WHO IS PREFERRED TO REFER?
THE PROPOSED TRANSFER OF PROSECUTORIAL DISCRETION IN THE MILITARY

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Abstract

Many argue that military commanders are unfit to have the power of prosecutorial discretion because of their lack of a formal legal education and propensity to abuse discretion when allegations of misconduct involve those in leadership. Meanwhile, others argue that commanders are the only ones fit to hold this power. The current military justice system follows along the latter train of thought, as commanders are the individuals responsible for those within their units and are tasked with the goal of maintaining good order and discipline throughout the military. Consequently, the transfer of prosecutorial discretion to high-ranking military lawyers would undermine commanders' ability to carry out their duties and would negate the purpose of the commander's role as codified in the Uniform Code of Military Justice and Manual for Courts-Martial. Because of this, Congress should reject the proposals contained in both the 2020 Military Justice Improvement Act and § 540F of the 2020 National Defense Authorization Act and should instead enact a new provision to the Uniform Code of Military Justice that re-emphasizes commanders' leadership roles and responsibilities.

I. INTRODUCTION

Crimes of sexual misconduct are a common problem in the military.[1] Every year, hundreds of service members[2] are sexually assaulted.[3] Often times, another service member in the victim's unit or chain of command is the assailant.[4] However, like in the civilian world, crimes involving sexual misconduct are difficult to prosecute and often do not lead to a conviction.[5] Similarly, "nearly 6 out of 10 survivors say they have experienced some form of retaliation for reporting" that someone in their chain of command committed some form of sexual misconduct.[6] As a result, there are many people who believe "Congress has not done enough to protect our service members from sexual assault in the ranks and punish the perpetrators who commit these violent crimes."[7] The majority of Congress and military officials agree that this is true and that reform in the military justice system is necessary to address the problem; however, there is substantial disagreement on what precise changes are necessary.[8]

There are currently two proposals before Congress that suggest transferring prosecutorial discretion from military commanders to high-ranking, experienced military lawyers.[9] This transfer

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[1] KIRSTEN GILLIBRAND, https://www.gillibrand.senate.gov/mjia (last visited Dec. 10, 2020).
[2] In 2019, the military received 1,021 formal sexual harassment complaints. There were 7,285 total sexual assault reports, including those that involve service members as the victim or the accused. *Pentagon: Reports of sexual assault, harassment in the military have increased*, STARS AND STRIPES (Apr. 30, 2020), https://www.stripes.com/news/us/pentagon-reports-of-sexual-assault-harassment-in-the-military-have-increased-1.627966.
[3] *Id.*
[4] *Id.*
[5] *Supra*, note 1.
[6] *Id.*
[7] *Id.*
[8] *See id.*
[9] *See The Key Differences: Gillibrand's Amendment and Levin/McCaskill's Proposal*, PROTECT OUR DEFENDERS, https://www.protectourdefenders.com/key-differences-between-gillibrands-and-levinmccaskills-proposals (last visited Dec. 10, 2020).

of discretion would apply in all cases in which the maximum punishment for the misconduct alleged includes imprisonment for over one year.[10] Similar proposals have been brought several times over the last decade.[11]

Previous versions of these proposals are said to have been rejected largely due to the resistance of experts as well as current and former high-ranking military officials (mostly those who served as commanders and judge advocates).[12] Those opposed to the proposals cite various reasons, including commanders' loss of the ability to lead effectively, efficiency concerns, and the lack of qualified personnel.[13] Attempts to transfer discretion have been cited as "a solution in search of a problem" because many people do not believe that undercutting commanders' abilities to lead is a solution to the military's sexual assault problem.[14]

Instead, changes to the codified law that governs the military justice system, such as those enacted in January 2019, should be used to address problems with the use (or abuse) of discretion.[15] Specifically, the focus should be on re-emphasizing the commander's role as a leader, additional training for commanders, and more review, rather than a total overhaul of the current military justice system because commanders, not military lawyers, are the best suited for making decisions regarding the discipline of service members within their units, and these changes are sufficient to decrease the likelihood of abuses of discretion.[16]

This Comment provides a general overview of the military justice system and argues that Congress should reject recent proposed changes to prosecutorial discretion. Part II provides background information regarding the Uniform Code of Military Justice (UCMJ) and the two proposals before Congress. Finally, Part III includes proposed language for the UCMJ and analyzes why the power to (or to not) refer or prefer charges to courts-martial should remain with commanders.

