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A Comparative Analysis of UCMJ Reform Proposals

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**This reflects my own personal understanding and opinions, and should not be taken as endorsement or rejection of either bill, nor does it represent any official government positions.*

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There are two bills and one forthcoming Department of Defense Commission report addressing, primarily, the role of the commanding officer in military justice. The critical target of these proposals, and what distinguishes them, is the degree to which senior commanders currently with "court-martial convening authority" may exercise their traditional prosecutorial discretion over certain offenses. On one end of the spectrum, reform would involve removing these military officers from deciding *whether* and *how* to prosecute just "sex-related offenses." On the other end, reform would involve removing military officers from deciding whether and how to prosecute *all* serious (felony-type) offenses, including those offenses with military circumstances, leaving only relatively light ("misdemeanor") and "uniquely military offenses" to the discretion of the commander.[1] With the reform proposals getting a lot of attention in the media,[2] this short analysis is intended to clarify what each proposal does and does not do, and offers some opinion on their respective strengths and weaknesses.

Some Initial General Observations:

- Both bills would dramatically alter, in theory, the current practice of military justice. The Senate bill (sponsored by Sen. Gillibrand) would be a complete overhaul yet would require rapid implementation (within 180 days); the House version (sponsored by Rep. Speier) is more modest, only affecting sex-related offenses, but allows for two years before it would become effective.[3] Both bills are consistent with the historical trend line of "civilianization" of military justice since World War I, incorporating an increasing number of statutory and constitutional due process protections for the accused, an orientation toward victim rights, and the gradual demotion of commanders' influence over the forms, process, and outcomes of military justice. Moreover, the message and impact of both bills are consistent with the latest word on the nature of military justice from the Supreme Court – that its purpose is *justice*; a commander's interest in "good order and discipline" an incidental feature of a system that looks and acts increasingly like any conventional state criminal justice scheme.[4]

- No there is no *empirical* evidence for the claim that removing "court-martial convening

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[1] At the moment, there does not appear to be any broad reform advocacy for a complete abandonment of a separate military justice court-martial system during peacetime (as in, for example, Germany and France), nor advocacy for removing commanders from making disposition decisions with respect to *all* criminal justice matters.

[2] *See*, *e.g.*, Ellen Mitchell, *Gillibrand makes new push for military sexual assault reform*, THE HILL, Apr. 29, 2021, https://thehill.com/policy/defense/550999-gillibrand-makes-new-push-for-military-sexual-assault-reform; Leo Shane III, *Major overhaul in how the military handles sexual misconduct cases may finally happen*, MIL. TIMES, Apr. 29, 2021, https://www.militarytimes.com/news/pentagon-congress/2021/04/29/major-overhaul-in-how-the-military-handles-sexual-misconduct-cases-may-finally-happen/; Michel Paradis, *Congress Demands Accountability for Servicemembers*, LAWFARE, June 1, 2021, https://www.lawfareblog.com/congress-demands-accountability-service-members.

[3] On June 1, 2021, Rep. Louie Gohmert sponsored and introduced H.R. 3647 ("To Improve the Military Justice System, and Other Purposes"), but as of this writing the text of the bill has not been made available.

[4] Ortiz v. United States, 138 S. Ct. 2165 (2018).

authority" from commanders – for any or all offenses – will promote lawlessness, degrade morale, impinge unit cohesion, diminish trust, or otherwise negatively impact mission readiness or accomplishment. This argument, nevertheless, has been made regularly by defenders of the status quo in Congressional hearings and in print.[5]

- The Senate bill has significantly more bipartisan support than the House version and has been overwhelmingly supported by veterans and criminal justice victim advocacy interest groups.

- As publicly suggested by Secretary of Defense Austin and Chairman of the Joint Chiefs of Staff, General Milley, the military leadership is open to making fundamental change to the military justice system, but for the purpose of combating sexual assault and harassment. The DoD Independent Review Commission has not published its report yet but has signaled support for removing convening authority over sex-related offenses from the chain-of-command.

- Neither bill addresses the role of the traditional convening authority's influence in selecting panel members for non-covered offenses, which has historically been the most obvious target for due process-related objections to military justice since the UCMJ's enactment in 1950.

- By categorically limiting traditional convening authority to specified low impact "military" crimes and "misdemeanors," the Senate bill fails to fully account for the *effect* of certain misconduct on unit members and unit missions; therefore, the bill ignores the reason why commanders historically and globally are granted some investigative, prosecutorial, and judicial-like functions in military justice schemes – roles long-assigned by Congress, long-wielded by chains-of-command, and long-accepted by both civilian and military courts. Rather than specifying certain *offenses* to be within the narrow jurisdiction of commanders, reform should tie this jurisdiction to the *military effect* of the conduct (see explanation below in Para. 6a.).

