.[65] Then-Senator Claire McCaskill of Missouri wrote an op-ed requesting the Secretary of the Air Force (SECAF) and Air Force Chief of Staff (CSAF) review Lt. Gen. Franklin's actions,[66] and then-Senator Barbara Boxer of California and Senator Jeanne Shaheen of New Hampshire co-authored a letter to then-Secretary of Defense Chuck Hagel asking him to "work with them on removing commanders' discretion in sexual assault case[s]."[67] Frustration at the apparent pro-defendant bias of convening authorities in high-profile prosecutions, anxiety surrounding the potential impact of UCI and lack of adequate protections for complaining witnesses and concomitant pressures to address sexual assault more effectively in response to the #MeToo movement impelled Congress to both enact substantive reforms to the UCMJ and intensify pressure on top military leaders to treat sex offense cases seriously.[68]

D. Congressional Control

Congress exercises influence over the military justice system in two distinct ways: its authority to amend the UCMJ and its approval of the promotions of high-ranking officers.[69] Legislative responses to the narrative of crisis surrounding military sexual assault have utilized both these sources of

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[63] Article 60(c)(1), UCMJ; 10 U.S.C. § 860(c)(1) (2012).

[64] 76 M.J. 242, 255 n.1 (C.A.A.F. 2017) ("The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority") (quoting Article 60(c)(1), UCMJ; 10 U.S.C. § 860(c)(1) (2012)). For additional discussion of *Boyce*, please see section II.B, *infra*.

[65] *See* Murphy, *supra* note 47, at 132–33.

[66] The involvement of the SECAF and CSAF in reviewing Lt. Gen. Franklin's decision to set aside the conviction could arguably invite future allegations of UCI based on the involvement of high-ranking Air Force officials in a convening authority's decision-making, as occurred in *Boyce*. *See* Claire McCaskill, *Their day in court*, ST. LOUIS POST-DISPATCH (Mar. 12, 2013), http://www.stltoday.com/news/opinion/columns/their-day-in-court/article_ced54e14-5dca-5c53-a038-4b9de9ccbaa9.html [https://perma.cc/7JMU-F3ZW]; *see also* Montgomery, *supra* note 62.

[67] Montgomery, *supra* note 62.

[68] *See* Joyner & Weirick, *supra* note 43; Murphy, *supra* note 47, at 130; *infra* Part III.

[69] *See* Murphy, *supra* note 47, at 130, 132.

authority to promote and enact substantive change.[70] However, while these reform efforts are motivated by a good-faith Congressional desire to improve the transparency and efficacy of military sexual assault adjudications and the frequency with which incidents of sexual misconduct are reported, these attempts at UCMJ amendment have "created a climate where . . . political considerations create the potential to substantively influence legal decisions in specific courts-martial" to the detriment of the proceedings' ultimate legitimacy.[71]

1. *Statutory Authority: Frustrated and Incremental Change*

In the statutory context, changes have included both tangible revisions to pertinent UCMJ articles and more comprehensive reform proposals. While amendments to specific statutory provisions have often taken effect without significant opposition,[72] more comprehensive efforts to restructure military prosecutions and curtail the influence of convening authorities have, as yet, failed to garner votes sufficient for passage.[73] Among other successful modifications, Congress has updated the definition of rape under UCMJ Article 120 to recast the provision more in "offender[-]centric" terms and obviate its outdated focus on consent.[74] Additionally, UCMJ Articles 32 and 60 have been updated to provide additional survivor protections at the pre-trial hearing stage[75] and restrict post-trial discretion of the convening authority,[76] respectively, and revisions to UCMJ Article 6b have articulated a comprehensive slate of rights for survivors involved in sexual assault cases.[77]

While amendments to individual UCMJ provisions have sought to augment the legitimacy of sexual assault adjudications by rendering courts-martial proceedings more insulated from bias and affirmatively protective of survivors, attempts to initiate more foundational systemic change in the military justice system have proven difficult to realize. Senator Kirsten Gillibrand's Military Justice Improvement Act (MJIA), which sought, among other reforms, to "remov[e] certain offenses from command authority

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[70] *See* Mark Visger, *The Canary in the Military Justice Mineshaft: A Review of Recent Sexual Assault Courts-Martial Tainted by Unlawful Command Influence*, 41 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 59, 62–63 (2019).

[71] *Id.* at 62.

[72] *See generally infra* Part IV.

[73] *See* Amanda Marcotte, *What Happened to the Military Sexual Assault Bill in the Senate on Thursday?*, SLATE (Mar. 7, 2014), https://slate.com/human-interest/2014/03/military-sexual-assault-bills-claire-mccaskill-defeats-kirsten-gillibrand-in-the-senate.html [https://perma.cc/8FU8-TGFV].

[74] *See* Mark D. Sameit, *When a Convicted Rape Is Not Really a Rape: The Past, Present, and Future Ability of Article 120 Convictions to Withstand Legal and Factual Sufficiency Reviews*, 216 MIL. L. REV. 77, 78 (2013).

[75] *See generally* Kiel, *supra* note 15.

[76] *See* Angela D. Swilley, *A Whole Other Matter: The New Article 60(d) and Handling Victim Submissions During Clemency*, 2015 ARMY LAW. 16, 16–17 (2015).

[77] *See infra* Part IV.A.

[and] eliminat[e] . . . a commander's power to overturn or downgrade convictions in clemency,"[78] failed in the Senate in 2014.[79] However, a more conservative competing proposal from then-Senator McCaskill, which retained prosecutorial discretion for commanders, passed the body ninety-seven to zero the same year.[80] Most recently, the 2020 NDAA directed the Secretary of Defense to conduct a feasibility study to determine whether the convening authority's discretion to bring charges in felony-equivalent cases[81] should be reallocated to an independent senior judge advocate outside the accused's chain of command.[82] Several months before the secretary's recommendation to Congress was due, a group of military justice scholars endorsed the proposal in a "shadow report" advocating reform of the "'command-centric' model of military justice," although the DoD working group convened to evaluate the contemplated shift in charging discretion recommended against adopting the new system.[83]

2. *Promotion Oversight: A Clash of Military and Congressional Leadership*

Direct statutory amendment is the most efficient means of transformation, but reconstitution of UCMJ provisions is not the only avenue for the federal legislature to effectuate its military justice reform policies. Congressional oversight of the promotions of high-ranking military officials may exert significant pressure on convening authorities to handle sexual assault cases in line with Congressional priorities.[84] For example, then-Senator McCaskill blocked the promotion of Air Force Lt. Gen. Susan Helms, citing her decision to overturn a conviction for aggravated sexual assault without ex-

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[78] Murphy, *supra* note 47, at 132.

[79] *See* Shelbi Nicole Keehn, *Striking a Balance between Victim and Commanding Officer: Why Current Military Sexual Assault Reform Goes Too Far*, 48 COLUM. J.L. & SOC. PROBS. 461, 488 (2015).

[80] Murphy, *supra* note 47, at 133.

[81] UCMJ offenses carrying a sentence of a year or more.

[82] *See* Michel Paradis, *Is a Major Change to Military Justice in the Works?*, LAWFARE (May 4, 2020), https://www.lawfareblog.com/major-change-military-justice-works [https://perma.cc/JGW3-U2QR]; Dan Maurer, *The 'Shadow Report' on Commanders' Prosecutorial Powers Raises More Questions than Answers*, LAWFARE (May 11, 2020), https://www.lawfareblog.com/shadow-report-commanders-prosecutorial-powers-raises-more-questions-answers [https://perma.cc/RDZ2-4VPJ].

[83] *See* Paradis, *supra* note 82; *see also infra* Part V.B (describing the contents and criticism of the DoD report evaluating the 2020 NDAA's "alternative" military justice system proposal); Part V.C (discussing merits of reforms proposed in the 2020 NDAA).

[84] *See* Murphy, *supra* note 47, at 130 ("Even if command authority remains intact, potential loss of a star or the lack of promotion to the next rank . . . sends the message to senior leaders that severe professional consequences will result if commanders take what they think Congress believes to be the incorrect action in sexual assault cases."). *See also* Visger, *supra* note 70, at 67–68 (2019) ("[T]his judicial authority that commanders exercise is significant due to the adverse consequences that Congress has imposed on officers' careers resulting from those officers' judicial decisions in specific courts-martial.").

planation.[85] Similarly, although Lt. Gen. Franklin was not actively denied promotion, he elected to retire early under pressure from members of the Senate Armed Services Committee who were dissatisfied with his actions as the convening authority in the Wilkerson and Boyce cases.[86] This decision resulted in Franklin, a three-star general, retiring with only two stars because he had not yet served the requisite "time in grade"[87] of three years to retire at his current rank.[88] Unlike Brig. Gen. Sinclair, whose reduction in rank was both punitive and highly unusual for an officer of his seniority, Lt. Gen. Franklin's reduction in rank was facially procedural, attributable to the unsatisfied requirements of the time in grade regulation.[89] However, like Brig. Gen. Sinclair, Lt. Gen. Franklin was tangibly impacted by the reduction in his pension and retirement benefits as a result of the lower rank, and reputationally damaged by the dual pressures of Congressional and Air Force leadership that forced him to elect early retirement, even as they allowed him to preserve some facial autonomy over the conclusion of his military career.[90]

Although civilian and military leadership agreed that Franklin's continued service in the Air Force would be deleterious to the military's perceived ability to effectively adjudicate sexual assault claims,[91] the legitimacy issues plaguing military justice are far more ubiquitous: some senior officials serving as convening authorities for highly publicized sexual assault trials have spoken openly regarding perceived pressures to align with specific congres-

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[85] *See* Craig Whitlock, *General's promotion blocked over her dismissal of sex-assault verdict*, WASH. POST (May 6, 2013), https://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528_story.html [https://perma.cc/U8UA-DN5M].

[86] Darren Samuelsohn, *General out over sex-case decisions*, POLITICO (Jan. 8, 2014), https://www.politico.com/story/2014/01/air-force-sexual-assault-craig-franklin-101900 [https://perma.cc/P929-XX9K]. *See infra* Part III.A for a detailed discussion of *Boyce*.

[87] "Grade" references military rank and accompanying pay grade.

[88] Nancy Montgomery, *Franklin Will Retire as a Two-Star, Officials Say*, STARS & STRIPES (Jan. 10, 2014), https://www.stripes.com/news/franklin-will-retire-as-a-two-star-officials-say-1.261202#:~:text=craig%20Franklin%20would%20retire%20as,has%20not%20been%20made%20public. [https://perma.cc/WFB4-T6Y6].

[89] *See supra* Part II.C.

[90] It was widely understood at the time that General Franklin's decision to retire was involuntary and motivated by reputational concerns. *See, e.g.*, Nancy Montgomery, *Lengthy Sexual Assault Case Ends in Acquittal*, STARS & STRIPES (Oct. 29, 2015), https://www.stripes.com/news/lengthy-sexual-assault-case-ends-in-acquittal-1.375792 [https://perma.cc/2UKV-6JBM]. *United States v. Boyce*, discussed *infra* Part III.A, corroborates this account: "[o]n December 27, 2013, the Chief of Staff of the Air Force, Gen Welsh, telephoned Lt Gen Franklin and informed him that the new Secretary had 'lost confidence' in him and that he had two options: voluntarily retire from the Air Force at the lower grade of major general, or wait for the Secretary to remove him from his command in the immediate future." 76 M.J. 242, 245 (C.A.A.F. 2017).

[91] *See Boyce*, 76 M.J. at 245; Samuelsohn, *supra* note 86; *see also* Jeremy S. Weber, *Court-Martial Nullification: Why Military Justice Needs a 'Conscience of the Commander,'* 80 A.F. L. REV. 1, 60 (2019) ("According to an affidavit filed by General Franklin's staff judge advocate, the Judge Advocate General of the Air Force relayed to the staff judge advocate that the failure to refer the case to trial would place the Air Force in a difficult position with Congress and that absent a 'smoking gun,' alleged victims are to be believed and their cases are to be referred to trial, among other matters.").

sional priorities. Navy Rear Admiral Lorge, a convening authority whose alleged UCI was adjudicated in *United States v. Barry*,[92] claimed that conversations with high-ranking officials in the Navy Judge Advocate General's (JAG) Corps pressured him to approve a guilty verdict despite his doubts that the government had met its burden of proof.[93] Rear Adm. Lorge expressed concerns that "the political climate regarding sexual assault in the military was such that a decision to disapprove findings, regardless of merit, could bring hate and discontent on the Navy from the President, as well as senators," and had the potential to impact career advancement for commanders.[94] He further cited "high[-]profile" sexual assault cases in which convening authorities "received extreme negative attention" for setting aside guilty findings.[95]

The ability of members of Congress to directly impact the career prospects of high-ranking officers whose handling of sexual assault cases they condemn epitomizes the substantial impact of external political and social pressures on military decision making.[96] As this Article proceeds to consider two major sources of illegitimacy in the military justice system—UCI and inefficacious or counterproductive reforms of specific UCMJ provisions—it is vital to contextualize these threats within the broader societal landscape in which sexual assault cases are currently handled, the ways in which the military justice system is inherently vulnerable to civilian pressures without being held consistently to civilian standards, and how this disjunction may exacerbate existing credibility and systemic integrity concerns.[97]

Pressure on convening authorities to acquiesce to legislative policy priorities surrounding sexual assault, exemplified by cases like *Barry*, provides fertile ground for allegations of UCI that undermine credible convictions and deny justice to all involved parties. Convening authorities are currently responsible for evaluating charges and determining whether or not to refer

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[92] 78 M.J. 70 (C.A.A.F. 2018). For further discussion of *Barry*, see *infra* Part III.B.

[93] *See* Christopher Diamond, *Admiral Claims that Politics Swayed Verdict for SEAL Convicted in Sexual Assault Case*, NAVY TIMES (May 18, 2017), https://www.navytimes.com/news/your-navy/2017/05/18/admiral-claims-that-politics-swayed-verdict-for-seal-convicted-in-sexual-assault-case/ [https://perma.cc/4FNX-XHNZ].

[94] *Barry*, 78 M.J. at 80–81 (Ryan, J., dissenting).

[95] *Id.* C.A.A.F. ultimately held that political pressure exerted by high-ranking Navy officers constituted unlawful command influence in *Barry*. *See infra* Part II.A.

[96] *See* D'Ambrosio-Woodward, *supra* note 15, at 178–79; Visger, *supra* note 70, at 62 ("The conflict between Congress and military leadership over commander jurisdiction has created a climate where these political considerations create the potential to substantively influence legal decisions in specific courts-martial.").

[97] *See* Brady, *supra* note 58, at 249–50; Visger, *supra* note 70, at 70 (noting that UCI doctrine is "very robust as applied to members of the military" but encompasses neither Congressional influence nor decisions made by convening authorities "based on possible adverse career effects from Congress due to an unfavorable outcome"). *See generally* Monu Bedi, *Unraveling Unlawful Command Influence*, 93 WASH. U. L. REV. 1401 (2016) (analyzing differing standards between military and civilian prosecutorial conduct and observing that the military standard more highly values systemic integrity).

cases to court-martial.[98] Referral is defined as "the order of a convening authority that charges against an accused will be tried by a specified court-martial:"[99] functionally an exercise of prosecutorial discretion.[100] Historically, convening authorities also exercised discretion at the post-trial phase, when they were empowered to disapprove guilty findings or reduce the imposed sentence.[101] This power was eliminated in almost all cases by the 2014 NDAA, reflecting ongoing Congressional disapproval of military leadership's handling of numerous high-profile sexual assault cases and desire to circumscribe commander discretion to alter or overturn adjudicated outcomes.[102] Appellate avenues for military sexual assault convictions require a convicted party to first seek relief in their service branch's Court of Criminal Appeals[103] and subsequently in the Court of Appeals for the Armed Forces, an Article I court comprised of civilian judges and arguably the military justice system's court of last resort.[104]

Convening authorities who adopt zero-tolerance stances on sexual assault are more likely to order prosecutions to evince their appreciation for the severity of the issue and preserve the evaluation and referral discretion they perceive to be threatened by Congressional scrutiny and criticism.[105] These commanders may be motivated by desires to maintain troop cohesion, to enforce disciplinary standards, and, perhaps most importantly, to reassert their own jurisdictional authority, which they likely view as an integral com-

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[98] *See* Visger, *supra* note 70, at 67.

[99] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 601(a) (2019).

[100] *See* Visger, *supra* note 70, at 67.

[101] 10 U.S.C. § 860(b)–(c) (2012), amended by National Defense Authorization Act for Fiscal Year 2014, § 1702(c), Pub. L. 113-66, 127 Stat. 955 (2013).

[102] National Defense Authorization Act for Fiscal Year 2014, § 1702, Pub. L. 113-66, 127 Stat. 955 (2013) (amending 10 U.S.C. § 860 (2012)); *see also* Visger, *supra* note 70, at 74; Whitlock, *supra* note 85; Montgomery, *supra* note 62.