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[10] S. 1789, 116th Cong. (2020); S. 1790, 116th Cong. (2020).
[11] *See* Chris Jenks & Geoffrey S. Corn, *The Military Justice "Improvement" Act of 2020*, https://www.caaflog.org/uploads/1/3/2/3/132385649/caaflog_mjia.pdf (last visited Jan. 22, 2021)
[12] Geoffrey S. Corn, Chris Jenks & Timothy C. MacDonnell, *A Solution in Search of a Problem: The Dangerous Invalidity of Divesting Military Commanders of Disposition Authority for Military Criminal Offenses*, JUST SECURITY (Jun. 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/.
[13] *See id.*
[14] *See id.*
[15] *See FY17 NDAA and the Military Justice Act of 2016*, DACIPAD (2017), https://dacipad.whs.mil/images/Public/10-Reading_Room/02_DACIPAD_Mtg_Materials/DACIPAD_Meeting_Materials_20170119.pdf.
[16] *See* General Michael G. Dana, *Military Justice Act of 2016 Training for Commanding Officers with Court-Martial Convening Authority*, MARADMIN (Nov. 5, 2018), https://www.marines.mil/News/Messages/MARADMINS/Article/1682574/military-justice-act-of-2016-training-for-commanding-officers-with-court-martia/.

II. AN OVERVIEW OF THE CURRENT MILITARY JUSTICE SYSTEM

While the military justice system has many similarities to the civilian criminal system, there are several key differences that distinguish the two.[17] Chapter 47 of the United States Code contains the Uniform Code of Military Justice, which is the statutory law that governs this system.[18] Under this Code, military commanders serve as the convening authority and have prosecutorial discretion for all offenses committed by service members.[19] As a result, commanders have broad discretion in determining what type of punishment, whether administrative or judicial, is appropriate.[20] Because commanders are not lawyers, they work closely with military lawyers to ensure that only appropriate legal action is taken.[21] Due to high profile cases in the media, such as that of Vanessa Guillen, many people believe that commanders should not have this much power and are advocating for a transfer of prosecutorial discretion for a large number of offenses; however, many people, including former commanders and judge advocates, are opposed to these changes.[22]

A. The Current Military Justice System

In the military, when a member is accused of committing a crime listed in the punitive articles section of the UCMJ, the installation commander has broad discretion in deciding whether charges should be referred to a court-martial; thus, the commander is referred to as the convening authority and has prosecutorial discretion.[23]

There are three types of courts-martial: (1) summary courts-martial, (2) special courts-martial, and (3) general courts-martial.[24] These each vary in several ways, with summary courts-martial being quick tribunals for minor offenses and lesser punishments; special courts-martials mirror civilian criminal trials; and general courts-martial which are reserved for the most serious offenses and involve the harshest punishments.[25]

Although the process of a court-martial is similar to civilian criminal procedure, there are a few important differences.[26] When misconduct by a service member is alleged, the proper agency investigates the matter to determine whether there is sufficient evidence to support the accusation

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[17] *See* Tim MacArthur, *Criminal Justice vs. Military Justice*, MVETS (Jan. 15, 2019), https://mvets.law.gmu.edu/2019/01/15/criminal-justice-vs-military-justice/.
[18] Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C.A. Ch. 47 (West).
[19] Article 22, 10 U.S.C.A. § 822.
[20] *See* Michael Paradis, *Is a Major Change to Military Justice in the Works?*, LAWFARE (May 4, 2020, 11:30 AM), https://www.lawfareblog.com/major-change-military-justice-works.
[21] The Air Force Judge Advocate General's School THE MILITARY COMMANDER AND THE LAW 7 (Major Jenny A. Liabenow et al. eds., 15th ed. 2019).
[22] *See* Alex Horton, *Proposed Vanessa Guillen law would transform military's sexual assault misconduct inquiries*, THE WASHINGTON POST (Sept. 16, 2020, 4:04 PM), https://www.washingtonpost.com/national-security/2020/09/16/proposed-vanessa-guilln-law-would-transform-militarys-sexual-misconduct-inquiries/.
[23] Rule for Courts-Martial [hereinafter R.C.M.] 306.
[24] R.C.M. 201(f).
[25] *See id.*
[26] *See supra*, note 17.