- By limiting its proposed reform to just sex-related offenses, the House bill implies that commanders are reasonably invested and capable in administering justice in all matters *except* for sex crimes. While sex crimes are notoriously challenging to investigate and prosecute, this is true for both civilian and military prosecutors, and there are far more similarities between this class of crime and others than meaningful differences. It is not self-evident why commanders can be trusted with one class of crime but not others. So, if commanders cannot be trusted with sex crimes, it is not self-evident why they

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[5] *See*, *e.g.*, Jim Garamone, *Top Service Lawyers: Commanders Crucial to Attacking Sexual Assault, Harassment*, DEFENSE.GOV, April 4, 2019, https://www.defense.gov/Explore/News/Article/Article/1806147/top-service-lawyers-commanders-crucial-to-attacking-sexual-assault-harassment/ (quoting the Judge Advocate General of the Army, Lieutenant General Charles Pede: "In the multitude of congressionally mandated studies, where diverse panels of experts have exhaustively examined the military justice system, hearing from hundreds of witnesses who gave thousands of hours of testimony, they reported back to you one critical consistent conclusion: that commanders should not be removed from the justice system")Chief of Staff of the Army, General Raymond Odierno (June 4, 2013), summarized transcript available at *Top Brass Reject Overhauling Military Justice System to Reduce Sexual Assault*, PBS NEWSHOUR (4 June 2013), https://www.pbs.org/video/top-brass-reject-overhauling-military-justice-system-1377553127/; Geoffrey S. Corn, Chris Jenks, & Timothy C. MacDonell, *A Solution in Search of A Problem: the Dangerous Invalidity of Divesting Commanders of Disposition Authority for Military Criminal Offenses*, JUST SECURITY, 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/ Charles Dunlap, *Civilianizing Military Justice? Sorry, It Can't — and Shouldn't — Work*, WAR ON THE ROCKS, October 8, 2015, https://warontherocks.com/2015/10/civilianizing-military-justice-sorry-it-cant-and-shouldnt-work/; and *Outsourcing Military Discipline: Bad for Everyone*, WAR ON THE ROCKS, October 27, 2015, https://warontherocks.com/2015/10/outsourcing-military-discipline-bad-for-everyone/.

should be permitted to handle other "serious misconduct" or "felonies" that have no nexus to military missions, personnel, or readiness.

- Neither bill provides traditional chains-of-command with a formal opportunity to provide official but non-binding recommendations about disposition of covered cases to the independent prosecutorial team. This would be contrary to current practice in which the chain-of-command – starting with the accused's immediate commander – regularly provides insight and recommendations through the judge advocates to the traditional convening authority. The investigation, prosecution decision, trial, and attendant circumstances for even non-military, "serious" felonious misconduct will always have potential to negatively impact unit mission readiness, mission accomplishment, or unit personnel. Such factors are already considered relevant to the disposition decision, so the law ought to provide a venue for the chain-of-command to articulate its assessment of those factors before the independent judge advocate decides.

The following sections outline the most significant elements of the existing reform proposals and identifies areas of concern.

1. Framing the Reform Problem

It is above all crucial to acknowledge this latest effort at reform is nothing new; it is consistent with the historical trend of increasing "civilianization"[6] of American military justice, which is – itself – roughly thirty years behind peer militaries in Europe and Canada.[7] Of note, it is no longer sufficient or accurate to claim that military justice is all about preserving "good order and discipline" of the troops because they are already separated from civilian society by culture, temperament, and purpose, and for the sake of accomplishing military missions. Nor is it logically or empirically defensible to claim that commanders will inevitably lose the trust of their subordinates, or that mission readiness will suffer, if commanders lose their traditional court-martial convening authority.[8] Military servicemembers are no

[6] Frederic I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MILITARY LAW REVIEW 512, 513 (2017); Edward F. Sherman, *The Civilianization of Military Law*, 22 Maine Law Review 3 (1970); Stephen I. Vladeck, *The Civilianization of Military Jurisdiction*, *in* THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA 287 (John T. Parry & L. Song Richardson eds., 2013); Eugene R. Fidell & Stephen I. Vladeck, *Second-Class Justice in the Military*, N.Y. TIMES, Mar. 20, 2019; https://www.nytimes.com/2019/03/20/opinion/military-justice-congress.html.

[7] In both much of Europe, including the U.K., and Canada, courts-martial and "military justice codes" since the mid-1990s have focused almost exclusively on traditional military offenses, and prosecutors have either been military with complete independence and prosecutorial discretion or service members have been charged and tried in civilian courts. Victor Hansen, *The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences*, 21 MICH. ST. INT'L. L. REV. 229 (2013); Simon P. Rowlinson, *The British System of Military Justice*, 52 A.F. L. REV. 17 (2002); *see also* Findlay v. United Kingdom, App. No. 2210/03, 24 Eur. H.R. Rep. 221 (1997); *see also* R. v. Généreux, [1992] 1 S.C.R. 259, 286 (Can.); Government of Canada, *Judge Advocate General Report: 2018-2019*, Chapter Two – The Canadian Military Justice System: Structure and Statistics," https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2018-2019/chapter-two-service-tribunals-statistics.html. For a broader examination of modern reforms to military justice internationally, *see* MILITARY JUSTICE IN THE MODERN AGE (Alison Duxbury & Matthew Groves eds.) (2016).