[103] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1203(c) (2019). It is important to note that the branch-specific military appellate courts may review convictions for both legal and, notably, factual sufficiency. *See* Lisa M. Schenck, *Just the Facts, Ma'am: How Military Appellate Courts Rely on Factual Sufficiency Review to Overturn Sexual Assault Cases When Victims Are Incapacitated*, 45 SW. L. REV. 523, 525–27 (2016) (describing the automatic review power of military appellate courts in cases with "sentences that include death, a punitive discharge, or at least a year of confinement," and noting the power of these courts to review both the legal and factual sufficiency of convictions).

[104] As reaffirmed in *Ortiz v. United States*, 138 S. Ct. 2165 (2018), decisions rendered by CAAF are reviewable by the Supreme Court. *See generally* Rodrigo M. Caruço, *In Order to Form a More Perfect Court: A Quantitative Measure of the Military's Highest Court's Success as a Court of Last Resort*, 41 VT. L. REV. 71 (2016) (analyzing the role of the Court of Appeals for the Armed Forces as a court of last resort and arguing that the court too frequently acts as an intermediate error-correction court).

[105] *See* Visger, *supra* note 70, at 62 ("Military leadership has reacted strongly to congressional criticism of its handling of sexual assault cases, motivated in significant part by their desire to retain commander jurisdiction over the court martial process . . . . [Convening authorities'] desire to retain jurisdiction then creates a situation in which military leaders respond to Congressional criticism and attempts to remove jurisdiction by demonstrating that they are taking strong action against sexual assault in order to obtain a desired political outcome (e.g. retention of court-martial jurisdiction).").

ponent of their ability to lead and regulate their subordinates.[106] They may also wish to demonstrate their alignment with Congressional priorities by handling sexual assault allegations within their sphere of authority swiftly and decisively.[107]

Meanwhile, legislative advocates are motivated to reform what they consider a discredited and ineffective system by redressing the perceived failure of military leaders to facilitate just and efficient sexual assault adjudications.[108] Legislators are also motivated by personal reputational incentives and may feel pressure to adopt hardline positions on certain issues to maintain consistency with party platforms and avoid perceptions of reneging on campaign policy priorities which could jeopardize their reelection bids.[109] Because members of Congress must be more responsive to public opinion and shifting cultural priorities than the convening authorities who exercise prosecutorial discretion in sexual assault cases, these legislators may therefore exert pressure on military leadership to align with legislative policy priorities,[110] utilizing both their statutory and promotional authorities and the civilian media to advance these objectives.[111]

Effective prosecution and deterrence of military sexual assault is a common goal of both civilian and military leaders. However, the incentives

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[106] *See id.* at 62–63.

[107] *See id.*; *see also* Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline?*, 66 CLEV. ST. L. REV. 123, 125 (2017); Visger, *supra* note 70, at 82 ("Commanders are making disposition decisions not based on the legal merits of a case, but instead on how the commander perceives Congress or their chain of command will react.").

[108] *See, e.g.*, Sen. Kirsten Gillibrand, *Comprehensive Resource Center for the Military Justice Improvement Act*, https://www.gillibrand.senate.gov/mjia [https://perma.cc/JR5J-4V8C].

[109] *See, e.g.*, *32 Sexual Assaults Reported at Wright-Patt AFB in 4-year Period*, DAYTON DAILY NEWS (Feb. 14, 2014), https://www.daytondailynews.com/news/sexual-assaults-reported-wright-patt-afb-year-period/1vphtZIAzpHg3OEiC03dMP/ [https://perma.cc/LBD6-254H] ("U.S. Sen. Kirsten Gillibrand, D-N.Y., has asked Defense Secretary Chuck Hagel to release information about sexual assaults at the largest bases in each military branch . . . . The sweeping request for the past five years includes 'all reports and allegations of rape, forcible sodomy, sexual assault, sex in the barracks, adultery and attempts, conspiracies or solicitations to commit these crimes.'"). *See generally* Katherine M. Gehl & Michael E. Porter, *Fixing U.S. Politics*, HARV. BUS. REV. (July–Aug. 2020), https://hbr.org/2020/07/fixing-u-s-politics [https://perma.cc/N48U-G94T] (describing how politicians double down on promises to mutually exclusive groups of partisans in order to demonize opponents and maximize reelection prospects).

[110] *See, e.g.*, Schenck, *supra* note 24, at 592 ("Following . . . high-profile cases involving sexual assault, Congress has responded by directing the Secretary of Defense to establish various panels, reports, and surveys to evaluate specific issues involved in the military services' sexual assault case prevention, response, training, investigation, and disposition.").

[111] *See, e.g.*, Samuelsohn, *supra* note 86 (describing how Senators McCaskill and Gillibrand both used General Franklin's decision to retire early to reassert their policy priorities around military sexual assault reform. McCaskill deemed Franklin's actions as a convening authority "the best possible illustration of why civilian review, elimination of commanders' ability to overturn convictions and so many other protections are included in our recent defense bill," while Gillibrand deemed his retirement "a glaring admission that untrained, biased commanders should not have this authority.").

and priorities of the convening authorities who exercise broad discretion within the military justice system in service of that goal may be at odds with those of internal military leadership, external Congressional oversight, or both.[112] This tension can produce an oppositional dynamic, as adversarial exchanges[113] with Congressional leaders or policy advocates may exacerbate military leaders' resistance to reforms imposed by civilian actors. This increased hostility has the potential to undermine good faith legislative and advocacy efforts to decisively address military sexual assault via impartial, just prosecutions. Convening authorities who perceive civilian advocates to be impugning their handling of sexual assault cases according to non-military standards and absent sufficient knowledge of relevant military context[114] may be more reluctant to support changes to sexual assault adjudication procedures. This reticence may further frustrate reform efforts and obstruct realization of the protections and due process all involved parties deserve.[115]

For these reasons, the restructuring contemplated by the 2020 NDAA and discussed in Part V of this Article offers the most promising solution to the two-pronged legitimacy problem currently confronting military adjudications of sexual assault offenses. This reform seeks to preserve prosecutorial discretion within the military justice system by reallocating it to senior judge advocates better equipped to evaluate cases on the merits and less susceptible to allegations of UCI than non-lawyer convening authorities. The creation of standing military trial courts, also proposed in Part V, further enhances the credibility of courts-martial by establishing a quasi-independent judicial body more insulated from political concerns and commander pressure than its contemporary iteration and therefore more capable of rendering neutral, judicially sound decisions.

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[112] *See* Visger, *supra* note 70, at 71.

[113] As an example of the oppositional tenor of this fight, Protect Our Defenders, a national advocacy group seeking to "address the epidemic of sexual assault and harassment" in the military, placed the blame for the military's ongoing inability to effectively reduce sexual assault rates on senior Armed Forces officials, describing the "military leadership's failures that have led to the sexual assault crisis" in a press release in support of Senator Gillibrand's Military Justice Improvement Act. Press Release, *Protect our Defenders*, ***Statement*** Protect Our Defenders Calls on Congress to Pass MJIA and Reform Broken Military Justice System (June 13, 2019), https://www.protectourdefenders.com/statement-protect-our-defenders-calls-on-congress-to-pass-mjia-reform-broken-military-justice-system/ [https://perma.cc/86VC-DWN2].

[114] *See, e.g.*, Fredric I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MIL. L. REV. 512, 514–15 (2017) ("On a practical level [the unique concerns and mission of the military] requires that our military criminal legal system take into account: The worldwide deployment of military personnel; . . . The peculiar nature of military life, with the attendant stress of combat or preparation for combat; The need for disciplined personnel.").

[115] *Id.* at 515.

III. UCI as Statutory Offense: *United States v. Boyce*[116] and *United States v. Barry*[117]

Allegations of actual or apparent UCI pose a significant threat to the efficacy and integrity of military sexual assault prosecutions.[118] Paradoxically, investigation and disposition of unlawful influence claims that may cause convictions to be overturned are often self-defeating: while such inquiries seek to augment the reliability of court-martial proceedings by ensuring they are legitimate and free from improper extrajudicial influence, UCI allegations simultaneously reinforce public perceptions of the inadequacy of the military justice system to address politically charged, controversial cases.[119] The judicial test for apparent UCI evinces its critical reputational component: courts seeking to identify the appearance of unlawful influence consider "the *perception* of fairness in the military justice system as viewed through the eyes of a reasonable member *of the public*."[120] Political pressures and systemic incentives motivating swift and punitive disposition of military sexual assault claims,[121] however, increase the likelihood that UCI allegations will arise from these proceedings.[122]

Codified in the UCMJ under Article 37, UCI criminalizes the conduct of any "person subject to [that] chapter"[123] who "attempt[s] to coerce or, by any unauthorized means, influence the action of a court-martial or any

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[116] 76 M.J. 242 (C.A.A.F. 2017).

[117] 78 M.J. 70 (C.A.A.F. 2018).

[118] Actual UCI is defined as "an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." Visger, *supra* note 70, at 69 (quoting *Boyce*, 76 M.J. at 247). Apparent UCI is classified as any action that "place[s] an 'intolerable strain' on the public's perception of the military justice system because 'an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.'" *Id.* (quoting *Boyce*, 76 M.J. at 249).

[119] *See, e.g.*, Bedi, *supra* note 97, at 1408–10 (describing the emphasis on systemic integrity in the military justice system and suggesting that both the deleterious impacts of UCI and unfettered convening authority discretion at the charge referral stage of proceedings may counsel a limitation of this authority to better advance this value); Brady, *supra* note 58, at 202.

[120] United States v. Ashby, 68 M.J. 108, 129 (C.A.A.F. 2009) (quoting United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006)) (emphasis added).

[121] *See* Murphy, *supra* note 47, at 130; Michael Doyle, *Marine's Sexual Assault Conviction Overturned Because of Commandant's Tough Talk*, McClatchy (May 22, 2014), https://www.mcclatchydc.com/news/crime/article24768001.html [https://perma.cc/6DLZ-U798]; Erik Slavin, *Judge: Obama Sex Assault Comments 'Unlawful Command Influence*,' Stars & Stripes (June 14, 2013), https://www.stripes.com/judge-obama-sex-assault-comments-unlawful-command-influence-1.225974 [https://perma.cc/4QU8-RXZT]. *See generally* Part I, *supra*.

[122] Brady, *supra* note 58, at 199 ("[W]hat makes the current [military justice] system particularly pernicious is that . . . at least the appearance of unlawful command influence . . . may well be inescapable given the clear directives of executive, legislative, and military authorities that allegations of sexual assault must be swiftly and harshly dealt with.").

[123] *See* 10 U.S.C. § 802(a) (listing persons subject to the Uniform Code of Military Justice).

other military tribunal or any member thereof, 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."[124] The scope of the statute is expansive: the only exceptions Article 37(a) contains regarding legal guidance that does *not* constitute UCI, for example, are (1) "general instructional or informational courses in military justice . . . solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial," and (2) "statements and instructions given in open court by the military judge, president of a special court-martial, or counsel."[125] The breadth and comprehensive drafting of Article 37 reflect the potential of UCI allegations to undermine the rigidly hierarchical norms upon which the military institution is predicated. "Lawful command influence . . . is a necessary part of military life,"[126] whereby commanders are expected to exercise extensive authority over subordinates to facilitate accomplishment of mission objectives.[127] Improper use of this power has delegitimizing implications beyond discrete judicial proceedings affected by UCI because exploitation of this authority jeopardizes the fundamental integrity of the military justice chain of command.[128]

UCI exists when a convening authority or other officer in a command role "influence[s] decisions that should be independent of command prerogatives and policy."[129] UCI's status as an offense under the UCMJ provides a procedural safeguard of the accused's due process rights, ensuring that his or her court-martial is equitable by curtailing a commander's otherwise legitimate authority to issue orders and provide direction to subordinates.[130] Military courts often employ a multi-factor analysis to determine the existence of UCI:

> (1) the timing of the contact, e.g., the proximity of contact to the accused's case; (2) who made the contact, e.g., the position of the officer alleged as attempting the influence . . . ; (3) the type of contact, e.g., speech, letter, memorandum, or directive; (4) the content of the contact, e.g., what and how it was said, whether mandatory, discretionary, informational; (5) who was contacted—

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[124] 10 U.S.C. § 837(a).

[125] *Id.*; *see also* Visger, *supra* note 70, at 66 (describing Article 37's prohibitions as "quite robust").

[126] Bedi, *supra* note 97, at 1414.

[127] *Id.*

[128] *Id.* at 1420 ("The UCMJ prescribes that '[e]ach commander in the chain of command has independent . . . discretion to dispose of offenses within the limits of that authority.' The rationale for this independence centers on the unique nature of military justice and the fact that a putative defendant's specific commander (and not a higher-ranked commander) is presumably in the best position to decide what charges (if any) should be brought and how best to dispose of them in light of keeping good order and discipline within the command.").

[129] Teresa K. Hollingsworth, *Unlawful Command Influence*, 39 A.F. L. Rev. 261, 262 (1995).

[130] *See* Bedi, *supra* note 97, at 1414.

> witnesses, court members, military judge, members of the command; (6) the reasonable likelihood of prejudice to the accused at his trial.[131]

This standard recognizes that "[c]ommand influence is inherent to every command action" and seeks to contextualize improper influence along a spectrum of commander behavior that is necessarily influential by virtue of the officer's seniority and authority within a rigidly hierarchical system.[132] Notably, intent is not an element of the UCI analysis, suggesting that the doctrine is concerned with an objective preservation of systemic integrity and due process, regardless of the commander's personal motivations for either appearing to intervene in the proceedings or actually doing so.[133] This omission may lead to paradoxical judicial outcomes in the context of sexual assault prosecutions, whereby commanders' attempts to implement general policies to effectively handle politically charged and highly scrutinized allegations ultimately result in convictions being overturned on UCI grounds.[134] These reversals compound the reputational threats posed by UCI, as they frustrate efforts to rectify institutional deficiencies in the military justice system by presenting a procedural bulwark to just dispositions.

Whatever the motivation for improper commander behavior, UCI claims erode the validity of convictions at court-martial whether or not they are successful. Moreover, the contemporary jurisprudential framework for resolving these allegations is turbulent and evolving, and evinces the systemic failures hindering the just and effective prosecutions of military sexual assault claims.[135] Recent UCI decisions from the Court of Appeals for the Armed Forces (CAAF) highlight this instability: during its 2017 and 2018 terms, CAAF overturned five service member sexual assault convictions for actual or apparent UCI or the presence of "implied bias," including *United States v. Boyce*,[136] *United States v. Commisso*,[137] *United States v. Riesbeck*,[138]

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[131] *Id.* at 1415 (citing United States v. Allen, 31 M.J. 572, 592 (N.M.C.M.R. 1990)) (citations omitted).

[132] Erik C. Coyne, *Influence with Confidence: Enabling Lawful Command Influence by Understanding Unlawful Command Influence—A Guide for Commanders, Judge Advocates, and Subordinates*, 68 A.F. L. Rev. 1, 4 (2012).

[133] *See* Bedi, *supra* note 97, at 1419.

[134] *See, e.g.*, United States v. Garcia, ARMY 20130660 at *9 (A.Ct. Crim. App. 2015). In *Garcia*, the Army Court of Criminal Appeals concluded that "Government counsel's multiple improper references to Army-wide efforts to respond to and prevent sexual assault created the appearance of unlawful command influence." *Id*. The "Army-wide efforts" discussed here are described earlier in the opinion as including "the President's and senior Department of Defense officials' statements regarding sexual assault, and related training sessions, Army-wide and at the local post, including mandatory viewings of *The Invisible War*." *Id.* at *1.

[135] *See* John Loran Kiel, Jr., *So You're Telling Me There's a Chance: Why Congress Should Seize the Opportunity to Reform Article 37 (UCI) of the UCMJ*, 227 Mil. L. Rev. 1, 1–2 (2019) [hereinafter Kiel, *So You're Telling Me There's a Chance*].

[136] 76 M.J. 242, 244 (C.A.A.F. 2017).

[137] 76 M.J. 315, 318 (C.A.A.F. 2017).

and *United States v. Barry*.[139] These cases, which span the Air Force, Army, Coast Guard, and Navy, respectively, evince the civilian court's frustration with the "failure of lower courts and military attorneys to police the system."[140]

In *Riesebeck*, CAAF overturned a sexual assault conviction after finding that the four admirals involved in selecting panel members for the accused's initial court-martial had engaged in panel stacking that resulted in drastically disproportionate female representation.[141] CAAF rejected the conclusions of both the Coast Guard Court of Criminal Appeals and the military judge who presided over the *DuBay* hearing,[142] with Judge Ryan writing for a unanimous court that it was "pure sophistry" to find that a " 'benign' motive" for the panel composition existed in the case.[143] Similarly, in *Commisso*, CAAF decried an "egregious oversight" by a military judge who failed to ask panel members who had previously participated in a Sexual Assault Review Board at which the accused's case was discussed why they had concealed this membership and their resulting knowledge of the case during voir dire.[144] *Riesbeck* and *Commisso* highlight the damaging impacts of the civilian political pressures that impel commanders and convening authorities to aggressively pursue sexual assault charges using methods that implicate fundamental fairness and due process concerns and thereby further erode the system's capacity to effectively adjudicate such cases at all, or at least the public's perception of its ability to do so.[145]

The remainder of this Part will focus on CAAF's recent decisions in *Boyce* and *Barry*, which underscore the two-front legitimacy challenge facing military sexual assault adjudications. Both cases concern allegations of UCI at the highest echelons of military leadership, implicating the Secretary,

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[138] 77 M.J. 154, 159 (C.A.A.F. 2018).