[8] Retired Air Force Major General Charles Dunlap, the former Deputy Judge Advocate General for the U.S. Air Force, has been the most outspoken and consistent of these critics. *See*, *e.g.*, Charles J. Dunlap, Jr., *Top Ten Reasons Sen. Gillibrand's Bill is the Wrong Solution to Military Sexual Assault*, JUST SEC'Y, Dec. 9, 2013 ("it is mindboggling to me as to why anyone would think that the way to fix anything in the military would be to take the commander out of the process"), and his original essay fleshing out this argument at https://scholarship.law.duke.edu/faculty_scholarship/3153/ ("It is axiomatic in the military that everything important is commander-led"); *and* Charles Dunlap, *Civilianizing Military Justice? Sorry, It Can't — and Shouldn't — Work*,

longer living in any socially- or professionally-isolated "separate community;"[9] even the Supreme Court (which rarely opines on the nature of military justice) has come to recognize that the military justice system is about, chiefly, *justice* – "good order and discipline" is a beneficial side effect, but *only* a side-effect of a properly functioning military criminal code.[10] Reform, if made, should account for this overarching purpose of military law[11] while still accounting for the relevant and competent role that a military chain-of-command plays in addressing certain types of misconduct. Such reform should be framed as both a proper and historically consistent calibration of civilian control over the military *and* a proper rebalancing of relative constitutional responsibilities for national defense between the President and Congress. In other words, real reform of military justice is not just a debate about commanders and their authorities, suspects and their rights, or victims and remedies.

2. The *JAG Convening Authority for All Felonies* Proposed Model of Military Justice

S.1520. A bill to reform the disposition of charges and convening of courts-martial for certain offenses under the Uniform Code of Military Justice and increase the prevention of sexual assaults and other crimes in the military. ("Military Justice Improvement and Increasing Prevention Act")

a. Summary and Support

The text of the Senate bill has not been published on Congress.gov, but a draft of the bill's text is accessible from the Senate's Office of Legislative Counsel, posted previously on CAAFlog.org.[12] According to Sen. Gillibrand, the "bill would professionalize how the military prosecutes serious crimes by moving the decision to prosecute from the chain of command to independent, trained, professional military prosecutors, and provides for several new prevention provisions such as more and better training for commanders and increased physical security measures, while ensuring that commanders still have the ability to provide strong leadership and ensure a successful command climate."[13]

Of the proposed reforms, this bill would drive the most drastic change to the UCMJ and its attendant procedures and rules. It is the current version of Sen. Gillibrand's long-running effort to reform military justice as it relates to sexual assault prevention and prosecution. Unlike previous bills, this version has garnered significant public and Congressional support in the wake of the 2020 Fort Hood

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WAR ON THE ROCKS, October 8, 2015, https://warontherocks.com/2015/10/civilianizing-military-justice-sorry-it-cant-and-shouldnt-work/; and *Outsourcing Military Discipline: Bad for Everyone*, WAR ON THE ROCKS, October 27, 2015, https://warontherocks.com/2015/10/outsourcing-military-discipline-bad-for-everyone/.

[9] Parker v. Levy, 417 U.S. 733 (1974).

[10] Ortiz v. United States, 138 S. Ct. 2165 (2018).

[11] The Preamble to the Manual for Courts-Martial identifies three "purposes" with one ultimate end state: "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." UNITED STATES MANUAL FOR COURTS-MARTIAL (2019) (M.C.M.), pt. I (Preamble), para. 3. They are not prioritized, nor are they defined, and no mention is made of any of these in the UCMJ itself.

[12] Draft no. DAV21967 1D3, available at https://www.caaflog.org/mj-reform.html.

[13] News Release, Office of Senator Kirsten Gillibrand, *Senators Gillibrand, Grassley, Ernst, Blumenthal, Cruz, Shaheen, Kelly And Military Sexual Assault Advocates Introduce New, Bipartisan Military Justice Improvement And Increasing Prevention Act* (April 20, 2021), https://www.gillibrand.senate.gov/news/press/release/senators-gillibrand-grassley-ernst-blumenthal-cruz-shaheen-kelly-and-military-sexual-assault-advocates-introduce-new-bipartisan-military-justice-improvement-and-increasing-prevention-act.

Report following the murder of Specialist Vanessa Guillén. As of this writing, the bill has 64 cosponsors, with broad bipartisan support. The bill also has wide support from various interest groups: *Protect our Defenders*; *Iraq and Afghanistan Veterans of America* (IAVA); *Veterans of Foreign Wars* (VFW); *Vietnam Veterans of America*; *National Alliance to End Sexual Violence*; *National Coalition Against Domestic Violence*; *Common Defense*; *Veterans Recovery Project*; *Service Women's Action Network* (SWAN); and the *National Institute of Military Justice.*

b. Specific provisions

The bill would remove the controversial "court-martial convening authority" power from the hands of certain high-ranking senior military officers (currently, flag/general officers and certain other civilian officials[14]) with referral power over these cases and replace them with "independent" senior judge advocates. This newly designated Judge Advocate Court-Martial Convening Authority (CA) would be an "experienced" judge advocate in the grade of O-6, outside the chain of command of the accused and victim, operating out of a newly created office within the headquarters of each Service Chief. Importantly, this new Convening Authority will have discretion not just over the referral of a case from investigation to court-martial, but also the original "*preferral*" of charges against the accused under Article 30, UCMJ, and Rule for Court-Martial 307, which is currently a function of the accused's chain-of-command at the O-6 level and below (typically, a company-grade officer).[15] Like the British military justice system, the designation of the jury-like "panel" for such cases will be made by this independent Convening Authority's office, not personally selected by the chain-of-command's General Court-Martial Convening Authority, as it currently does.[16]