[139] 78 M.J. 70, 73 (C.A.A.F. 2018).

[140] *See* Visger, *supra* note 70, at 91.

[141] 77 M.J. at 159 ("[A]lthough the court-martial panel for this case was selected from a roster of officers that was only twenty percent female and a pool of enlisted personnel that was only thirteen percent female, the panel selected for Appellant's court-martial was seventy percent female. Five of the women were victim advocates. Following voir dire and Appellant's challenges, the panel consisted of seven members, five of whom were women. Four of those women were victim advocates.").

[142] A *DuBay* hearing is a procedural mechanism which permits referral of a case heard at court-martial that raises significant collateral issues to a different, higher-ranked convening authority than the officer who initially referred the charges. The second convening authority then refers the case to trial again for the purpose of convening an out-of-court hearing (the *DuBay* hearing) to "hear the respective contentions of the parties on the question, permit the presentation of witnesses and evidence in support thereof, and enter findings of fact and conclusions of law based thereon." United States v. Dubay, 37 C.M.R. 411, 413 (C.M.A. 1967).

[143] *Riesbeck*, 77 M.J. at 162.

[144] United States v. Commisso, 76 M.J. 315, 324 (C.A.A.F. 2017). The three panel members had "regularly attended Sexual Assault Review Board (SARB) meetings, including at least four meetings prior to [the accused's] court-martial where his case was discussed from the putative victim's perspective." *Id.* at 317–18.

[145] *See, e.g.*, Visger, *supra* note 70, at 91–92.

Chief of Staff, and Judge Advocate General of the Air Force, and the Judge Advocate General and Deputy Judge Advocate General of the Navy, respectively.[146] Both cases also evince the self-defeating potential of well-meaning civilian reforms that seek to increase procedural fairness and augment survivor protections but ultimately leave cases vulnerable to allegations of UCI that may result in overturned convictions on appeal.[147] Moreover, the two cases particularly reflect contemporary judicial opacity around the issue of UCI itself, as both holdings departed sharply from established precedent on the issue; *Boyce* abandoned the requirement of a prejudice finding to sustain UCI convictions,[148] while *Barry* adopted a subjective and inconsistent standard for assessing whether a commander "felt influenced."[149] Legitimacy concerns evoked by UCI allegations are compounded by inconsistent federal jurisprudence from the military's "civilian appellate court of last resort"[150] that deprives the system of a readily-articulable referential standard and diminishes procedural consistency and reliability in sexual assault cases.[151]

A. United States v. Boyce

Of the recent CAAF decisions discussed above, the first to reject longstanding UCI precedent was *United States v. Boyce*. This 2017 case held that no showing of prejudice to the accused is required to sustain a claim of apparent UCI.[152] As in the *Wilkerson* case, the convening authority in *Boyce* was Lt. Gen. Franklin, who had recently come under scrutiny for declining

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[146] *Id.* at 90–92. The Judge Advocate General of each branch of service is that branch's highest-ranking military lawyer. The Deputy Judge Advocate General is frequently subsequently selected as the Judge Advocate General.

[147] *Id.* at 90 ("The case demonstrates that the political pressures of the military's sexual assault situation has invaded the highest levels of the U.S. Navy's JAG Corps. This suggests that the same political pressures to protect commander jurisdiction being felt by military leaders is also being felt by their attorneys. Previous reforms to the military justice system sought to inject attorneys into the process to serve as guardians of the system, to promote due process and minimize the potential of command abuses. Now, even the military attorneys are being influenced by these political pressures.").

[148] United States v. Boyce, 76 M.J. 242, 248–49 (C.A.A.F. 2017)

[149] United States v. Barry, 78 M.J. 70, 80 (C.A.A.F 2018) (Ryan, J., dissenting).

[150] Visger, *supra* note 70, at 68.

[151] *See, e.g.*, Greg Rustico, *Overcoming Overcorrection: Towards Holistic Military Sexual Assault Reform*, 102 VA. L. REV. 2027, 2048–49 (2016) ("[I]t is difficult to precisely define UCI . . . . The ultimate decision about whether an individual case is tainted by UCI will be case specific and fact intensive.").

[152] 76 M.J. at 249. At issue in *Boyce* was the decision of the convening authority, Lt. Gen. Franklin, to refer the accused's charges to a general court-martial immediately after receiving word from the Air Force Chief of Staff that the Secretary of the Air Force had "lost confidence in him" and that he could either wait to be removed from command or voluntarily retire at a reduced rank. The Secretary's decision regarding Lt. Gen. Franklin was predicated in part on his decision to overturn the conviction in the *Wilkerson* case (discussed *supra*) and his declination to refer sexual assault charges in *United States v. Wright*, 75 M.J. 501 (A.F. Ct. Crim. App. 2015), which raised political and reputational concerns for the Air Force. 76 M.J. at 245–46.

to refer charges in another sexual assault case, *United States v. Wright*.[153] On December 27, 2013, three months after this referral decision, Lt. Gen. Franklin received a call from the Air Force Chief of Staff, informing him that "the new Secretary[154] had 'lost confidence' in him" and that, if he did not voluntarily retire, the Secretary would remove him from command.[155] On the same day, Lt. Gen. Franklin learned of the pending charges against Boyce.[156] He elected to refer the charges to court-martial on January 6, 2014, and publicly announced his retirement two days later.[157] In an interview with Boyce's defense counsel later in the month, Lt. Gen. Franklin asserted that he had decided to refer the case "independently" and that there "probably is an appearance of UCI but [he] wasn't affected by it," since it "would be foolish to say there is no appearance of UCI."[158]

Paradoxically, the *Boyce* majority emphasized the precise reputational concerns implicated by the appearance of UCI[159] even as the court upended the standard used to adjudicate such allegations,[160] thereby depriving the military justice system of a consistent jurisprudential yardstick by which to address these threats to its legitimacy. Departing from earlier UCI precedent, CAAF found that "the prejudice involved in [apparent UCI] is the damage to the public's perception of fairness of the military justice system as a whole *and not* prejudice to the individual accused."[161] Despite acknowledging in a footnote that lack of prejudice to the accused (or prejudice that was later cured) remains "a significant factor that must be given considerable weight," the court broke with earlier UCI jurisprudence to advance its interpretation of unlawful influence as a systemic reputational risk and stated that a lack of prejudice to the accused "ultimately is not dispositive" of whether the "public taint" of apparent UCI was nonetheless sufficiently injurious to the perceived reliability of the proceeding to sustain a finding of unlawful influence.[162]

Although CAAF granted relief to the accused in *Boyce* despite finding no prejudice, the holding's departure from precedent and arguable violation of federal law threaten to undermine the very systemic integrity the court

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[153] 75 M.J. 501 (A.F. Ct. Crim. App. 2015).

[154] Deborah Lee James was confirmed as Secretary of the Air Force two weeks earlier, on December 13, 2013. Jon Harper, *Deborah Lee James confirmed as next Air Force Secretary*, STARS & STRIPES (Dec. 13, 2013), https://www.stripes.com/news/deborah-lee-james-confirmed-as-next-air-force-secretary-1.257331 [https://perma.cc/7AMN-6N42].

[155] *Boyce*, 76 M.J. at 245.

[156] *Id.* at 246.

[157] *Id.*

[158] *Id.*

[159] UCI jurisprudence defines two subsets of unlawful influence: actual and apparent. *Id.* at 247–48; *see supra* note 118.

[160] *See* 76 M.J. at 248–49.

[161] *Id.* (emphasis added).

[162] *Id.* at 248–49 n.5.

sought to strengthen in the case.[163] Writing separately in dissent, Judges Stucky and Ryan highlighted two underlying inconsistencies in the majority's opinion. The dissenters argued that, although the court found no actual UCI in the case, the majority nonetheless held that an objective, fully informed observer *equipped with the knowledge that there had been no unlawful influence* might doubt the impartiality of the court-martial proceedings,[164] and the majority subsequently used this finding to grant relief to the accused even in the absence of a prejudice finding, in contravention of Article 59(a) of the UCMJ.[165]

Judge Ryan's dissent further noted the majority's departure from CAAF's contemporary UCI jurisprudence, recently rearticulated in the 2013 case of *United States v. Salyer*.[166] She argued that, contrary to the holding of the present case, a "correctible legal error of apparent unlawful command influence must be based upon more than the theoretical presence of influence on a particular convening authority," but rather on "an objective observation of the 'facts and circumstances' of an individual case and a finding of substantial prejudice to the rights of the accused."[167] Thus, while the majority opinion in the case evinced significant judicial anxiety regarding the potential of UCI allegations to undermine public trust in the military justice system, in practice its holding may have exacerbated these concerns by provoking upheaval and injecting ambiguity into adjudication of unlawful influence claims.[168]

B. United States v. Barry

Another recent CAAF decision, *United States v. Barry*, further underscores the opacity and confusion surrounding UCI allegations. Barry, a se-

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[163] *See* Visger, *supra* note 70, at 85 ("[The *Boyce*] ruling is breathtaking in its potential implications. One could readily argue that it calls into question every Air Force sexual assault case referred to court-martial subsequent to the Franklin incident.").

[164] *Boyce*, 76 M.J. at 254 (Stucky, J., dissenting) ("It is difficult to understand how an objective, disinterested, *fully informed observer*, knowing that there is no actual unlawful influence, 'would harbor a significant doubt about the fairness of the proceeding.' " (emphasis in original)).

[165] *Id.* (Ryan, J., dissenting) (observing that Article 59(a) of the UCMJ provides that "[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights *of the accused*." (quoting 10 U.S.C. § 859(a) (2012) (emphasis in original))).

[166] 72 M.J. 415, 423 (C.A.A.F. 2013) ("[T]he initial burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation.").

[167] 76 M.J. at 256 (Ryan, J., dissenting). Judge Ryan's dissent goes on to cite similar language from the earlier case of *United States v. Allen*, decided in 1991 by CAAF's predecessor court, the Court of Military Appeals: "[T]here must be something more than an appearance of evil to justify action by an appellate court in a particular case. 'Proof of [command influence] in the air, so to speak, will not do.' We will not presume that a military judge has been influenced simply by the proximity of events which give the appearance of command influence in the absence of a connection to the result of a particular trial." 33 M.J. 209, 212 (C.M.A. 1991) (alteration in original).

[168] *See* Kiel, *So You're Telling Me There's a Chance*, *supra* note 135, at 1–2.

nior enlisted sailor, was convicted of a single specification of sexual assault; his conviction was approved by the convening authority, Rear Adm. Lorge, and subsequently by the Navy-Marine Corps Court of Criminal Appeals.[169] Barry subsequently petitioned CAAF for review, alleging UCI on the basis of a sworn declaration from Rear Adm. Lorge, who asserted "serious misgivings about the evidence supporting [Barry's] conviction" and averred that he would not have approved the court-martial findings absent "the pressure he perceived from senior civilian and military leaders."[170] Rear Adm. Lorge noted several incidents evincing this "pressure," describing, among other events, a courtesy visit long before the case with then-Judge Advocate General (TJAG) Vice Adm. Nanette DeRenzi, in which she communicated to Rear Adm. Lorge that "commanders were facing difficult tenures as convening authorities due to the political climate surrounding sexual assault."[171] Rear Adm. Lorge also described an office visit and subsequent phone call with then-Deputy Judge Advocate General (DJAG) Rear Adm. James Crawford.[172] Although Rear Adm. Lorge could not recall any specific recommendations provided by Rear Adm. Crawford, he believed he had received legal advice on both occasions that approving the court-martial findings in Barry's case was "the appropriate course of action."[173]

In *Barry*, the majority found evidence of actual unlawful influence by Rear Adm. Crawford, but not Vice Adm. DeRenzi, despite the fact that both officers "imparted essentially the same message" by functionally the same means to Rear Adm. Lorge.[174] Moreover, while the dissent emphasized that Rear Adm. Lorge "*felt influenced* by external pressures focused on the handling of sexual assault allegations and trials in the military justice system,"[175] and the court held that neither Rear Adm. Crawford nor Vice Adm. DeRenzi had acted intentionally to influence Rear Adm. Lorge's post-trial

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[169] United States v. Barry, 78 M.J. 70, 73 (C.A.A.F. 2018). Following Barry's conviction for sexual assault at a general court-martial, Rear Adm. Lorge, the convening authority in the case, affirmed the findings and sentence based upon his mistaken belief that he lacked discretion to take any other action. As a result, the Navy-Marine Corps Appellate Government Division, which represents the United States in appellate proceedings before the Navy-Marine Corps Court of Criminal Appeals (NMCCA), moved to remand the case for additional post-trial processing. The NMCCA set aside the conviction and remanded the case to Rear Adm. Lorge. Upon reconsideration, Rear Adm. Lorge expressed "concerns regarding the fairness of [Barry's] trial and the appropriateness of [his] sentence," but ultimately approved both the findings and the sentence. *Id.* Rear Adm. Lorge's actions were affirmed by CAAF, but a subsequent successful petition for reconsideration by Barry resulted in CAAF's remanding the case to TJAG for a *Dubay* hearing. After reviewing the *Dubay* judge's findings of fact and conclusions of law, CAAF granted review of the unlawful command influence issue. *Id.* For an explanation of *Dubay* hearings, see footnote 142, *supra*.

[170] *Barry*, 78 M.J. at 73–74.

[171] *Id.* at 74.

[172] *Id.* at 75. Rear Adm. Crawford subsequently became the Navy Judge Advocate General upon the retirement of Vice Adm. DeRenzi.

[173] *Id.*

[174] *Id.* at 81 (Ryan, J., dissenting).

[175] *Id.* at 80 (emphasis in original).

decisions,[176] CAAF nonetheless resolved the case on the grounds of actual command influence and consequently declined to reach the apparent command influence issue.[177] The majority opinion in *Barry* therefore provoked confusion by failing to adequately differentiate the nearly-identical actions of the Navy JAG Corps' two top-ranking officers so as to clarify the court's disparate UCI holdings with regard to each officer. As the dissent noted, this confusion was exacerbated by CAAF's conflated analyses of actual and apparent command influence.[178]

Writing again in dissent, Judge Ryan, joined by Judge Maggs, decried the court's formulation of a new standard for UCI predicated upon whether the convening authority under scrutiny "felt influenced" by their superiors to take particular actions in sexual assault cases.[179] This variable means of assessing potential unlawful influence, she argued, produced "an absurd result that Congress could not have intended."[180] The dissent further noted that the standard established by the majority would "permit an Article 37, UCMJ, violation to turn on a convening authority's susceptibility to 'feeling' influenced," and was therefore subjective, inconsistent, and functionally unworkable.[181] Judge Ryan highlighted that not only was the holding in *Barry* internally contradictory, the majority's finding of actual UCI also appeared to contravene recent CAAF jurisprudence in *United States v. Riesbeck*,[182] in which intentional action was held to be necessary to sustain a finding of actual UCI.[183]

The holding in *Barry* thus proves doubly injurious to the integrity of CAAF's UCI jurisprudence. First, its analysis reaches divergent conclusions with respect to nearly identical conduct without satisfactory explanation of these inconsistent results.[184] Second, it establishes an unworkable standard for evaluating UCI claims that "will leave both the field and lower courts floundering to determine how and when unintentional conduct rises to an 'unlawful' level or constitutes 'improper manipulation.'"[185] Further, *Barry*'s

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[176] *Barry*, 78 M.J. at 75, 78 (majority opinion).

[177] *Id.* at 79. Specifically, the court declined to decide the issue of apparent influence, having already decided the actual influence question. *See id.* at 79 n.8 ("In light of our conclusion regarding the presence of actual unlawful influence, we need not determine whether . . . apparent unlawful influence also tainted the processing of Appellant's case.").

[178] *See id.* at 84 (Ryan, J., dissenting).

[179] *Id.* at 80 ("Pressures external to the military justice system—and a convening authority who *feels influenced* by such pressures—are altogether different from a person subject to the Uniform Code of Military Justice (UCMJ) attempting to coerce or influence a convening authority, which is what Article 37(a), UCMJ . . . requires.").

[180] *Id.* at 83.

[181] *Id.*

[182] 77 M.J. 154 (C.A.A.F. 2018).

[183] *Barry*, 78 M.J. at 85 (Ryan, J., dissenting) ("Both the statute and our case law, including our recent decision in *Riesbeck*, require intentional action in cases of actual unlawful influence.").

[184] *See id.* at 85.