Though originating as a measure to deter and punish sexual crimes, the bill covers all "serious crimes." This means that the newly empowered Judge Advocate CA is responsible for disposition decisions for most offenses proscribed under the current UCMJ: offenses with a maximum punishment of more than one year (usually this marks the distinction between misdemeanors and felonies in civilian jurisdictions). These civilian-type offenses range from rape, murder, and larceny, to kidnapping, arson, and fraudulent use of credit cards.[17] Jurisdiction also includes certain offenses that would be – under the

[14] In the Army alone, there are more than sixty general officers with the "General Court-Martial Convening Authority" currently required to move a sexual assault allegation from investigation to docketed court-martial. In addition to certain kinds of commanding officers, the authority to convene General Courts-Martial also rests with the President, Secretary of Defense, and each Service Secretary. *See* 10 U.S.C. § 822 (Article 22, UCMJ).

[15] This authority to initially "dispose" of a matter is regulated by Rule for Court-Martial (R.C.M.) 306. This Rule in turn refers the commander and judge advocate advisor to the Appendix 2.1 of the M.C.M., which lists fourteen factors to consider. The publication of such "non-dispositive" factors is required by Congress in Article 33, UCMJ. These prosecutorial discretion factors deliberately mirror those published by the American Bar Association, National District Attorneys Association, and the Department of Justice. Of the fourteen factors, only four (a., b., c., and n.) are related to military circumstances.

[16] *See* Article 25(e)(2), UCMJ, for the qualifications of the members, at the discretion and judgment of the Convening Authority.

[17] Specifically, it covers the following offenses: prohibited activities with a military recruit or trainee; wrongful broadcast or distribution of intimate visual images; murder; manslaughter; death or injury of an unborn child; rape and sexual assault; deposit of obscene materials in the mail; rape and sexual assault of a child; "other sexual misconduct;" larceny; fraudulent use of credit or debit cards; false pretenses to obtain services; robbery; frauds against the U.S.; bribery; graft; kidnapping; arson; extortion; aggravated assault; assault with intent to commit specified offenses; maiming; domestic violence; stalking; perjury; obstructing justice; misprison of a serious offense; wrongful refusal to testify; prevention of authorized seizure of property; noncompliance with procedural rules; wrongful interference with adverse administrative proceedings; and retaliation (and conspiracy, solicitation, or attempt to do any of the above). It is not at all clear why burglary (Article 129, UCMJ) is not a covered offense.

circumstances – either prejudicial to good order and discipline or "of a nature to bring discredit upon the armed services" in violation of Article 134, UCMJ (specifically, child pornography, negligent homicide, indecent conduct, indecent language communicated to child under age 16, pandering, prostitution, or conspiracy, solicitation, or attempt to commit any of the above).

This new Judge Advocate CA's jurisdiction, therefore, would *not* cover violations of the traditional "military-type" crimes (Article 83 – 117)[18] nor receiving stolen property (Article 122a); government computer offenses (Article 123); making, drawing, uttering a check, draft, or order without sufficient funds (Article 123a); simple assault (Article 128(a)); conduct unbecoming an officer (Article 133), and most of the Article 134 offenses (acts which, under the circumstances, are prejudicial to good order and discipline or of a nature to bring discredit upon the armed services.[19] These, instead, would remain within the disposition discretion of the chain-of-command, even if the victim of the offense is civilian (person or property), the offense occurs off a military installation, and otherwise has no military consequence.[20]

This new Judge Advocate CA will be empowered to refer the matter to either a General Court-Martial, exposing the accused to the maximum range of potential punishments (with respect to term of confinement, discharge characterization, reduction in rank, and forfeiture of pay), or Special-Court-Martial. If so referred, the court-martial would be empowered to try all known offenses, including those "misdemeanor" or "military-type" offenses that would otherwise be left at the discretion of the command. As with current military justice procedures and decision-making, disposition by the new CA must be free from unlawful influence and coercion, whether by the chain-of-command or other officials (including lawyers).[21]

If the Judge Advocate CA determines not to refer the matter, it is effectively returned to the discretion of the original chain-of-command. At that point, the commander may refer the matter to Special Court-Martial, Summary Court-Martial (which is not a criminal prosecution at all), or nonjudicial punishment under Article 15, UCMJ. All of these remaining options have significant caps on punishment

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Depending on the object of the intent of the accused upon unlawfully breaking and entering, maximum punishment is either 5 or 10 years in prison. This is a possible clerical oversight of the bill's drafters.