[185] *Id.*

departure from CAAF's earlier pronouncements in *Riesbeck* and *Boyce* compounds the ambiguity surrounding application of UCI standards. This implementation-related confusion diminishes the efficacy of UCI claims as a bulwark against extrajudicial improprieties in courts-martial proceedings and consequently undermines the integrity of convictions affirmed under the shadow of actual or apparent unlawful influence allegations.[186]

C. Legitimacy Implications of Barry *and* Boyce

UCI is often deemed the "mortal enemy of military justice"[187] for its ability to compromise public trust in an already-opaque legal system that affords non-lawyer commanders broad prosecutorial and quasi-judicial discretion.[188] Allegations of UCI engender tension between the preservationist aims and reputational consequences of Article 37(a): the codification of the offense of unlawful influence seeks to maintain the "systemic integrity" of military justice,[189] but raising these claims on appeal may undermine the perceived legitimacy of initial court-martial dispositions.[190] Judicial endorsement of inconsistent UCI standards jettisons the procedural protections Article 37(a) is intended to entrench, and the holdings of *Barry* and *Boyce* have only further obfuscated adjudication of UCI claims.[191]

Influence that impels convening authorities to affirm sexual assault convictions in order to demonstrate commitment to eradicating military sexual assault is ultimately adverse to the interests of the survivors whose claims are adjudicated. Such influence is also adverse to the interests of the accused, whose conviction and sentencing take place in a proceeding potentially marred by bias or political concerns. Reputational priorities of convening authorities[192] that result in punitive dispositions of sexual assault cases invite unlawful influence actions that imperil the legitimacy of rightful con-

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[186] *See, e.g.*, Brady, *supra* note 58, at 202; Daniel G. Brookhart, *"Physician Heal Thyself:" How Judge Advocates Can Commit Unlawful Command Influence*, 2010 Army Law. 56, 56 (2010).

[187] United States v. Gore, 60 M.J. 178, 178 (C.A.A.F. 2004) (quoting United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986)).

[188] *See* Bedi, *supra* note 97, at 1412 ("Legislators and legal academics alike voiced their displeasure with this unfettered discretion afforded military commanders."); Murphy, *supra* note 47, at 150–51 ("Because commanders still have the authority to make procedural and substantive decisions in all phases of a court-martial, there is the potential for unlawful command influence to forever plague the military justice system.").

[189] Bedi, *supra* note 97, at 1407.

[190] Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 Harv. L. Rev. 937, 946 (2010) (noting "concerns that [the convening authority's] vast power might be wielded arbitrarily threaten the perceived fairness of the system").

[191] *See* Kiel, *So You're Telling Me There's a Chance*, *supra* note 135, at 2.

[192] *See* Visger, *supra* note 70, at 75 ("[Commanders] are going to be acutely aware of the political stakes involved in their decisions [regarding the disposition of sexual assaults] (and the potential ramifications to their own military careers if they make an unpopular decision). In such instances, the temptation is great for a commander to decide a case based on political considerations instead of the evidence.").

victions and erode public trust in the military justice system as a whole.[193] For this reason, coherent jurisprudence around UCI is fundamental to ensure an effective safeguard against both perversion of court-martial proceedings at the trial stage and subsequent denial of effective, impartial justice for survivors on appeal.

IV. Revision and Reform: UCMJ Articles 120, 6b, 32, and 60

In addition to the contradictory developments in UCI jurisprudence, heightened legislative focus on military sexual assault has tangibly impacted the scope and implementation of the UCMJ articles that govern these proceedings.[194] While augmentation of survivor protections and circumscription of commander discretion exemplify good faith efforts to improve the military's handling of sex offense cases, it is not clear that these changes have enhanced the legitimacy or efficacy of prosecutions under Article 120.[195] For example, legislative changes that are perceived as a "heavy thumb . . . on the scales in favor of alleged victims," may exacerbate reluctance to implement reforms and further entrench failed policies that undercut public trust in the military justice system's ability to competently prosecute sexual offenses.[196] Similarly, the UCI allegations stemming from the involvement of the SVC in the *Sinclair* case demonstrate the potential weaponization of these good faith reform efforts, which may limit their protective effects and inspire allegations of improper political influence.

The exploitation of protections intended to enhance systemic equity can have damaging consequences, rendering the military justice system increas-

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[193] *See* Brady, *supra* note 58, at 199 ("[W]hat makes the current system particularly pernicious is that . . . at least the appearance of unlawful command influence . . . may well be inescapable given the clear directives of executive, legislative, *and military* authorities that allegations of sexual assault must be swiftly and harshly dealt with.") (emphasis added).

[194] *See, e.g.*, Louis P. Yob, *The Special Victim Counsel Program at Five Years: An Overview of Its Origins and Development*, 2019 Army Law. 64, 66 (2019) ("[S]ignificant legislation ensuring victim's rights has passed, now codified at Article 6b of the UCMJ. Article 6b denotes many specific victim rights, and it expressly includes the right of victims to petition military appellate courts for redress."); Rachel E. VanLandingham, *Discipline, Justice, and Command in the U.S. Military: Maximizing Strengths and Minimizing Weaknesses in a Special Society*, 50 New Eng. L. Rev. 21, 56 (2015) ("As the latest maelstrom of yet another sexual assault controversy in the uniformed ranks swirled around the Pentagon, whether or not to remove prosecutorial discretion from commanders and instead vest it in military lawyers has been vigorously debated . . . recent legislation has, to a quite limited degree, curtailed command military discretion."); Kiel, *supra* note 15, at 8 ("The FY14 NDAA was consequential because it contained more revisions to the Uniform Code of Military Justice (UCMJ) than at any time since it was appreciably modified decades ago by the Military Justice Act of 1983. To be exact, the FY14 NDAA enacted thirty-six statutory provisions that pertain to sexual assault.").

[195] The UCMJ provision criminalizing rape and sexual assault in the military context. *See infra* Part IV.A.1.

[196] Brady, *supra* note 58, at 198.

ingly vulnerable to UCI allegations that politicize the adjudicative process and undermine convictions.[197] Modifications to Articles 32 and 60, limiting the scope of pre-trial hearings and the post-trial clemency discretion of convening authorities, respectively, may be perceived as injurious to a commander's ability to ensure the good order and discipline fundamental to the Armed Forces and intrinsic to their role.[198] Paradoxically, importation of attributes of the civilian justice system to court-martial proceedings in an effort to enhance the system's perceived fairness and legitimacy can directly facilitate allegations of UCI that undermine the credibility of the adjudications these reforms seek to strengthen.[199]

Part IV begins by analyzing recent updates to UCMJ Article 120, which codifies rape and sexual assault offenses in the military context. The section subsequently examines contemporary reforms to three additional UCMJ provisions: Articles 6b, 32, and 60. Discussion of each article proceeds in two sub-parts, exploring the historical context and political motivations surrounding the revisions to each examined article, and subsequently assessing the impacts of and reactions to each of these reforms, in order to analyze their impact on perceptions of efficacy and legitimacy in military sexual assault cases.

A. UCMJ Revision: Statutory Measures to Address Sexual Assault

1. *Article 120: The Changing Definition of Sexual Assault*

Recent expansions of protections under Article 6b for service members alleging sexual assault reflect the latest innovation in a broader trend of legislative reform that has prioritized survivors' rights in military sexual assault proceedings for nearly two decades.[200] Absent earlier amendments to the def-

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[197] *Id.* at 213. The letter sent by the alleged victim's SVC, Captain Cassie Fowler, advised the convening authority to reject General Sinclair's plea deal, which represented his relationship with the alleged victim as a consensual extramarital affair, because such a characterization by the defendant "would only strengthen the arguments of those individuals that believe the prosecution of sexual assault should be taken away from the military." *Id.*

[198] *See* Keehn, *supra* note 79, at 486.

[199] As occurred in the Sinclair case, in which an intervention by the alleged victim's attorney advising the convening authority to reject Sinclair's initial plea deal raised the appearance of unlawful command influence and facilitated the dismissal of many of the more serious initial allegations in the subsequently executed plea agreement. *See* Zucchino, *supra* note 48; *see also* Brady, *supra* note 58, at 225 ("Given the combination of high-ranking members of the chain of command unequivocally stating how they expect allegations of sexual assault to be handled—swiftly and harshly—and military personnel's propensity for following orders, defense attorneys can satisfy the low initial threshold for showing unlawful command influence in sexual assault cases relatively easily . . . . It is therefore unsurprising that defense attorneys in Article 120 cases have been consistently filing—and winning—unlawful command influence motions.").

[200] Brady, *supra* note 58, at 217.

initions of sexual offenses under UCMJ Article 120, however, the category of individuals to whom these changes apply would have been severely limited in scope.[201] In 2006, six years before the release of *The Invisible War* once again drew public attention to military sexual assault, Congress amended the statutorily codified definitions of sexual offenses under Article 120.[202] This reform was catalyzed in part by a 2005 CAAF opinion, *United States v. Leak*,[203] which identified deficiencies in the article's outdated definition of rape.[204] Writing for the majority in *Leak*, Judge Baker described Article 120 as "antiquated in its approach to sexual offenses. . . . [T]he article does not reflect the more recent trend for rape statutes to recognize gradations in the offense based on context."[205] This lack of statutory nuance, the court found, "may not easily fit the range of circumstances now generally recognized as 'rape,' including date rape, acquaintance rape, [and] statutory rape, as well as stranger-on-stranger rape."[206]

Although a 2005 report by a subcommittee to the Joint Service Committee on Military Justice (JSC)[207] discouraged altering UCMJ definitions of rape and related offenses, arguing that "the rationale for significant change was outweighed by the confusion and disruption that such change would cause,"[208] Congress nonetheless passed revisions to Article 120 the following year as part of the 2006 NDAA. The updated article established a "gradation of sex offenses"[209] and codified specific crimes in an effort to make the statute more reflective of the modern understanding of sexual assault and similar crimes.[210]

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[201] *See generally* Thomas E. Wand, *The New Article 120, UCMJ- Big Changes in Prosecuting Sexual Offenses Committed on and After 1 October 2007*, 34 REPORTER 28 (2007) (detailing the 2006 amendments).

[202] *See* Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice Re-Traumatize Sexual Assault Survivors in the Courtroom?*, 11 OHIO ST. J. CRIM. L. 439, 445–47 (2014).

[203] 61 M.J. 234 (C.A.A.F. 2005).

[204] Schenck, *supra* note 202, at 442 ("[T]he offense of rape under Article 120 [as it existed in 2005] reflected the common law [of 1950] . . . [and was] widely criticized as antiquated . . . [because] the statutory scheme focused attention on the victim's conduct as opposed to the accused's conduct.").

[205] 61 M.J. at 246 (citing NAT'L. INST. OF MIL. JUST. REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 11 (2001)).

[206] *Id.*

[207] The JSC is "an inter-agency, joint body of judge advocates and advisors, dedicated to ensuring the Manual for Courts-Martial (MCM) and Uniform Code of Military Justice (UCMJ) constitute a comprehensive body of criminal law and procedure." JOINT SERV. COMM. ON MIL. JUST., *About the JSC*, https://jsc.defense.gov/ [https://perma.cc/QL74-W9ET] (last visited May 24, 2020).

[208] SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE 1 (JSC Subcommittee, 2005), https://jpp.whs.mil/public/docs/03_Topic-Areas/02-Article_120/20150116/58_Report_SexCrimes_UCMJ.pdf [https://perma.cc/MJ87-SW3W][hereinafter SEX CRIMES REPORT TO THE JSC].

[209] Schenck, *supra* note 202, at 445–46.

[210] The 2006 update to Article 120 specified the following sex offenses: (a) rape; (b) rape of a child; (c) aggravated sexual assault; (d) aggravated sexual assault of a child; (e) aggravated sexual contact; (f) aggravated sexual abuse of a child; (g) aggravated sexual

Following the 2006 amendments to Article 120, Congress implemented additional changes regarding prosecution and punishment of sex offenses and concomitant expansions of survivor protections. Among other modifications, the legislature in 2012 created distinct subcategories for offenses against adult victims (120(a)), child victims (120(b)), and other sex offenses (120(c)) and further augmented the precision with which certain offenses were described.[211] Provisions of the 2013 and 2014 NDAAs went further, mandating administrative discharges in cases of rape or sexual assault convictions where punitive discharge was not an element of the sentence,[212] restricting dispensation of certain sexual assault offenses to general courts-martial,[213] and facilitating survivor participation in post-trial clemency proceedings.[214]

2. *Article 6b: Survivor Protections and the Special Victims' Counsel*[215] *Program*

I. Revision

Congress' broadest expansions of survivors' rights to date derived from the 2016 Military Justice Act's revisions to UCMJ Article 6b[216] and the establishment of the Special Victims' Counsel program.[217] Initially enacted in 2013,[218] Article 6b contained an enumerated list of survivor protections.[219]

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contact with a child; (h) abusive sexual contact; (i) abusive sexual contact with a child; (j) indecent liberty with a child; (k) indecent act; (l) forcible pandering; (m) wrongful sexual contact; and (n) indecent exposure. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §§ 551–53, 119 Stat. 3136, 3256–64 (2006) (codified as amended at 10 U.S.C. § 920 (2006)) [hereinafter 2006 Article 120].

[211] *See* Schenck, *supra* note 202, at 445–48.

[212] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 572(a)(2), 126 Stat. 1632, 1753–54 (2013) (requiring that the DoD sexual assault prevention and response program be amended to include "[a] requirement that the Secretary of each military department establish policies to require the processing for administrative separation of any member of the Armed Forces under the jurisdiction of such Secretary whose conviction for a covered offense is final and who is not punitively discharged from the Armed Forces in connection with such conviction.").

[213] "A general court-martial is the highest trial level in military law and is usually used for the most serious offenses. These are crimes that would typically be considered felonies in a civilian jurisdiction." U.S. Army Trial Def. Serv. Pac. Rim, *Special and General Courts-Martial*, https://8tharmy.korea.army.mil/tds/assets/info-papers/Courts-Martial-170914.pdf [https://perma.cc/M5QD-XQ7E] (last visited May 24, 2020).

[214] Brady, *supra* note 58, at 218.

[215] The Special Victims' Counsel is known as the Victims' Legal Counsel (VLC) in the Navy and Marine Corps. For clarity, "Special Victims' Counsel" and "SVC" are used here to refer to programs in all branches.

[216] *See, e.g.*, David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 St. Mary's L.J. 1, 24–25 (2017) (describing changes made to Article 6b as a result of the Military Justice Act of 2016).

[217] *See generally* Yob, *supra* note 194 (describing the SVC program's origins and its development in the first five years of existence).

[218] *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672, 952 (2013) [hereinafter NDAA FY14].

The amended statute, which partially parallels the federal Crime Victims' Rights Act,[220] reflects Congressional intent to transpose aspects of the civilian justice system into military sexual assault prosecutions. Amended in 2015[221] and 2016,[222] the current iteration of Article 6b outlines a comprehensive series of protections, including the right to be "reasonably protected from the accused," the right "not to be excluded from any public hearing or [judicial] proceeding" related to the crime, and the right to "be treated with fairness and with respect for the[ir] dignity and privacy."[223] The American Bar Association described the 2016 Military Justice Act as "implementing features of the civilian criminal justice system . . . [to] further enhanc[e] fairness, transparency, and efficiency to benefit all parties, to include victims."[224]

Congress further expanded protections for survivors by mandating the creation of Special Victims' Counsel programs in each branch of the Armed Forces in the 2014 NDAA.[225] The program provides legal counsel to survivors of sexual assault offenses to "help them preserve their rights and . . . advocate on their behalf" while their claims are adjudicated.[226] While SVC programs vary semantically in their descriptions across different branches and commands, the statement of purpose of the SVC at Aviano Air Force Base[227] offers an apt summation of the program's aims: "(1) provide support through independent representation; (2) build and sustain victim resiliency; (3) empower victims; and (4) increase the level of legal assistance provided

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[219] *See* Sean P. Mahoney, *Taking Victims' Rights to the Next Level: Appellate Rights of Crime Victims Under the Uniform Code of Military Justice*, 225 MIL. L. REV. 682, 688 (2017).

[220] The Crime Victims' Rights Act is part of the Justice for All Act of 2004. Pub. L. No. 108-405 (codified as amended at 18 U.S.C. § 3771 (2004)).

[221] To allow victims to seek extraordinary relief from their service branch's Court of Criminal Appeals. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 531, 129 Stat. 726, 814 (2015).

[222] To facilitate assumption of victims' rights for families of underage or incapacitated victims, to enshrine limitations on victims' ability to request trial of the accused in a civilian court, and to require defense counsel requests to interview witnesses to go through SVCs or other victims' counsel. Military Justice Act of 2016, Pub. L. No. 114-328, § 5105, 130 Stat. 2000, 2895–96 (codified as UCMJ Art. 6b (2016), 10 U.S.C. § 806b (Supp. IV 2016)).

[223] *See* 10 U.S.C. § 806b(a) (2012) ("Rights of the victim of an offense under this chapter").

[224] Sarah M. Root, *Changes to the Uniform Code of Military Justice*, 36 GPSOLO 46 (Mar./Apr. 2019).

[225] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1716, 127 Stat. 672, 966–67 (2013).

[226] Yob, *supra* note 194, at 65.

[227] The installation at which Lt. Col. Wilkerson was tried for sexual assault. For further discussion, see Part II.C, *supra*. *See also* Nancy Montgomery, *Former Aviano IG is Found Guilty in Sexual Assault Case*, STARS & STRIPES (Nov. 2, 2012), https://www.stripes.com/news/former-aviano-ig-is-found-guilty-in-sexual-assault-case-1.195656. [https://perma.cc/XH5P-P27V].

to victims."[228] The 2016 amendments to Article 6b appended a provision requiring defense counsel to route any request to interview the survivor of an alleged sex offense through their designated SVC.[229]

II. Reform

Congress implemented the SVC to augment process and protections at court-martial and to mitigate the potential for defense counsel to "harass[ ] and intimidat[e]" complaining witnesses bringing sexual assault claims; however, the program has not been immune from criticism.[230] Detractors allege, among other critiques, that the autonomy afforded the SVC can impermissibly curtail the accused's due process rights[231] and raise Confrontation Clause concerns.[232] An *amicus curiae* brief submitted by the Navy-Marine Corps Appellate Defense Division in a 2013 CAAF case[233] enumerated these legitimacy challenges, highlighting concerns that presence of an SVC in a sexual assault court-martial "would effectively double the prosecutorial effort against the accused."[234] The brief argued that an alliance between the prosecution and the SVC would "appear to the public to be improper,"[235] and that "the existence of an attorney-client relationship between the victim and SVC would reduce the amount of impeachment evidence . . . available to the accused," thereby jeopardizing the accused's right of confrontation under the Sixth Amendment.[236] The arguments raised in the brief underscore the paradoxical vulnerabilities of SVC programs, which may be collaterally attacked based on their reduction of the systemic integrity[237] of military sexual assault prosecutions by violating the due process and confrontation rights of the accused, even as they make adjudications safer and more just for complaining witnesses.

Expansion of survivors' rights under Article 6b reflects a good-faith legislative initiative to improve the climate in which allegations of military

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[228] *Special Victims' Counsel*, AVIANO AIR FORCE BASE, https://www.aviano.af.mil/About-Us/Special-Victims-Counsel/ [https://perma.cc/ZK8K-CMH6].

[229] Military Justice Act of 2016, Pub. L. No. 114-328 § 5105(c), 130 Stat. 2000, 2896 (codified as UCMJ Art. 6b (2016), 10 U.S.C. § 806(b) (Supp. IV. 2016)).

[230] Schlueter, *supra* note 216, at 25.

[231] *Id.*

[232] Erin Gardner Schenk & David L. Shakes, *Into the Wild Blue Yonder of Legal Representation for Victims of Sexual Assault: Can U.S. State Courts Learn from the Military?*, 6 U. DENV. CRIM. L. REV. 1, 27 (2016).

[233] LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013) (establishing a sexual assault victim's right to be heard through their SVC, subject to reasonable limitations, at Article 32 preliminary hearings and courts-martial).

[234] Schenk & Shakes, *supra* note 232, at 23–24 (citing Brief of Amicus Curiae of Appellate Defense Division for the Navy-Marine Corps in Opposition to L.R.M.'s Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, 72 M.J. 364 (C.A.A.F. 2013) (No. 2013-05), 2013 WL 2419446, at 14–18) [hereinafter "Brief of Appellate Defense Division for the N-MC"].

[235] *Id.* at 26 (citing Brief of Appellate Defense Division for the N-MC at 15–16).

[236] *Id.* at 27 (citing Brief of Appellate Defense Division for the N-MC at 17–18).

[237] Bedi, *supra* note 97, at 1407.

sexual assault are reported, referred, and prosecuted. However, implementation of these protections may provoke backlash from military leaders in response to perceived overreaching and scale-tipping by civilian politicians unfamiliar with the details of court-martial proceedings and the norms of military culture.[238] This reaction threatens to undermine the credibility of sexual offense prosecutions by increasing the military justice system's vulnerability to allegations of UCI[239] and other systemic improprieties[240] raised by the actions of convening authorities. CAAF's apparent endorsement of the "felt influenced" standard in *Barry* exacerbates this potential liability.[241] To ensure that survivors' rights are tangibly protected and recent reforms do not become self-defeating, Congress should implement additional changes that eliminate commander discretion entirely for serious offenses prosecuted under the UCMJ and further civilianize the military justice system by vesting this prosecutorial authority in a specially-designated, independent, senior judge advocate external to the accused's chain of command. This change would mitigate the delegitimizing impacts of adversarial political debate by reposing discretion in an experienced officer tasked with prioritizing "traditional prosecutorial concerns" such as due process and evidentiary sufficiency.[242]

3. *Article 32: The Pretrial Hearing*

I. Revision

Heightened societal focus on the military's handling of sex offenses in the wake of a highly-publicized sexual assault case at the Naval Academy[243] also resulted in Congress' "wholesale revision" of UCMJ Article 32, which governs pretrial investigative hearings.[244] During the summer of 2013, a female midshipman[245] at the United States Naval Academy accused three of the university's football players of rape.[246] An exposé about the case was subsequently published in the *Washington Post*, and focused on the case's

[238] *See* Visger, *supra* note 70, at 62–63.

[239] *See* Schlueter, *supra* note 216, at 25; Brady, *supra* note 58, at 199.

[240] *See* Schenk & Shakes, *supra* note 232, at 27 (enumerating potential legitimacy problems occasioned by the creation of the SVC program that were identified by the Navy-Marine Corps Appellate Defense Division's 2013 amicus brief. These objections to the SVC program included concerns that the accused would be "double-teamed" by the SVC and the prosecution, the SVC's potential to complicate Brady disclosures, and an impermissible constriction of the accused's confrontation rights in contravention of the Sixth Amendment).

[241] United States v. Barry, 78 M.J. 70, 85 (C.A.A.F. 2018) (Ryan, J., dissenting).

[242] *See* Paradis, *supra* note 82.

[243] *See* Henneberger & Shin, *supra* note 19.

[244] Kiel, *supra* note 15, at 8.

[245] Term used to refer to Naval Academy students. Midshipmen are "classed" based on their year in school—e.g., first-year students are Midshipmen Fourth Class (4/C), while seniors are Midshipmen First Class (1/C).

[246] Henneberger & Shin, *supra* note 19.

particularly egregious Article 32 hearing (a pretrial proceeding similar to a probable cause hearing in the civilian criminal justice system).[247] The article highlighted the disparities between an Article 32 hearing and a civilian grand jury proceeding in order to emphasize the former's callous treatment of complaining witnesses and its apparent disregard for judicial process, with "no rules of evidence and open-ended cross examinations that [could] be trial-like in nature and scathing in tone."[248]

The *Post* story also underscored the opportunity presented by Article 32 hearings for defense counsel to harass and intimidate complaining witnesses on the stand. It noted that the proceedings are open to the public and, in the case at issue, included evidence of "active participation [in the sexual acts]" by the alleged victim in an attempt to evince consent.[249] The proceeding focused on the alleged victim's "memory, behavior, and credibility," rather than the accused's, and included vulgar and inappropriate questions designed to humiliate and bully her.[250] The preliminary hearing officer in charge of the investigation[251] ultimately recommended that the case not be referred to a court-martial due to "heavy damage done to the alleged victim's testimony [that] made it difficult if not impossible to prove the case beyond a reasonable doubt."[252] The case and article attracted significant media attention and generated numerous exhortations to reform pretrial hearing procedure,[253] which spurred Congress to include amendments to Article 32 in the 2014 NDAA.[254]

After the publication of the *Post* exposé, Representative Jackie Speier (D-CA), then-Senator Barbara Boxer (D-CA), and Senator Richard Blumenthal (D-CT) authored an open letter to President Obama expressing their outrage that "Article 32 allows sexual assault victims to be questioned in a manner that is intimidating and degrading, and that [the authors] believe has had a major chilling effect on sexual assault reporting" and demanding "im-

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[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Id.* At the Article 32 hearing in the Naval Academy football case, defense counsel asked the alleged victim if she "felt like a ho" after the incident in question, whether she carried condoms in her purse, and "how wide she open[ed] her mouth" to perform oral sex. *Id.*

[251] Preliminary hearing officers (PHOs) are frequently, but are not statutorily required to be, judge advocates, and may sometimes be lay commanders with minimal legal training. 10 U.S.C. § 832(b)(1).

[252] Jonathan Lurie, *The Transformation of Article 32: Why and What?*, 29 Wis. J.L. Gender & Soc'y 409, 409 (2014) (noting that the convening authority did ultimately refer the case to a court-martial).

[253] *See, e.g.*, Eugene R. Fidell, *The Naval Academy Sex Assault Hearing Should Be the Last of its Kind*, Balt. Sun (Sept. 16, 2013), https://www.baltimoresun.com/opinion/op-ed/bs-ed-naval-academy-case-20130916-story.html [https://perma.cc/86NV-4647] ("It is time for Congress to repeal Article 32 and substitute a requirement for a bare bones preliminary hearing along the lines of those conducted in the federal district courts.").

[254] Kiel, *supra* note 15, at 9–10.

mediate remedies."[255] The 2012 Department of Defense Annual Report on Sexual Assault in the Military lends credence to the hypothesis of this chilling effect, finding that approximately 26,000 service members had experienced unwanted sexual contact during the prior year, but noting only 3,374 reports of sexual assault during the same timeframe.[256] While these statistics do not identify the source of this disparity, the harassment and intimidation tolerated in pre-reform Article 32 hearings[257] typify the mishandling of sexual assault cases that discouraged survivors from reporting, diminished public confidence in the military justice system, and provoked calls for Congressional intervention.[258]

II. Reform

Article 32 reforms proposed by Representative Speier, then-Representative Pat Meehan (R-PA), and then-Senator Boxer and passed as part of the 2014 NDAA sought to "bring the military justice system in line with our civilian criminal courts . . . [to] stop treating the victim as the criminal and continue protecting the sexual predators."[259] Substantive changes to the Article recharacterized the proceeding as a "preliminary hearing" rather than an "investigation" and prevented complaining witnesses from being forced to testify to foreclose repetition of the harassment that occurred in the Naval Academy case.[260] In enacting these amendments, Congress sought to make the Article 32 hearing more comparable to a civilian grand jury proceeding by "focus[ing] away from the victims of crime and reorient[ing] to the question of probable cause."[261]

While reforms to Article 32 unquestionably augment protections for complaining witnesses, critics argue that the amended preliminary hearing may induce perverse results similar to those occasioned by the changes to

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[255] Barbara Boxer, Richard Blumenthal & Jackie Speier, *Letter to President Barack Obama – Reform Military Justice System to Protect Sexual Assault Victims*, VoteSmart (Sept. 25, 2013), https://votesmart.org/public-statement/812983/letter-to-president-barack-obama-reform-military-justice-system-to-protect-sexual-assault-victims#.Xd1oXpNKgdU [https://perma.cc/YHZ8-B83E].

[256] Dep't of Def. Annual Rep. on Sexual Assault in the Military: Fiscal Year 2012 Vol. one, *supra* note 42, at 12, 18.

[257] *See* Lurie, *supra* note 252, at 411 (describing the pre-2013 Article 32 hearing as "a device for abusive cross-examination of the plaintiff.").

[258] *See, e.g.*, Visger, *supra* note 70, at 60–61 (referencing a 2017 DoD report on military prosecution of sexual assault cases that "raised concerns that the political fight over the military handling of sexual assault prosecutions is bleeding over and potentially affecting the fairness of the trial process itself.").

[259] Press Release, Congresswoman Jackie Speier, Congresswoman Jackie Speier on Inclusion of the Article 32 Reform Act in the National Defense Authorization Act (Dec. 17, 2013), https://speier.house.gov/media-center/press-releases/congresswoman-jackie-speier-inclusion-article-32-reform-act-national [https://perma.cc/978F-KGWZ].

[260] *Id.*; Brady, *supra* note 58, at 208.

[261] Christopher J. Goewert & Nichole M. Torres, *Old Wine into New Bottles: The Article 32 Process After the National Defense Authorization Act of 2014*, 72 A.F. L. Rev. 231, 234 (2015).

Article 6b, and ultimately reduce the perceived efficiency and integrity of the military justice system more broadly.[262] Like their civilian analogs, Article 32 investigations historically functioned as a clearing ground to eliminate cases lacking sufficient evidence to justify referral to a court-martial.[263] Notably, however, the revised Article 32 provides no check on convening authorities' referral discretion at the preliminary investigation itself, even when the hearing does not yield the requisite evidence to support referral of a charge for prosecution.[264] Recent reforms purport to enhance the mechanism's evidentiary-sufficiency function by limiting the scope of the Article 32 inquiry,[265] but failures to secure convictions or successful appeals on the basis of factually insufficient charges[266] referred by commanders who are overly bullish or eager to demonstrate their alignment with Congressional priorities will diminish the perceived ability of the military justice system to address sex offenses through efficient, effective adjudication.[267] These deficient charges that are nonetheless referred to court-martial may result in lower conviction rates, as convening authorities under political pressure to

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[262] *See, e.g.*, Victoria Brown et al., *Rape & Sexual Assault*, 21 GEO. J. GENDER & L. 367, 392 (2020) ("Article 32 allows a person accused of rape to cross-examine the survivor. Thus, unlike in a civilian criminal case, where cross-examination is not allowed before trial, one of the greatest obstacles for military sexual assault survivors who pursue justice in the military is overcoming Article 32. The purpose of the Article is to avoid trials on unfounded accusations. At an Article 32 hearing there is no judge and the rules of evidence do not apply.").

[263] *See, e.g.*, United States v. Samuels, 27 C.M.R. 280, 286 (C.M.A. 1959) (stating that the Article 32 investigation "operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.").

[264] *See* Brian C. Hayes, *Strengthening Article 32 to Prevent Politically Motivated Prosecution: Moving Military Justice Back to the Cutting Edge*, 19 REGENT U. L. REV. 173, 174 (2006).

[265] *See* Lurie, *supra* note 252, at 412 (enumerating the four functions of the Article 32 proceeding, as amended, as "a) Determining whether there is probable cause to believe that an offense has been committed and the accused committed the offense; b) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused; c) Considering the form of charges; and d) Recommending an appropriate disposition for the case.").

[266] *See, e.g.*, United States v. Whisenhunt, No. ARMY 20170274, 2019 WL 2368568, at *1 (A. Ct. Crim. App. June 3, 2019) (setting aside a 21-year sentence imposed upon a West Point cadet convicted of raping a sleeping classmate because the accused's convictions were deemed factually insufficient).

[267] *See* Hayes, *supra* note 264, at 201–02 ("[High profile military sexual assault scandals] will place tremendous pressure on court-martial convening authorities to satisfy demands for retribution. Some may choose to err on the side of caution—prosecuting anyone potentially connected with the scandal, whether or not that decision is supported by the evidence. In this environment, the lack of a truly independent probable cause hearing for military defendants will continue to cause injustice."); Visger, *supra* note 70, at 60–61 ("[A] recent Department of Defense report on the prosecution of sexual assault cases raised concerns that the political fight over the military handling of sexual assault prosecutions is bleeding over and potentially affecting the fairness of the trial process itself. [CAAF's 2017-2018 UCI cases] are tied to the military's efforts to retain jurisdiction over court-martial prosecutions after congressional threats to remove jurisdiction due to the military's mishandling of sexual assault prosecutions.").

address sexual assault allegations "swiftly and harshly"[268] will remain incentivized to over-refer cases involving Article 120 allegations to courts-martial despite insufficient evidentiary profiles that cannot support guilty findings.[269]

A 2017 report by the Subcommittee to the Judicial Proceedings Panel (JPP) that evaluated the impact of recent legislative changes on the handling of sexual assault cases in the military justice system evinced the detrimental impacts of an over-inclusive attitude toward charge referral.[270] The report found that over-referral of insufficiently supported sexual assault allegations to courts-martial resulted in high acquittal/low conviction rates that tended to "discredit the entire military justice system in the eyes of Service members and the general public," diversion of judicial resources away from "more serious and well-supported allegations," and "ethical quandar[ies]" for prosecutors forced to try cases with "no reasonable likelihood of conviction."[271]

As with Article 6b, Congressional amendments to Article 32 sought to achieve the well-intentioned objectives of enhancing protections for survivors and complaining witnesses and augmenting the systemic credibility of military sexual assault prosecutions.[272] In practice, however, Article 32 reforms may prove similarly self-defeating due to the critical disjunction between the preliminary hearing's findings and the convening authority's unimpeded ability to refer the charges for prosecution, given the profound reputational concerns inherent in referral decisions on highly politicized sexual assault charges.[273] Limiting the scope of the Article 32 preliminary hearing without concurrently shifting referral discretion away from the

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[268] Brady, *supra* note 58, at 225; *see also* Hayes, *supra* note 264, at 175 ("A second, less justifiable motive, is the convening authority's desire to protect his or her own reputation and career. Recent military scandals have seen widespread media and political pressure on the court-martial convening authority. In some circumstances, this pressure may encourage the convening authority to prosecute simply in order to stave off criticism.").

[269] Brady, *supra* note 58, at 249; *see also* Hayes, *supra* note 264, at 201 (describing the "tremendous pressure on court-martial convening authorities to satisfy demands for retribution.").

[270] *See generally* JUD. PROCS. PANEL SUBCOMM., REPORT ON BARRIERS TO THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES (May 12, 2017), https://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_Barriers_Final_20170512.pdf [https://perma.cc/3HXZ-72K7].

[271] *Id.* at 21. The report further found that "[j]udge advocates overwhelmingly reported a perception of pressure on convening authorities to refer sexual assault cases to court-martial, regardless of merit. . . . [T]his pressure extends to weak cases that civilian jurisdictions would not prosecute and, in some cases, have already declined to prosecute." *Id.* at 14.