[18] These include malingering (Article 83), AWOL (Article 86), failure to obey an order (Article 92), dereliction of duty (Article 92(3)), mutiny (Article 94), aiding the enemy (Article 103b), wearing unauthorized insignia or badge or medal (Article 106a), and reckless endangerment (like "dueling" or "negligent discharge of a firearm") (Article 114). But it also includes wrongful use, possession, or distribution of controlled substances (Article 112a).

[19] Conduct may be either or both, depending on the provable facts. Moreover, conduct can be charged under Article 134 when it meets neither of these terminal elements, provided it is a "crime and offense not capital." This includes violations of other federal statutes that may be punishable regardless of where the wrongful act or omission occurred, conduct engaged in outside the U.S. that would be a noncapital offense if it had been within the "special maritime and territorial jurisdiction of the U.S," as well as certain state law violations committed in areas of exclusive or concurrent federal jurisdiction when the UCMJ and other federal law has not defined the applicable offense. The M.C.M. gives "counterfeiting" (18 U.S.C. § 471) as an example of an offense that could be tried by court-martial as a violation of Article 134.

[20] For example, advocating against, or physically demonstrating (non-violent) contempt for, the civilian democratic electoral process would fall within this category of non-covered offenses, leaving it to the chain-of-command to dispose.

[21] United States v. Bergdahl, 80 M.J. 230 (C.A.A.F. 2020) (holding that certain officials outside of the chain-of-command, including presidents, are subject to limitations meant to shield court-martial proceedings from undue influence); United States v. Barry, 78 M.J. 70 (C.A.A.F. 2018) (holding that the Navy's Deputy Judge Advocate General committed unlawful influence over a court-martial in violation of Article 37, UCMJ).

exposure, but the Summary Court-Martial and Article 15 NJP also come with decreased due process protections commensurate with administrative or employment-related sanctions.

If the bill is enacted, the effective date for this reform is 180 days later and would apply to any covered offense that allegedly occurs on or after the effective date. The bill also addresses physical security measures on military property and improved training on sexual assault and harassment (one must complete "victim advocate"-type training before promotion to O-5 or E-9).

c. Concerns

(1) The UCMJ and Manual for Courts-Martial do not classify offenses as misdemeanors and felonies. Instead, the maximum punishment authorized by law for each offense is actually established by the President, under authority granted by Congress in Article 36, UCMJ. The maximum punishments are in terms of incarceration, rank reduction, forfeitures of pay, and punitive discharges from the Service. Therefore, it is possible that a president – by Executive Order – could either expand or contract the types of misconduct that falls within the traditional UCMJ disposition discretion of the commander or within the jurisdiction of the new Judge Advocate CA. In the bill, Congress does not make clear what the rationale is behind the "greater-than-one-year" incarceration distinction, so there is no principled set of grounds for dividing the crimes between the lawyers and the commanders, other than the too-broad implication that "serious" crimes are not within the competence of commanders.

(2) The bill says nothing about commanders' involvement in the *investigation* of (the covered) crimes,[22] including their authority to issue "search authorizations" based on probable cause,[23] or place suspected service members in pre-trial confinement.[24] It is not clear whether, or to what extent, this authority should constrict in a way commensurate with the authority to convene courts-martial for those offenses.

(3) The bill does not provide any formal opportunity for the chain-of-command (of victim or accused) to provide written advice and recommendations to the Judge Advocate CA prior to preferral or referral of charges. This seems unreasonable, given that in any given matter, the alleged offense *may* have an effect on the unit's good order and discipline in a way only the commander can fully understand and take responsibility to fix; moreover, in any given matter, the investigation and prosecution may have an effect on "justice" as perceived by the victim and accused, one or both of whom will fall within the commander's operational responsibility. That effect could have consequences on the accused's or victim's morale and military readiness, both of which are already factors considered by commanders when making disposition decisions.[25] Finally, the investigation and prosecution may have registerable effect on the commands' "efficiency and effectiveness" (like whether its timing would overlap with scheduled deployments or field training, a significant concern if the accused's unit has multiple witnesses testifying) – a factor also considered under the current disposition guidance and one of the three stated "purposes" of military law. There is no sensible reason for denying the chain-of-command a formal opportunity to provide non-binding *recommendations* to the new CA in the same way that judge advocates currently provide non-binding recommendations to the chain-of-command.

(4) The bill does not mention any role or authority of the new Judge Advocate CA to order

[22] R.C.M. 303.

[23] M.C.M., pt. III (Military Rules of Evidence 311-316).

[24] R.C.M. 304, 305.

[25] *See* M.C.M., App. 2.1, para. 2.1.

pretrial preliminary hearings under Article 32, UCMJ. Because the purpose of the hearing is to confirm proper jurisdiction, the proper form and scope of the charges, and that probable cause exists, there is no sound reason for removing this check against prosecutorial abuse, whether that "prosecutor" is the Judge Advocate CA or the traditional commander.