[272] Brady, *supra* note 58, at 217–18. (describing recent changes to the military justice system implemented by the NDAAs for FYs 2013, 2014, and 2015. "To be clear, retooling the military justice system's response to sexual assaults in order to thoroughly support alleged victims is not malign in itself. Victims must be encouraged to come forward if the military is to effectively combat sexual assault. But Congress did little to ensure that an accused's due process rights would also be respected, despite radically altering the justice system.").

[273] *See* Hayes, *supra* note 264, at 175–76.

convening authority therefore renders the military justice system more vulnerable to the extra-judicial influences already operating upon commanders, which include personal reputational concerns and the desire to avoid negative media attention or political scrutiny.[274] Amendments to Article 32 strive to protect complaining witnesses from hostile, egregious cross-examinations, as occurred in the Naval Academy football rape case,[275] but may ultimately decrease conviction rates and diminish perceptions of procedural legitimacy so as to damage their long-term interests. Therefore further reform is necessary, both to ensure individual protections and to enhance systemic integrity.

4. *Article 60: Post-Trial Clemency and the Future of UCMJ Reform*

I. Revision

The UCMJ reforms catalyzed by heightened political attention to military sexual assault were not limited to Articles 6b and 32. Increased legislative oversight resulted in statutory revisions that both further impacted procedure and protections in sexual assault cases and sought to curtail the influence of convening authorities. For example, Congressional outrage over Lt. Gen. Franklin's decision to disapprove Lt. Col. Wilkerson's conviction and dismiss the charges in his case spurred an effort to amend UCMJ Article 60 to restrict the post-trial discretion of convening authorities to overturn court-martial findings, amend sentences, and grant clemency for major offenses.[276] Reforms to Article 60 enacted in the 2014 NDAA[277] simultaneously expanded the role of the complaining witness in post-trial proceedings by empowering survivors in sexual assault cases where convictions and sentences are under post-trial review to submit impact statements for the consideration of the convening authority prior to the issuance of any revised decision.[278] These changes sought to enhance the legitimacy of court-martial proceedings by mitigating public perceptions that a commander could, uni-

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[274] *See generally id.* (describing convening authority incentives to refer charges for prosecution despite insufficient evidentiary profiles); Murphy, *supra* note 47 (investigating increased politicization in the military justice system due to UCMJ reforms resulting from recent, high-profile military sexual assault scandals and advocating a reallocation of charging and referral discretion from commanders to military lawyers in prosecutorial roles); Visger, *supra* note 70 (examining five recent court-martial convictions for sexual assault subsequently reversed by CAAF on UCI grounds to evaluate concerns that civilian political debate regarding military sexual assault had fundamentally eroded the fairness of the military trial process, as commanders fought to maintain jurisdictional authority they perceived to be threatened by Congress).

[275] *See generally* Henneberger & Shin, *supra* note 19 (describing Article 32 hearing in Naval Academy football sexual assault case).

[276] Suzanne Simms, Comment, *Revision of Article 60 and the Military Convening Authority's Clemency Power: An Alternative to the Enacted Legislation*, 2 GEO. MASON NAT. SEC. L.J. 301, 303–04 (2014).

[277] *Id.* at 303.

[278] *See* David A. Schlueter, *American Military Justice: Responding to the Siren Songs for Reform*, 73 A.F. L. REV. 193, 227 (2015); NDAA FY14 *supra* note 218, at § 1706.

laterally and without oversight, set aside court-martial conviction findings for reputational, political, or personal ideological reasons.[279]

II. Reform

Revision of Article 60 sought to enhance equivalencies between the military and civilian justice systems and insulate court-martial proceedings from overbroad commander authority.[280] Amendments to this Article adopted in response to the "'sexual assault crisis' narrative"[281] provoked significant outrage among military leaders.[282] While the changes fell short of realizing the "nuclear option of removing a commander from the process entirely," as proposed by the 2013 Military Justice Improvement Act,[283] critics have perceived the dramatic constriction of convening authority autonomy as an imposition of a normative structure ill-suited to the realities of military justice and culture.[284] Restriction of the post-trial clemency power, for example, may be seen to impugn commander authority to maintain good order and discipline[285] without fulfilling any complementary preventative function.[286]

Although this Article has consistently criticized the effectiveness of efforts to "civilianize" the military justice system, Part V posits that these reforms have largely been inefficacious because they sought to integrate elements of civilian justice into a framework that remains unique to the military, which prevents full realization of the reforms' intended benefits. The changes endorsed and proposed in the following section would scaffold upon the civilianizing reforms discussed above to create a hybrid justice system that more fully reposes the exercise of two key forms of discretion—

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[279] *See* Mark R. Strickland, *Rush to Justice: Amending Article 60 of the Uniform Code of Military Justice*, 60 FED. LAW. 56, 58 (2013).

[280] *See* Danielle Rogowski, Note, *Quis Custodiet Ipsos Custodies? The Current State of Sexual Assault Reform Within the U.S. Military and the Need for the Use of a Formal Decisionmaking Process in Further Reform*, 38 SEATTLE U. L. REV. 1139, 1157 (2015).

[281] Burris, *supra* note 15, at 27.

[282] *See, e.g.*, Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60, UCMJ*, 2014 ARMY LAW. 23, 23 (2014) (noting the increased potential for prejudice to the accused given the curtailment of the convening authority's clemency power); Simms, *supra* note 276, at 304 ("The newly legislated changes to Article 60 . . . do not honor the original purpose of the convening authority's role in the military justice process, and are thought by some to be a knee-jerk reaction to social pressures.") (citing Strickland, *supra* note 279, at 56).

[283] *See* Goodwin, *supra* note 282, at 26.

[284] *See* Schlueter, *supra* note 278, at 207.

[285] *See* Visger, *supra* note 70, at 62 ("The military commanders view the court-martial power as an instrument of command, essential to ensuring discipline in the unit, so that the commander is able to achieve the mission—ultimately victory at war. This desire to retain jurisdiction then creates a situation in which military leaders respond to Congressional criticism and attempts to remove jurisdiction by demonstrating that they are taking strong action against sexual assault in order to obtain a desired political outcome.").

[286] *See* Strickland, *supra* note 279, at 58.

prosecutorial and judicial—in the parties best equipped to exercise it in the context of the court-martial: military attorneys and judges.

Military justice reforms of the type enacted by changes to Article 60 are frequently criticized as being too drastic, and any proposed divestment of convening authority discretion over serious offenses does require reevaluation of the very foundations and structure of the court-martial.[287] However, the reforms discussed below are logical, gradual, and consistent with prior incremental changes in the involvement of the convening authority in military prosecutions.[288] These structural reforms will relocate jurisdiction for crimes with a civilian felony analog to experienced military lawyers operating external to the accused's chain of command. They will also fully realize the goal of impartial, effective, and legitimate adjudications by eliminating the conflicting reputational influences currently impacting convening authorities, reducing the incidence of both actual and apparent UCI, and helping to better realize the due process and survivor protections contemplated by recent UCMJ reforms.[289]

V. The Time is Now: Why the 2020 NDAA Offers an Ideal Opportunity for Systemic Change

Iterations of amendments to Articles 6b, 32, and 60, among other UCMJ reforms enacted in the years since the release of *The Invisible War*, tell a common story of good intentions and inefficacious execution. Precisely because enhanced survivor protections and systemic safeguards that strive to improve the transparency and credibility of the military's handling of sexual assault are such worthy objectives, future reforms should maintain cognizance of the particular nuances and dynamics of good order and discipline and command authority in the military context in order to better achieve the protections such changes seek to realize.

This Part begins with a brief description of suggested reforms contained in the 2020 NDAA, an explanation of the response of military leaders, politi-

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[287] *See* Paradis, *supra* note 82 ("[I]t is difficult to overstate what a radical reform to the basic underpinnings and logic of the court-martial system that this seemingly modest reform would be.").

[288] *Id.* ("[L]egislative reforms have consistently 'reduced commanders' original sweeping authority over the administration of military justice' and effectively removing that authority altogether now 'is a justified incremental step in the same overall direction.'") (citing Shadow Advisory Rep. Grp. of Experts (SARGE), Alternative Authority for Determining Whether to Prefer or Refer Charges for Felony Offenses Under the Uniform Code of Military Justice 5 (April 20, 2020), https://assets.documentcloud.org/documents/6861828/Shadow-Advisory-Report-April-20-2020.pdf [https://perma.cc/54QL-5PJ6] [hereinafter "Shadow Report"]).

[289] *See* Shadow Report, *supra* note 288, at 8 ("The alternative system [shifting discretion for cases with felony statutory analogs to judge advocates] would, if anything, improve good order and discipline by providing a criminal justice process that is faster, smarter, and less vulnerable to unlawful influence and command- or commander-specific variation.").

cians, and academics, and an analysis of the ripeness of systemic change given the contemporary political context. It next endorses the 2020 NDAA's central reform proposal: a transfer of charging authority for felony-equivalent crimes from the convening authority to a specially designated judge advocate.[290] It concludes by proposing one additional reform that goes beyond the scope of the alternative system contemplated by the 2020 NDAA amendments: the creation of standing military courts.

A. A Persistent Issue

Efforts to eliminate the incidence of military sexual assault and ensure just, effective resolution of reported cases have been ongoing for three decades.[291] Recent research on the continued ubiquity of sexual misconduct and consistently low reporting rates, however, evinces the failure of these reform measures and mandates more drastic change. The DoD's 2018 Report on Sexual Assault in the Military found that the incidence of sexual assault had risen by 38% between 2016 and 2018, with 20,500 of the service members who responded to the survey reporting experiencing some form of sexual misconduct in the latter year, up from 14,900 in 2016.[292] The frequency of sexual assault at the United States service academies also rose by approximately 50% over the 2017–2018 academic year, with 15.8% of female students and 2.4% of male students reporting experiencing unwanted sexual contact during that time period, according to the results of a Congressionally mandated biannual survey conducted over the course of the school year.[293] Moreover, the report estimated that an average of 50% of female students experienced sexual harassment across the three service academies included in the survey, while approximately 16% of male students experienced sexual harassment during the same time.[294] Notably, of the 747 documented sexual

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[290] *See* Paradis, *supra* note 82.

[291] *See supra* Part II.B.

[292] DEP'T OF DEF., 2018 REPORT ON SEXUAL ASSAULT IN THE MILITARY APPENDIX B: STATISTICAL DATA ON SEXUAL ASSAULT 10 (2019), https://www.sapr.mil/sites/default/files/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf [https://perma.cc/JT3V-K8T8] [hereinafter APPENDIX B 2018] (reporting data and statistics on sexual assault for Fiscal Year 2018).

[293] Patricia Kime, *Sexual Assaults Rise Nearly 50 Percent at Service Academies*, MILITARY.COM (Jan. 31, 2019), https://www.military.com/daily-news/2019/01/31/sexual-assaults-rise-nearly-50-percent-service-academies.html [https://perma.cc/257X-4XCC]. In the 2015–16 academic year, 12.2% of female students and 1.7% of male students reported unwanted sexual contact. *Id.*; DEP'T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES, ACADEMIC PROGRAM YEAR 2017-2018 4 (2019) https://www.sapr.mil/sites/default/files/APY17-18_MSA_Report_FINAL.pdf [https://perma.cc/L75X-4NCM] [hereinafter MILITARY SERVICE ACADEMIES REPORT].

[294] The United States Military Academy (West Point), the United States Naval Academy, and the United States Air Force Academy. The United States Coast Guard and Merchant Marine Academies were not included in the report. *See* MILITARY SERVICE ACADEMIES REPORT, Letter from James N. Stewart, *supra* note 293, at 1.

assaults at the service academies, only 117 were officially reported to senior officers in the students' chain of command, and over one-third of those cases were reported by students who did not wish to pursue further investigation or disciplinary action.[295]

The findings from these reports evince that the issue of military sexual assault continues to disproportionately impact women; sexual assaults with female victims climbed a staggering 50% over the survey's three-year timespan, and 6.2% of female service members were estimated to have experienced sexual assault during FY18, compared to 0.7% of male service members.[296] The total number of service members reporting an assault during the survey's time period increased approximately 800.[297] Sixty-six percent of reported assaults named a superior within the victim's chain of command as the perpetrator.[298] The 2018 Report on Sexual Assault in the Military further highlighted junior enlisted women as the highest risk category, with women ages seventeen to twenty-four facing a likelihood of sexual assault approximately double the national average.[299]

The particular vulnerability of this demographic—and the military's failure to improve its sexual assault protocols and protect its most at-risk service members—were starkly highlighted in the summer of 2020 by the murder of Army Specialist Vanessa Guillén.[300] The body of Spec. Guillén, a junior enlisted soldier who disappeared from the Texas Army base of Fort

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[295] Kime, *supra* note 293; *see also* MILITARY SERVICE ACADEMIES REPORT, *supra* note 293, at 4 (observing that of the 117 official reports made during the 2017-2018 academic year, 48 were restricted. Restricted reports allow victims to access medical and counseling services but do not trigger additional investigation).

[296] APPENDIX B 2018, *supra* note 292, at 10.

[297] *Id.* at 11 (increasing from 5,277 reports in FY16 to 6,053 reports in FY18). The survey that forms the basis for the DoD report is conducted biannually in even-numbered years, but some additional data is released in the DoD's odd-year reports. The 2019 report found that the number of official reports of sexual misconduct had, again, increased slightly, for a total of 6,236 reports in FY19. However, without accompanying data detailing the prevalence of unwanted sexual contact as reported by surveyed service members, the inferences that can be drawn from the slight increase in official reports are limited. *See* DEP'T OF DEF., 2019 REPORT ON SEXUAL ASSAULT IN THE MILITARY APPENDIX B: STATISTICAL DATA ON SEXUAL ASSAULT 10 (2020), https://www.sapr.mil/sites/default/files/3_Appendix_B_Statistical_Data_on_Sexual_Assault.pdf [https://perma.cc/6J3B-GFMV].

[298] APPENDIX B 2018, *supra* note 292, at 41.

[299] *See id.* at 30; *see also* Patricia Kime, *Despite Efforts, Sexual Assaults Up Nearly 40% in US Military*, MILITARY.COM (May 2, 2019), https://www.military.com/daily-news/2019/05/02/despite-efforts-sexual-assaults-nearly-40-us-military.html [https://perma.cc/Q5XF-GWKP] ("Junior enlisted women were at highest risk for sexual assault. According to the report, the national odds that a woman will be sexually assaulted in her lifetime are 1 in 17. But for young military women ages 17 to 20, it is 1 in 8. And for 21- to 24-year-olds, it is 1 in 11.").

[300] *See generally* Shilpa Jindia, '*We Are Vanessa Guillén:' Killing Puts Sexual Violence in US Military in Focus*, GUARDIAN (July 14, 2020), https://www.theguardian.com/us-news/2020/jul/14/vanessa-guillen-killing-sexual-violence-us-military [https://perma.cc/F9EZ-5B3E] (recounting how the disappearance and death of Vanessa Guillén sparked protests and a petition regarding the failure of Fort Hood leadership and the Army more broadly to address military sexual harassment and violence).

Hood on April 22, 2020, was found dismembered approximately thirty miles away at the end of June.[301] Spec. Guillén had recounted instances of sexual harassment by two higher-ranking soldiers to friends and family, but did not report the incidents due to fear of retaliation or reprisal.[302] The case resulted in criminal charges in the Western District of Texas[303] and numerous distinct investigations at Fort Hood which probed not only Spec. Guillén's individual case, but also resources and support given to reporting survivors and the "command climate and culture" at the base more broadly.[304]

Notably, one objective of the investigations into Spec. Guillén's disappearance and murder that the Secretary of the Army Ryan McCarthy explicitly highlighted in a public statement concerned "helping the Army identify and address challenges Hispanic service members face."[305] While McCarthy's remarks highlighted diversity as a strategic institutional asset for the Army,[306] race was an intrinsic element of Spec. Guillén's experience with military sexual harassment and her decision not to report.

Junior enlisted women like Guillén face a litany of obstacles to reporting military sexual misconduct, including gender bias, a rigidly hierarchical rank structure, and fear of retaliation.[307] However, Spec. Guillén's status as a female service member of color compounded her barriers to disclosing, even as the military strives generally for increased transparency and survivor protections in its sexual assault response procedures.[308] In the wake of Spec. Guillén's murder, Latinx veterans and advocates have called attention to the

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[301] *See* Kyle Rempfer, *Civilian Charged in Plot to Dismember and Hide Remains of Fort Hood Soldier Vanessa Guillén*, ARMY TIMES (July 3, 2020), https://www.armytimes.com/news/your-army/2020/07/03/civilian-charged-in-plot-to-dismember-and-hide-remains-of-murdered-fort-hood-soldier-vanessa-guillen/ [https://perma.cc/9AFV-FVAY].

[302] *See* Jindia, *supra* note 300.

[303] A criminal complaint was filed against Cecily Aguilar, the girlfriend of the suspect, Specialist Aaron Robinson. Robinson committed suicide after Guillén's body was discovered. *See* Rempfer, *supra* note 301.

[304] Jindia, *supra* note 300.

[305] Public Statement, U.S. Army Public Affairs, Secretary of the Army announces independent review of Fort Hood, (July 10, 2020), https://www.army.mil/article/237199/secretary_of_the_army_announces_independent_review_of_fort_hood [https://perma.cc/65EX-4LZP].

[306] *See id.*

[307] *See* PROTECT OUR DEFENDERS, FACTS ON UNITED STATES MILITARY SEXUAL VIOLENCE (Aug. 2020), https://www.protectourdefenders.com/factsheet/msa-fact-sheet-2020_final-3/ [https://perma.cc/PV9F-YFB5]. Approximately 38% of female military personnel and veterans report having experienced some form of military sexual trauma (MST). 59% of women who reported a penetrative sexual assault between FY16 and FY18 were assaulted by a perpetrator of higher rank, and 24% of women were assaulted by someone in their chain of command. Sixty-six percent of service members who reported retaliation after filing an official sexual assault report were women. *Id.*

[308] *See, e.g.*, Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1250 (1991) ("Women of color are differently situated in the economic, social, and political worlds. When reform efforts undertaken on behalf of women neglect this fact, women of color are less likely to have their needs met than women who are racially privileged.").

fundamental racial biases that deter reports of military sexual harassment and assault by service members of color and intensify the disparity between its occurrence and its reporting.[309] To address this problem, further reforms to military justice and subsequent UCMJ amendments should consider and account for the divergent experiences of service members across lines of gender, race, and socioeconomic class, among other factors, to render future efforts to address sexual assault in the armed forces equitable for disparate demographic groups so that they are universally meaningful and effective.

Increasing sexual assault rates, functionally stagnant reporting figures, and the unconscionable death of Spec. Guillén offer a resounding indictment of recent efforts to augment deterrence and facilitate reporting and effective prosecution of military sexual assault. Guillén's shocking and tragic experience with military sexual misconduct is far from unique: the 2018 DoD report found that not only was the perpetrator a fellow service member in approximately 60% of cases over the survey period,[310] but 64% of all female survivors who did report during FY18 described a negative experience doing so, regardless of the perpetrator's identity.[311]

Following the release of the 2018 Report on Sexual Assault in the Military, acting-Secretary of Defense Patrick Shanahan issued a memorandum condemning these findings and proposing additional reforms, which included adopting the recommendation of the DoD's Sexual Assault Accountability and Investigation Task Force to create an independent crime of sexual harassment[312] and executing the Department's Sexual Assault Prevention Plan of Action to "stop sexual assault before it occurs."[313] The acting secre-

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[309] *See, e.g.*, Latina to Latina, Transcript, *To Honor Vanessa Guillén, These Two Latina Veterans Are Telling Women Not To Enlist* (July 13, 2020), https://latina-to-latina.simplecast.com/episodes/to-honor-vanessa-guillen-these-two-latina-veterans-are-telling-women-not-to-enlist/transcript [https://perma.cc/Q43M-KX49]. In reflecting on their own experiences with military sexual assault, Latina veterans and advocates Lucy Del Gaudio and Pam Campos-Palma highlighted race as a central factor impacting their experience of reporting MST. Campos-Palma further described the ongoing racial bias she encountered in attempting to process her disability claim for MST, saying, "[i]n my appointments, I'm often asked like, 'Well, what happened before the military? Was your mother married? Oh, tell me. Your mother's an immigrant?' And I also feel that there is racial bias in that those of us that are working class and Brown and Black, that we must have been damaged goods before we came into the military, and that we're not getting those claims paid out. When we talk about reparations for war-affected people, and this is an occupational hazard, who's getting those checks from the government? It's not us." *Id.*

[310] Appendix B 2018, *supra* note 292, at 11.

[311] Dep't of Def., 2018 Report on Sexual Assault in the Military Appendix C: Metrics and Non-Metrics on Sexual Assault 18 (2019), https://www.sapr.mil/sites/default/files/Appendix_C_Metrics_and_Non-Metrics_on_Sexual_Assault.pdf [https://perma.cc/2TJ9-AVP3].

[312] Dep't of Def., Sexual Assault Accountability and Investigation Task Force 19 (Apr. 30, 2019), https://media.defense.gov/2019/May/02/2002127159/-1/-1/1/SAAITF_REPORT.PDF [https://perma.cc/B8LA-HX4H].

[313] *See* Memorandum from Patrick Shanahan for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretary of Defense for Personnel and Readiness, Chiefs of the Military Services, Chief of the National Guard Bureau, General Counsel of the Department of Defense, Actions to Address and Prevent Sexual

tary's memorandum, which described itself as a "call to action" to the branches to "address how [they] are structured and how [they] resource efforts to combat this scourge,"[314] and the subsequent renewed public scrutiny of military sexual misconduct occasioned by the brutality and secrecy surrounding the Guillén case highlight both the necessity of broader, more drastic reform to the military justice system and the suitability of the present moment for their implementation.

B. The 2020 NDAA, DoD Recommendations, and the Potential Overhaul of the Court-Martial

The military has long been regarded as a "separate community."[315] In the specific context of the military justice system, this designation reflects the systemic constraints on court-martial proceedings and the ideological priorities they seek to realize.[316] Per the *Manual for Courts-Martial*, the military justice system exists to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[317] The hierarchical structure and unique cultural norms that comprise the military's institutional character may hinder smooth implementation of policy changes, but the failure of recent reform efforts to render sexual assault prosecutions more equitable and insulated from UCI mandates additional transformation of the military justice system to augment its legitimacy and efficacy.[318]

While many of the UCMJ amendments proposed in the 2020 NDAA parallel statutory changes proposed and rejected over the course of the past

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Assault in the Military, 3 (May 1, 2019), https://media.defense.gov/2019/May/02/2002126804/-1/-1/1/ACTIONS-TO-ADDRESS-AND-PREVENT-SEXUAL-ASSAULT-IN-THE-MILITARY.PDF [https://perma.cc/CY7A-2N6U].

[314] *Id.* at 1.

[315] *See, e.g.*, James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. Rev. 177, 189 (1984) ("[A]s a matter of history and practice, there is a fairly clear body of social norms peculiar to the military and known to all reasonable personnel . . . . [A] military organization is a hierarchy based on response to command . . . the successful performance of its mission depends on effective response to command").

[316] *See* Brady, *supra* note 58, at 200.

[317] Manual for Courts-Martial, United States, at I-3 (2019).

[318] *See*, *e.g.*, Amy Davidson Sorkin, *Military Sexual Assault: Shame Isn't Enough*, New Yorker (May 8, 2013), https://www.newyorker.com/news/amy-davidson/military-sexual-assault-shame-isnt-enough [https://perma.cc/TM6T-4ED7]; Kristina Peterson and Ben Kesling, *Military Chain of Command Under New Scrutiny in Assault Cases*, Wall St. J. (May 22, 2019), https://www.wsj.com/articles/senate-debates-role-of-military-commanders-in-sexual-assault-cases-11558553173 [https://perma.cc/HU5M-F9QS]; John M. Donnelly, *GAO: Pentagon Hasn't Delivered on Promises to Combat Sexual Harassment and Assault*, Stars & Stripes (May 13, 2020), https://www.stripes.com/news/us/gao-pentagon-hasn-t-delivered-on-promises-to-combat-sexual-harassment-and-assault-1.629619 [https://perma.cc/3YQH-JAMX].

decade,[319] military justice reform has arguably never been more relevant. In addition to the 2018 DoD survey discussed above, a 2019 report authored by the Department of Defense Inspector General found that, despite UCMJ reforms and political pressure, a "substantial portion" of sexual assaults are not fully prosecuted.[320] Both reports further noted that the number of reported sexual harassment and assault cases rose year over year between 2016 and 2019,[321] and Congressional leaders have expressed escalating frustration with the Pentagon's inadequate efforts to rectify the problem.[322] Moreover, public outrage over the death of Spec. Guillén and recent actions by President Trump, including his pardon of former Navy Chief Petty Officer Eddie Gallagher, "corrode[ ] confidence in the entire military disciplinary structure . . . [and] reflect[ ] a lack of trust in the judgment of those responsible for leading U.S. armed forces in combat," broadening the scope of the military justice legitimacy crisis far beyond sexual assault and intensifying the urgency of reform.[323]

In this unique context, the 2020 NDAA has the potential to result in more tangible progress than previous statutory efforts. Section 540F of the 2020 Act requested a feasibility study for an "alternative" system that could establish the foundation for the most comprehensive overhaul of military justice in modern history.[324] The bill charged the Secretary of Defense with generating a recommendation as to whether discretionary charging decisions for "serious" crimes[325] should be reallocated from convening authorities to an independent, specially designated military prosecutor outside the accused's chain of command.[326] The potential to abolish commander discretion for serious offenses reflects the culmination of years of incremental reform and a repudiation of the system that military law scholar Eugene Fidell de-

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[319] *See* Eugene R. Fidell, *Rube Goldberg and Military Justice*, JUST SEC. (April 6, 2020), https://www.justsecurity.org/68935/rube-goldberg-and-military-justice/ [https://perma.cc/F9M2-FMT3] (describing several years' worth of "considerable legislative support for transferring the disposition power from convening authorities . . . to a chief prosecutor outside the chain of command.").

[320] Donnelly, *supra* note 318.

[321] *Id.* (observing that cases rose from 6,172 reported cases in FY16 to 7,825 cases in FY19); APPENDIX B 2018, *supra* note 292, at 8 (observing that cases rose from 6, 172 reported cases in FY16, to 6,769 in FY17, to 7,623 in FY18).

[322] Donnelly, *supra* note 318 (quoting Rep. Speier: "[f]or the DOD . . . [to] have failed to take even these common-sense steps to prevent this kind of toxic rot for nearly a decade . . . is infuriating and unacceptable," and Sen. Shaheen: "[t]hese delays are a poor reflection of the Department's commitment to root out sexual harassment, and DOD leadership must do better.").

[323] Geoffrey S. Corn & Rachel E. VanLandingham, *The Gallagher Case: President Trump Corrupts the Profession of Arms*, LAWFARE (Nov. 26, 2019), https://www.lawfareblog.com/gallagher-case-president-trump-corrupts-profession-arms [https://perma.cc/XQY4-VP8L].

[324] *See* Maurer, *supra* note 82.

[325] Offenses carrying a penalty of a year or more, roughly analogous to felonies in the civilian justice system. *See id.*

[326] *See* Paradis, *supra* note 82.

scribed as a "Rube Goldberg machine . . . [R]life with potential for yet more command influence."[327]

A "shadow report" submitted to the Senate and House Committees on Armed Services in April 2020 by a group of military justice experts reinforces the urgency of reform and endorses the NDAA's proposed alternative system.[328] According to the report, the proposed shift in charging discretion would render military justice "faster, smarter, and less vulnerable to unlawful influence and command- or commander-specific variation."[329] The report highlights legitimacy concerns similar to those expressed by Congress.[330] It suggests that the alternative system "may increase conviction rates because disposition decisions by an attorney are more likely to weed out cases that are marginal in terms of successful outcomes at trial or on appellate review."[331] The report also surmises that the current acquittal rate is deleterious both to general deterrence of sexual assault and related offenses and to "public confidence in official decision-making."[332] The shadow group further suggests tangible measures to increase legitimacy under the proposed alternative system, such as offering a set of professional requirements for the judge advocate exercising disposition authority under Section 540F.[333] The report lauds the proposal both for its acknowledgment of the value nonlawyer commanding officers bring to military justice and its recognition that the system must be further professionalized if it is to maintain credibility and function effectively.[334]

Despite political pressure from Congress and the endorsement of the shadow group, the Report of the DoD Joint Service Subcommittee on Prosecutorial Authority Study (JSS-PAS) found that "implementation of the alternative military justice system defined by Section 540F is neither feasible nor advisable."[335] The JSS-PAS was comprised of 15 members, including

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[327] Fidell, *supra* note 319.

[328] *See* SHADOW REPORT, *supra* note 288, at 8 (proposing an alternative military justice system that will "reflect[ ] contemporary American values and experience as to who should make charging decisions in criminal cases").

[329] *Id.* at 8.

[330] *See id.* at 7 (observing that "timeliness and efficiency are not the only perspectives from which the impacts of [a military justice] system should be evaluated" and describing "trust and confidence in the military justice system among those who are subject to it (and their families)" as also "fundamental.").

[331] *Id.* at 8.

[332] *Id.*

[333] *Id.* at 9. Suggested potential factors to consider include "[p]ractice of criminal law in a civilian or military capacity for at least five years," "service as a military judge or appellate military judge for at least three years," and "service as trial, defense, or victims' counsel for at least five years, including being lead counsel in ten or more contested cases." *Id.*

[334] *Id.* at 4–5.

[335] DEP'T OF DEF., REPORT OF THE JOINT SERVICE SUBCOMMITTEE PROSECUTORIAL AUTHORITY STUDY 1 (Sept. 2, 2020), https://www.caaflog.org/uploads/1/3/2/3/132385649/jss-pas_540f_final_report.pdf [https://perma.cc/3KMZ-79HC] [hereinafter PROSECUTORIAL AUTHORITY STUDY].

former commanders, judge advocates, and civilian attorneys,[336] although it is noteworthy that none of the commanders in the group had ever held general court-martial convening authority, the power that would be most constricted by the alternative jurisdictional scheme proposed in Section 540F.[337] Although the JSS-PAS acknowledged that implementation of the alternative military justice system might be "textually possible," it concluded that the negative effects of such a change would be so severe as to render the reform "infeasible."[338]

The JSS-PAS offered several reasons for its rejection of the reallocation of prosecutorial discretion for certain offenses to senior judge advocates outside the accused's chain of command, but its central contention was premised on the commander's existing role in maintaining unit order and discipline.[339] The report invoked prior studies finding that "commanders have capably and reasonably exercised prosecutorial authority"[340] and expressed skepticism that the alternative system would invite any additional reporting of sexual assault crimes or "achieve its intended goals,"[341] based on comparisons to the military justice systems of American allies who have implemented similar reforms.[342] The report concluded that "[c]ommanders need full authority under the UCMJ to enforce good order and discipline. . . . Divesting commanders of the mechanism to enforce good order and disci-

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[336] The 15 individuals in the JSS-PAS represented the Army, Navy, Air Force, Marine Corps, and Coast Guard. The group contained high-ranking commanders across all branches of service with "more than 15 years of collective experience commanding at the summary and special court-martial convening authority level," as well as the Chief Prosecutor of the Air Force and the Chief of the Criminal Law Division in the Army's Office of the Judge Advocate General. *Id.* at ii.

[337] Dan Maurer, *An Open, but Difficult, Challenge: Finding the Rationale for a Commander's GCMCA for all Offenses*, CAAFLOG 2 (Oct. 2, 2020), https://www.caaflog.org/home/maurer-an-open-but-difficult-challenge-finding-the-rationale-for-a-commanders-gcmca-for-all-offenses [https://perma.cc/LQ9U-HZ4G].

[338] PROSECUTORIAL AUTHORITY STUDY, *supra* note 335 at 1.

[339] *Id.* at 1–2. ("[I]t is difficult to reconcile how a distant lawyer with no connection with a certain chain of command is able to assess and impact the good order and discipline of a distinct unit.").

[340] *Id.* at 2 (citing 2014 findings by the Response Systems to Adult Sexual Assault Crimes Panel (RSP) "determin[ing] that there was no evidence that replacing commanders as court-martial convening authorities with independent prosecutors would improve the military justice system and recommend[ing] against doing so.").

[341] *Id.* at 3 ("It is not clear why those advocating to replace commanders with judge advocates in the military justice system believe judge advocates would be less susceptible to improper considerations, particularly political pressures associated with sexual assault investigations and prosecutions. If anything, the consideration of improper motives could be amplified; for this alternative system to function, significant discretion would need to be delegated to junior prosecutors.").

[342] *See id.* (noting that direct comparisons to other systems were "tenuous" based on the differing sizes of various nations' armed forces, and expressing concern that the size of the American military and the "scope of offenses and offenders" over whom the alternative system proposed to vest jurisdiction in a single prosecutor would be "too burdensome to promote effective and timely justice.").

pline will result in a less effective military and will weaken the national security of the United States."[343]

The JSS-PAS report repeats the familiar justification for maintaining the current distribution of prosecutorial discretion: the criticality of ensuring military discipline and obedience to authority and the necessity of maintaining the commander's ability to enforce these norms. The report's "Purpose of Military Justice" section describes "military discipline" as "the respect for authority and absolute obedience to lawful orders. The purpose of discipline stems from the necessity of combat."[344] However, the JSS-PAS fails to acknowledge that this justification is functionally inapplicable in peacetime, and similarly ill-suited to a military justice system in a non-combat zone even in wartime.[345] As one critic of the report describes this disconnect, "[t]he possibility that the cook at Fort Benning might one day be asked to 'take that hill' seems too remote to stand as the theoretical justification for why his commander should decide whether he is prosecuted for using a stolen debit card."[346] In essence, while the JSS-PAS authors reject the ongoing "civilianizing" of military justice, the structure envisioned by the report is likely to violate the rights of victims and accused service members alike,[347] facilitating further erosion of the system's perceived integrity and efficacy to preserve conformity to a set of norms whose undergirding assumptions are inconsistent with its current role.[348]

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[343] *Id.* at 92.