3. The *Sex Offense JAG Chief Prosecutor* Model of Military Justice

H.R. 8270 ("I am Vanessa Guillén Act")

a. Summary and Support

This bill is sponsored by Rep. Jackie Speier and has less bipartisan support in the House than Senator Gillibrand's bill does in the Senate. The primary target of this bill's reform is sexual assault prosecutions and does not change the role of the commander or any of its prosecutorial discretion for any offenses that are not "sex-related." Though it has 187 cosponsors as of 25 May 2021, only 28 are Republicans. Of note, more than half of the Representatives for the Districts that include the five largest Active Duty and retired populations do not currently co-sponsor the Bill.[26]

b. Specific Provisions

Most notably, this bill would create an Office of the Chief Prosecutor for each the Armed Forces. This Chief Prosecutor would function in a way similar to the "Judge Advocate Convening Authority" in the Senate's bill. This position would be filled by an O-6 (Army, Air Force, or Marine Corps Colonel or Navy Captain) with significant experience prosecuting sexual assault cases in courts-martial; as with the Judge Advocate CA, the new Chief Prosecutor would be outside of chain-of-command of both the victim and accused, assigned to a new office inside the Headquarters of each Service. As with the Senate's bill, this Chief Prosecutor will have authority to convene courts-martial and select panel members for those trials, departing from the process outlined in Article 25(e)(2), UCMJ.

Also similar to the Senate bill, this bill would allow the prosecution of "all known offenses" under the new authority of the Chief Prosecutor, provided that at least one of the charges fits within the narrow jurisdiction of this office. The subject-matter jurisdiction of this new Chief Prosecutor is "sex-related offenses" only. This would include rape and sexual assault of both adults and children; depositing obscene material in the mail; "other sexual misconduct" (e.g., "Peeping Tom" conduct and posting "revenge porn" online), as well as any conspiracy, attempt, or solicitation for any of the above. Notably, the bill would also create a new criminal prohibition (Article 120d): "Sexual Harassment."

Unlike the Senate bill, Rep. Speier's bill only relates to the *referral* of charges. It does not address whether the chain-of-command may exercise its traditional authority to initially "prefer" charges under Article 30, UCMJ, and Rule for Court-Martial 306. But like the Senate bill, it says nothing about a commander's role in investigation such allegations, like ordering a preliminary inquiry under R.C.M. 303, or issuing a search authorization (equivalent to a civilian search warrant).

While the Chief Prosecutor has discretion to refer the case to either a General Court-Martial or Special Court-Martial, the consequence of not referring it means that the chain-of-command recovers discretion to dispose of the allegation. However, under the Senate's version, the commander could refer the matter to a Special Court-Martial, Summary Court-Martial, or nonjudicial punishment under Article

[26] The districts that do not currently sponsor the bill include NC-8 (Fort Bragg); VA-2 (Norfolk, Virginia Beach); CA-52 (San Diego); however, TX-31 (Fort Hood); VA-11 (Northern Virginia) do sponsor the bill.

15, UCMJ. In the House version, the commander's discretion is narrowed to just the Summary Court-Martial and nonjudicial punishment.

Unlike the Senate bill, the House bill *does* address the authority to order a preliminary hearing under Article 32, UCMJ, though it gives the Chief Prosecutor discretion to use it – currently, a referral to a general court-martial requires a pretrial hearing unless affirmatively waived by the accused. It is not self-evident why the referral, under the new proposed system, should not be preceded by a due process-enhancing probable cause determination by an independent factfinder.

Finally, the bill also authorizes victims of sex-related offenses to file claims (within 2 years) against the Service; this claim may be for the physical injury or death caused by a covered individual, for negligent failure to prevent the offense, or for negligent failure to investigate the allegation of the offense.

This bill also has a more generous implementation lead time: its effective date is two years after enactment, four times as long as provided by the Senate bill.

4. Department of Defense Independent Review Commission on Sexual Assault in the Military (IRC).

The IRC was established by Order of the Secretary of Defense on Feb. 26, 2021, and was given 90 days to make an assessment and then provide recommendations to the Secretary. As related during his 6 May 2021 press conference, the IRC has provided "initial" recommendations related to the "accountability" line of effort (which is focused on the UCMJ itself).[27] Public statements suggest that the IRC has recommended removing commanders from sex assault dispositions. This is consistent with the House's "I am Vanessa Guillén" Act's narrow focus, but it is not clear the extent to which the IRC will agree or depart from other proposed areas of reform.

5. Analysis

Military Justice should be thought of as *strategy* that optimizes Congress's constitutional role in the national security enterprise. Article I, sec. 8, clause 14 ("make rules for") of the Constitution is the way in which the framers believed Congress would most effectively establish what conduct does and does not meet the standard for a professional armed force managed and employed by the Commander-in-Chief. It also provides a constitutional grounding for delegating certain related functions to the Commander-in-Chief (see Articles 22 and 33, UCMJ). The UCMJ, and the President's Manual for Courts-Martial (MCM), together provide the "means" and "methods" that optimize the chain-of-command's chances of successfully preparing for and completing its military missions under civilian control. Therefore, reform of the UCMJ should maximize Congress's comfort with this separate and idiosyncratic criminal justice system, which is at least partly a function of enhancing constituents' comfort with system – both those already subject to the UCMJ and those thinking about volunteering to join the Armed Forces.[28] Nevertheless, it ought to remain considerate of the President's ability to manage the system in accordance with the principles of military law; finally, it ought to maximize the uniformed chain-of-command's

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[27] *Transcript: Secretary of Defense Austin and Chairman of the Joint Chiefs of Staff Gen. Milley Press Briefing*, May 6, 2021, https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/2598964/secretary-of-defense-austin-and-chairman-of-the-joint-chiefs-of-staff-gen-mille/.

[28] Geoffrey S. Corn & Victor M. Hansen, *Even If It Ain't Broke, Why Not Fix It?: Three Proposed Improvements to the Uniform Code of Military Justice*, 6 J. NAT'L SEC'Y L. & POL'Y 447, 448 (2013) ("an important aspect of maintaining good order and discipline is having a justice system that is seen by those within the system as fair").

ability to administer the system fairly, transparently, and rationally, while still focusing on military training for and executing military missions.[29]

Both bills suffer from conceptual – not practical – weaknesses. The Senate bill does too much without a grounding in a principled basis. The House bill does not follow its own logic, leaving it doing too little. The Senate bill would excise the commander from all "felonies" and leave only a short, itemized list of "uniquely military offenses" for the commander's jurisdiction. This does not pay adequate respect to the purposes of military law, how the Supreme Court views it, or the natural aptitude and interest of the commander with respect to certain forms of misconduct. The House bill ignores the logical conclusion that follows from asserting the prosecutorial incompetence or partiality/bias of commanders with respect to sexual assault: if they are not competent to address this crime, why not all crimes?

6. Recommendations

a. Consistent with the Senate bill, Commanders should be granted court-martial convening authority for military-related offenses only. But there is a more principled method of distinguishing "martial" offenses from civilian offenses than looking at maximum punishment and name of the offense: pay due regard for what a lay commander is both more interested in and comfortable understanding – the professional obligations of the command itself. This means the focus should be on the *effect* of the alleged misconduct.[30] Looking through this lens, there are seven categories of martial misconduct that are within the both the interest and competence of the commander to identify, prevent, deter, and punish with the same authorities – *constrained by existing due process protections* – they currently have under the UCMJ and MCM.[31]

1. acts or omissions that render the individual servicemember less ready to do his duty or perform the mission (*e.g.*, absence without leave, unfitness because of excessive alcohol consumption or drugs, and certain types of self-injury and recklessness);

2. acts or omissions that endanger or harm other servicemembers or military property (*e.g.*, hazarding a vessel, maltreating subordinates, hazing);

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[29] Dan Maurer, *The Veil (or Helmet) of Ignorance – a Rawlsian Thought Experiment About a Military's Criminal Law*, 55 U. RICH. L. REV. 945 (2021) (formulating four overarching "principles" that should guide the structure, allocation of rights, division of responsibilities, and assignment of authorities in military justice: the Principle of Non-Repulsion; the Principle of Retention; the Principle of Mission Risk Reduction; and the Principle of Compliance).

[30] It is critical to note that this is *not* a call for a return to the grossly unmanageable "service-connection" test rejected by the Supreme Court in Solorio v. United States, 483 U.S. 435 (1987) (overturning O'Callahan v. Parker, 395 U.S. 258 (1969) and the laundry list of possible considerations to meet that test described in Relford v. Commandant, 401 U.S. 355 (1971)). Applying that test very rarely led to consistent disposition decisions; however, *Solorio* overcorrected by winnowing the matter down to simply and only the accused's "status" under the UCMJ – if he was within the personal jurisdiction of Article 2, UCMJ, then he was subject to court-martial for nearly any offense, committed nearly any place, for nearly any reason. *Solorio* ignored the reason why commanders were given prosecutorial and judicial authority in the first place – that is, to enable the unit's mission readiness and mission accomplishment. Re-orienting attention to this fact, it becomes the principle by which Congress can rationally distinguish conduct that ought to be disposed of by a lay commander rather than by an attorney.

[31] Originally published and discussed in Dan Maurer, Larrabee *at the District Court: Misunderstanding Military Criminal Law by the Article III Judiciary is Far From Retired*, 2021 U. ILL. L. REV. ONLINE 23 (February 22, 2021).

3. acts or omissions that interfere with command's self-policing law enforcement authorities (*e.g*., resisting arrest, obstructing the police, false official statements);

4. acts or omissions that interfere with or degrade the command's ability to execute its mission (*e.g*., AWOL, desertion, making false records, contravention of standing orders, disobedience to lawful commands, contempt toward officials, disrespecting non-commissioned officers);

5. acts or omissions that aid the enemy in a time of conflict (*e.g*., desertion, misconduct as a sentry or guard, disclosure of information useful to the enemy, mutiny, sedition, espionage);

6. acts or omissions that depict, for no other reason than their inherent scandalous, shocking or immoral nature, the servicemember as something other than a morally upstanding servicemember, or which embarrass the service itself *(e.g.*, conduct unbecoming an officer and gentlemen, conduct of a nature to bring discredit upon the armed forces);

7. acts or omissions that prejudice "good order and discipline" for some other case-specific, fact-dependent reason.[32]