[344] *Id.* at 18.

[345] *See* Maurer, *supra* note 337, at 5 (listing the foundational assumptions that render this argument flawed: "[this line of reasoning] assumes that all service-member misconduct has similar characteristics and consequences *from the perspective of the commander and mission*; it assumes that criminal law is, in its use or threat of use, a reasonable and legitimate way to induce the adoption of professional values and norms that are distinctive and not prescriptive in civilian society; it assumes that criminal misconduct of any kind reflects on the professional values and martial ideals expected of service-members; it assumes wrongly that criminal misconduct of any kind is inherently prejudicial to good order and discipline simply because of who committed it; it assumes we can all agree on what the 'purpose' of military justice is, and that – whatever it is – it is something that remains static and non-contextual.").

[346] Brenner Fissell, *The Core of the Argument for Commander Discretion/Clemency–Critiquing JSS PAS*, CAAFLOG (Sept. 30, 2020), https://www.caaflog.org/home/the-core-of-the-argument-for-commander-discretionclemency-critiquing-jss-pas [https://perma.cc/VLB2-S6WJ] (quoting Lederer, *supra* note 114, at 515).

[347] PROSECUTORIAL AUTHORITY STUDY, *supra* note 335, at 58 ("The chief motivation for change [in charging discretion] among the allied nations . . . was the desire to protect the rights of defendants, rather than to address a deficiency in prosecutions. In the case of the U.K., Australia, and New Zealand, the change was a direct result of an increased willingness on the part of their courts to view commander-driven courts-martial as inconsistent with their obligations under international human rights treaties. While the motivation for Section 540F is not necessarily clear, ensuring the military justice system complies with human rights obligations is undoubtedly not a U.S. concern.").

[348] *See* Fissell, *supra* note 346 ("The PAS authors want it both ways: they want a . . . system . . . in which civilian-type offenses can be punished with lengthy terms of incarceration, but they want civilian-like procedures dispensed with in place of the commander's discretion at both the front and back end of the trial. They want a 'justice'

C. Benefits of a Change in Charging Discretion

The recommendations of the JSS-PAS report notwithstanding, Congress should consider amending the UCMJ to transfer charging decisions for crimes with a federal statutory analog to a senior judge advocate specifically designated for that purpose and located outside the accused's chain of command as contemplated in the 2020 NDAA and endorsed by the shadow report.[349] This transition would repose discretion for felony-equivalent crimes in experienced prosecutors with the relevant subject matter expertise and requisite professional judgment to render charging decisions in the interests of justice.[350] Commanders without legal training should, however, retain discretion over administrative and non-judicial punishments related to minor and military-specific offenses in order to preserve the integrity of the chain of command and maintain their authority to enforce good order and discipline.[351]

This shift in prosecutorial discretion would also improve the efficiency and impartiality of court-martial proceedings. Rule for Courts-Martial 601(d)(1) necessitates a finding of probable cause by either the convening authority or the command staff judge advocate (SJA) before a convening authority may refer charges to a general court-martial.[352] Similarly, UCMJ Article 34 requires the convening authority to "submit . . . matter[s] to the staff judge advocate [SJA] for advice" prior to referral to a general court-martial and to "consult" with an SJA before referring charges to a special court-martial.[353] In practice, convening authorities almost always confer with their SJAs before referring charges to any proceeding.[354] Conferring referral authority upon military prosecutors therefore simply streamlines the charging process by localizing final decisions with appropriately-trained officers who are already partially (and, often, functionally) responsible for making them.[355]

Further, because military lawyers are more insulated from the public pressures affecting dispensation of controversial cases than are high-visibility commanding officers, their charging decisions are likely to be more im-

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system with respect to conduct punished and form of punishment, but a 'discipline' system with respect to its procedures.").

[349] *See* Maurer, *supra* note 82.

[350] *See* Murphy, *supra* note 47, at 182; Rustico, *supra* note 151, at 2031.

[351] Murphy, *supra* note 47, at 182; *see also* SHADOW REPORT, *supra* note 288, at 5.

[352] MANUAL FOR COURTS-MARTIAL, UNITED STATES at II-62 (2019); *see also* Van-Landingham, *supra* note 194, at 55.

[353] 10 U.S.C. § 834(a); 10 U.S.C. § 834(b). General courts-martial adjudicate felony-equivalent offenses, while special courts-martial adjudicate misdemeanors.

[354] *See* REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 205 n.569 (2014) ("[C]ommanders do not make decisions in a vacuum . . . and their [j]udge [a]dvocates are involved at every step of the way.") (quoting Transcript of RSP Public Meeting 210–11 (June 27, 2013) (testimony of Mr. Fred Borch, Regimental Historian, U.S. Army Judge Advocate General's Corps)).

[355] Per the NDAA for FY14, jurisdiction in sexual assault cases is restricted to general court-martial proceedings. NDAA FY14, *supra* note 218, at § 1705(b).

pervious to allegations of UCI.[356] Judge advocates, moreover, are bound by rules of professional responsibility analogous to those of their civilian counterparts,[357] which function as an independent check on discretion that nonlawyer convening authorities lack.[358] This concurrent minimization of reputational pressure and expansion of professional scrutiny leaves judge advocates less susceptible to UCI than current convening authorities, thereby augmenting the legitimacy and integrity of the cases they ultimately refer and prosecute.[359]

This method of reallocating authority for charging decisions enhances the systemic legitimacy of the military justice system because it leverages expertise across the spectrum of offenses covered by the UCMJ, and therefore may appeal to civilian advocates and military leaders alike.[360] Critics of Section 504F condemn the proposal as "part of a coordinated campaign to divest commanders of their existing prosecutorial role and in so doing dilute the relationship between court-martial prosecutions and good order and discipline."[361] However, limiting convening authority discretion to misdemeanor equivalent cases and administrative separations signals respect for commanders' unique and critical role in maintaining order and authority amongst their subordinates.[362] It also preserves their jurisdiction in cases directly related to that function or in which judicial adjudication is not required.[363] Meanwhile, transferring prosecutorial discretion for serious,

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[356] *See* Rustico, *supra* note 151, at 2067 ("JAG officers already serve as a useful independent check on the use of military force [in the operational law arena]. . . . There is little reason to believe that JAG officers who practice criminal law [often the very same officers rotating between operational law and military justice billets] are not capable of similar independent judgment.").

[357] *Compare* Model Rules of Pro. Conduct r. 3.8 (Am. Bar Ass'n 2016) *with* Dep't of Navy, Professional Conduct of Attorneys Practicing under the Cognizance and Supervision of the Judge Advocate General, 32 C.F.R. § 776.47 (2019) (outlining professional rules for Navy trial counsel similar to those codified in ABA Model Rule 3.8).

[358] Shadow Report, *supra* note 288, at 13 ("Judge advocates are bound by service and civilian professional responsibility, unlike lay commanders.").

[359] *Id.* at 14. The shadow report further suggests that the § 540F billet be a terminal duty assignment for a senior judge advocate, which would create an additional bulwark against unlawful influence and "would help ensure that the incumbent brought the broad perspective and wealth of experience needed for the task." *Id.* at 14, n.55.

[360] *Id.* at 8 ("Congress should make clear that the alternative system leaves fully intact the commander's important existing nonjudicial punishment authority over (as Congress has long provided) minor cases as well as the administrative separation process as well as the full range of customary corrective measures that do not constitute disciplinary action within the meaning of the UCMJ.").

[361] Geoffrey S. Corn, Chris Jenks & Timothy MacDonnell, *A Solution in Search of a Problem: The Dangerous Invalidity of Divesting Military Commanders of Disposition Authority for Military Criminal Offenses*, Just Sec. (June 29, 2020), https://www.justsecurity.org/71111/introducing-an-open-letter-from-former-u-s-military-commanders-judge-advocates-commander-authority-to-administer-the-ucmj/ [https://perma.cc/UT8U-SU78].

[362] *See* Shadow Report, *supra* note 288, at 5.

[363] *See* John G. Doyle, *The Code Indicted: Why the Time Is Right to Implement a Grand Jury Proceeding in the Military*, 223 Mil. L. Rev. 629, 635 (2015) ("Commanders should play a role in the military justice process.").

felony-equivalent offenses to senior judge advocates enhances the reputability—both actual and perceived—of the military justice system by ensuring that charging decisions will be made by those best equipped to evaluate them with impartiality and professional candor.[364]

D. One Step Further: Standing Military Courts

While the changes proposed by the 2020 NDAA have the potential to fundamentally alter court-martial structure and procedure and reassert the military justice system's legitimacy, Congress should recognize a unique chance for systemic reform and leverage these opportune circumstances to enact more profound, fundamental alterations to military justice. One potential means to realize this change is for Congress to legislate the creation of permanent military courts, thereby recognizing that military judges in the current ad-hoc court-martial system are also vulnerable to unlawful influence from more senior officers.[365] In 2001, the National Institute of Military Justice's *Commission on the 50th Anniversary of the Uniform Code of Military Justice* report (the "Cox Commission Report") endorsed the same proposal.[366] The "'sexual assault crisis' narrative"[367] would not emerge with precise clarity for another decade after the Cox Commission Report, but early proponents of a permanent military court system already recognized that "standing courts-martial [were] the best solution to many aspects of . . . the current pre-trial role of the [convening authority], and would enhance the efficiency of the system as well as materially improve the fairness of the administration of justice."[368]

Although this reform would be more drastic than the changes proposed by the 2020 NDAA, the creation of standing military courts represents one avenue to achieve the broad-scale, foundational change necessary to realize the potential benefits of the discrete civilianizing reforms discussed previ-

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[364] *See* Murphy, *supra* note 47, at 179 ("UCMJ authority should be removed from commanders as the MJIA suggested. . . . The MJIA provided a remedy for the present conundrum by removing serious offenses from commanders. If UCMJ court-martial convening authority is removed from commanders, then commanders will have less ability to exercise unlawful command influence or exert pressure personally on cases by sending every case forward. Lawyers in a prosecutorial role should exercise the same discretion that civilian prosecutors enjoy without command involvement in the adjudication of crimes.").

[365] *See* Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary- A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 630 (1994).

[366] Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. M.S.U.-D.C.L. 57, 108 (2002) ("The Cox Commission, as part of its proposal to have military judges rather than convening authorities decide pre-trial issues, also called for the establishment of permanent or 'standing' courts martial.").

[367] Burris, *supra* note 15, at 27.

[368] Barry, *supra* note 366, at 108–09.

ously in this Article.[369] This change in court-martial structure would assuage Congressional concerns and restore legitimacy to the military justice system. It would also reinstate the confidence of survivors, service members, and the general public in the Armed Forces' ability to adjudicate serious offenses with appropriate impartiality and validity and to prioritize the interests of justice and adjudicative integrity, rather than political agendas or reputational concerns. In light of the critiques of "civilianizing" reforms offered earlier in this Article, a reform proposal that endorses the importation of additional aspects of the civilian justice system into the court-martial structure may seem contradictory. However, many of the UCMJ reforms that sought to implement procedural and survivor protections analogous to those found in civilian trials were arguably inefficacious because they attempted to adapt to a system whose foundational structure was ill-suited to accommodate them.

Unlike prior reform proposals,[370] the implementation of standing military courts would facilitate creation of a systemically coherent standing body familiar with institutional norms and insulated from the reputational incentives affecting commanders.[371] Military judges are increasingly independent actors; they are currently answerable to their judicial chain of command, rather than to the convening authority who refers charges for adjudication, and a 2016 amendment to the UCMJ granted them tenure protection for "appropriate minimum periods."[372] The creation of standing courts would fully realize this trend toward judicial autonomy, and would augment the system's legitimacy and impartiality as a result.

In their 1994 article advocating the creation of an independent, standing military judiciary, scholars and judge advocates Frederic Lederer and Barbara Hundley opined that "the recent history of military criminal law generally is its evolution away from command control . . . It is only appropriate that it is now time to review the very nature of the judiciary itself."[373] This trend away from the commander-centric model has continued in the years since Lederer and Hundley identified it, and recent legislative reform efforts have dramatically accelerated the diminution of command authority.[374] Over two decades later, it is clear that such an innovation is not only long overdue, it is fundamentally necessary to ensure the continued efficacy and integrity of the military justice system.

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[369] *See, e.g.*, Doyle, *supra* note 363, at 635 ("Piece-meal changes to the military justice system will not be effective where those changes are narrowly made without sufficient forethought into the second and third order effects of those changes on [the] system as a whole—the changes . . . must be made in light of the system as a whole.").

[370] Such as those suggesting the participation of civilian judges in court-martial proceedings. *See* Visger, *supra* note 70, at 96 (citing *Can Military Trials be Fair? Command Influence over Courts-Martial*, 2 STAN. L. REV. 547, 554 (1950)).

[371] *See id.* at 82.

[372] 10 U.S.C. § 826(c)(4).

[373] *See* Lederer and Hundley, *supra* note 365, at 632.

[374] *See* SHADOW REPORT, *supra* note 288, at 5.

VI. Conclusion

During a 2013 meeting between then-President Obama, then-Secretary of Defense Hagel, and the Joint Chiefs of Staff, the President vowed that "[the United States] will not stop until we see this scourge [of sexual assault] from what is the greatest military in the world eliminated."[375] Military and civilian authorities unanimously agree that one incidence of sexual assault in the armed forces is too many and should trigger introspection within the services and, if necessary, substantive reform to the adjudicative process.[376] The two-front delegitimizing impact of UCI allegations that result in overturned convictions[377] and well-intentioned statutory changes that provoke due process criticisms and backlash to implementation is injurious to all involved parties. This erosion of adjudicative integrity diminishes the system's perceived efficacy, both in the estimation of the public and among service members who do not report their assaults due to apprehension or mistrust regarding the handling of their complaints.[378] The most efficient method to increase the credibility of sex offense prosecutions is to place limits on convening authority discretion in felony-equivalent criminal cases,[379] as suggested by the 2020 NDAA and endorsed by the shadow group report,[380] and to establish standing military courts to leverage the expertise and impartiality of senior judge advocates.

The military as an institution is notoriously slow to implement reforms, and the structural changes endorsed in this Article would drastically alter existing power distributions within an already change-reluctant system. Nevertheless, whether or not one accepts the narrative of crisis surrounding the incidence, reporting, and prevention of military sexual assault, it is evident

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[375] Patricia Zengerle, *Top U.S. General Warns of Sexual Assault 'Crisis,' Meets Obama*, Reuters (May 16, 2013), https://br.reuters.com/article/us-usa-obama-sexassault-idUSBRE94F0LM20130516 [https://perma.cc/7GBV-7C76].

[376] *See, e.g.*, Burris, *supra* note 15, at 27; Murphy, *supra* note 47, at 145 ("[A] victim's reluctance . . . to report a crime of this nature is a problem in any circumstance."); Brady, *supra* note 58, at 199–200.

[377] *See* Jared Keller, *The Biggest Obstacle to the Pentagon's War on Sexual Assault: The Military Justice System*, Pac. Standard (May 29, 2018), https://psmag.com/news/the-biggest-obstacle-to-the-pentagons-war-on-sexual-assault-the-military-justice-system [https://perma.cc/AS65-78PV] ("[An] expanding interpretation of UCI has major consequences: that those commanders who often dismiss (or are subject to) allegations of sexual assault and abuse can simply shrug off the responsibility of charging their colleagues the minute any high-ranking government official talks at all about any related case.").

[378] Editorial Board, Washington Post, *The Military's 'Zero-Tolerance' Policy on Sexual Misconduct Isn't Working*, Wash. Post (July 4, 2012), https://www.washingtonpost.com/opinions/the-militarys-zero-tolerance-policy-on-sexual-misconduct-isnt-working/2012/07/04/gJQANSa6NW_story.html [https://perma.cc/CE3T-WY2U] ("An investigation by the Air Force into sexual misconduct at its basic-training operations has identified 31 women who have been victimized. Just as troubling is that only one of the women came forward to report the abuse, a startling fact that reflects the pervasive mistrust in the military's handling of sex crimes within its ranks.").

[379] *See, e.g.* Murphy, *supra* note 47, at 179.

[380] *See* Maurer, *supra* note 82. *See generally* Shadow Report, *supra* note 288.

that military prosecutions of sex offenses face a two-pronged legitimacy crisis of their own. Swift and strategic corrective action to restrict the autonomy of commanders susceptible to influence and rebuild trust in the institutions of military justice is vital and urgently needed[381]—anything less would be unworthy of the service members whose claims the military justice system seeks to vindicate and whose rights it endeavors to protect.

[381] *See* Murphy, *supra* note 47, at 179 ("UCMJ authority should be removed from commanders as the MJIA suggested. Over sixty years ago, the UCMJ was originally instituted to ensure the accused was protected from a commander with 'virtually unlimited control over military justice.' However, politically unpopular cases and the inevitable unlawful command influence in sexual assault cases necessitates the overhaul of our military justice system. The system is no longer a balance of command authority and the rights of the accused because it no longer sufficiently protects the process or the individual servicemember.").