Under the current UCMJ and M.C.M., there are few martial offenses that are *not also* felonies (if we use the one year in prison as the category marker): very short AWOLs, minor forms of disrespect, some dereliction of duty, for instance.[33] Nearly sixty percent of those acts criminalized under Article 134 (because they "prejudice good order and discipline" or are "of a nature to bring discredit" upon the armed forces) are felonies. This leaves a lot of martial wrongdoing offenses that *have no civilian analogue but for which the commander, not a judge advocate lawyer*, is likely the best positioned to judge whether the alleged violation is severe enough to warrant prosecution under the circumstances. It is not clear why even a senior judge advocate is in a better position to render a disposition decision on these offenses if the very reason they are crimes is because they do one or more of the seven things listed above, undermining command and control or degrading the unit's functionality.

b. Any reform to the UCMJ should clearly identify which of the three "purposes" of military law listed in the M.C.M.'s Preamble is preferenced or dispositive when they potentially conflict in any given case or when designing the system's rules and procedures.[34] According to the Supreme

[32] *See*, *e.g*., 10 U.S.C. § 934.

[33] M.C.M., App. 12 ("Maximum Punishment Chart"), at A12-1 – A12-8.

[34] Noted scholars and practitioners of military justice lament that nowhere in the law, or in military doctrine, is this preference made clear – nor are the terms even defined officially. Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline?*, 66 CLEV. ST. L. REV. 123 (2017). Leading military justice scholar David Schlueter has had, it appears, a change in his own view of the matter. *Compare* David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's – A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 10-11 (1991) ("There should be no doubt, however, that if military justice is to be viewed as a legitimate system of criminal justice in today's society, it must be viewed primarily as a tool of justice"), *with* David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 77 (2013) ("the Preamble to the MCM should be amended to put good order and discipline in first place, as the true primary purpose of military justice, but recognize the need to provide due process of law"). Though his view may have changed with respect to the dominance of one value over the other, Schlueter remains convinced in the necessary centrality of the commanding officer within the system, whatever its' purpose (personal correspondence on hand with the author).

Court, primacy goes to "justice," not "good order and discipline." By establishing the "end-state" of military justice in strategic terms, Congress can rationally anticipate, address, and match the various "ways" and "means" to meet that end. This makes the military's law for more transparent to the public and understandable to those within its jurisdiction.

c. To avoid confusion and to clarify role of the judge advocate for covered cases, designate the new independent official as the "Chief Prosecutor with convening authority for non-martial offenses." Ensure this office is removed from the chain-of-command of the accused and victim (this would be consistent with both proposed bills).

d. Provide the traditional lay commander with a formal opportunity to provide non-binding disposition recommendations to the Chief Prosecutor for covered offenses (this is not currently addressed in either bill).

e. The authority to *prefer* a matter and trigger various due process protections en route to possible court-martial should be tied to the authority to *refer* the matter from investigation to court-martial. Only the Senate bill currently does this.

f. The Chief Prosecutor for non-martial offenses should be required to convene a preliminary hearing under Article 32, UCMJ, waivable by the accused (this merges existing protections with some elements of the House bill).

g. If the new Chief Prosecutor (or Judge Advocate Convening Authority) elects not to refer the case to a court-martial, the lay commander's disposition discretion should be limited to non-criminal adjudication venues: summary courts-martial, nonjudicial punishment under Article 15, UCMJ, or administrative corrective measures (this is consistent with the House bill).

h. The authority to select court-martial panel members should be addressed; specifically:

i. For non-covered martial offenses, should selection by lay officer convening authorities still be regulated by the qualifications in Article 25(e)(2), UCMJ?

ii. For covered non-martial offenses, should the Chief Prosecutor or independent convening authority rely on the Article 25(e)(2) qualifications or should they reflect further "civilianization" with a form of randomized selection analogous to civilian jury selections?

Conclusion

Readers of this site will certainly have opinions – many informed by decades of trial experience in courts-martial and in advising commanders of all ranks – about these reform proposals. So, too, will the public, should it demonstrate an interest in its military's criminal justice system. But it is reasonable (maybe even crucial), in my opinion, to ensure that all parties with vested interests in the outcome of this reform and all parties who have a say over what is or is not included are on the same page. Debate over specific changes must be made with clarity and precision, but importantly must also be held in full view of how and why military justice evolves over time, and why it is both expected and perfectly legitimate. Finally, debate should not – though of course probably is – be premised on speculation drawn from personal anecdotal experience (whether it be civilian assumptions about the military process and based on civilian analogues, or military command or judge advocate experience). The kind of reform contemplated by these proposals has never been made in American military justice. So claims of inevitable degradation

to morale, cohesion, trust in the command, discipline, military efficiency, or mission readiness should be taken for what they are: *possibly* true in *particular* cases, but not axiomatic and with no evidentiary support. But so too should claims that all commanders are inherently biased and incapable of exercising "judicial temperament" or a fair and balanced prosecutorial bent. There is more nuance to this challenging issue than is typically mentioned, so it is my hope that this summary and analysis goes some way to informing the parties and the public about a system that still remains – despite its "civilianization" – largely in the blurry shadows.