against the member.[27] Upon completion of the investigation, a report is provided to the member's immediate commander.[28] The commander then reviews the potential charges and decides whether or not to proceed with judicial, non-judicial, or no punishment with the advice of the installation's staff judge advocate.[29] If the commander chooses to proceed with judicial punishment, the member is formally charged with the crimes in a process called "preferral."[30] The legal office drafts the charge(s) on a charge sheet and the officer who decides to prefer the charges (usually the immediate commander) signs the sheet and takes an oath stating the charges are true to his knowledge.[31] This oath ensures that there is probable cause based on the evidence.[32] The accused member then receives access to military defense counsel.[33] Prior to the accused being sent to court-martial, the commander (the convening authority) is tasked with reviewing all of the available information to determine whether a court-martial will even take place.[34] Prior to "referral" to courts-martial, an Article 32 hearing is required, where counsel for both the government and defense will meet before a preliminary hearing officer (PHO), who will determine whether there is sufficient evidence to justify referring the charges and proceeding with a court-martial.[35] This hearing is comparable to a probable cause hearing in the civilian criminal process.[36]

Similar to the civilian criminal process, the accused also has the opportunity to enter a guilty plea.[37] This opportunity occurs once charges have been preferred to the accused and referred to a court-martial.[38] The accused is able to negotiate a pre-trial agreement with the convening authority if he wishes.[39] Unlike in a civilian trial, the military judge will only accept a guilty plea and a pre-trial agreement if he is satisfied that the accused fully understands both the charges against him and the consequences of the guilty plea.[40] If the accused chooses to plead not guilty, the court-martial proceeds to a tribunal, usually in front of a panel of members the convening authority has selected.[41] Panels are made up of commissioned officers from a different unit and of a higher rank than the accused.[42] If the accused is an enlisted member, he may request that enlisted members also serve on the panel.[43] If the accused elects to have enlisted members on the panel, the enlisted members will also be from a different unit and of a higher rank than the accused.[44] Panel members are sworn in before the court and are empaneled, similar to civilian juries, after

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[27] *See* R.C.M. 701.
[28] R.C.M. 303.
[29] *See* R.C.M. 306, 406.
[30] R.C.M. 307, 308.
[31] *Id.*
[32] *Id.*
[33] R.C.M. 405(d)(2)-(4).
[34] R.C.M. 405(a).
[35] *Id.*
[36] *See generally* U.S. Attorneys, *Preliminary Hearing*, JUSTICE 101, https://www.justice.gov/usao/justice-101/preliminary-hearing (last visited Dec. 11, 2020).
[37] R.C.M. 705.
[38] *Id.*
[39] R.C.M. 705(a).
[40] R.C.M. 705(e)(3).
[41] *See* R.C.M. 912A(a), 503(a).
[42] *Id.*
[43] R.C.M. 912A(b).
[44] *Id.*

voir dire.[45] The court-martial then proceeds much like a civilian trial, with opening statements, cases in chief, rebuttal and sur-rebuttal, and closing statements.[46] After both the government and the defense have rested, the military judge instructs the panel on the applicable law and the panel issues its decision.[47] If the accused is found guilty, the tribunal proceeds to a sentencing hearing.[48] At this time, the panel or the military judge sentences the accused according to the guidelines in the UCMJ.[49]

The military justice system is intended to provide a means for military leaders to ensure that each member of each branch of the armed forces is fit and ready for duty at all times. The Manual for Courts-Martial states that "the purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness, and . . . to strengthen the national security of the United States."[50] Military commanders are tasked with the responsibility of "promot[ing] justice" and "maintain[ing] good order and discipline."[51] With this great responsibility comes great power, including that of prosecutorial discretion and acting as the convening authority.

The convening authority power allows military commanders to enforce discipline and ensure that all within their chain of command are fit and ready for deployment, as commanders are given the ability to issue various forms of non-judicial punishment or prefer charges to military courts-martial.[52] Commanders have held this power in some form since the beginning of the United States, as the convening authority power that exists today is based on what George Washington granted commanders under the Articles of War in 1775.[53]

Military commanders do not possess a formal legal education; instead, they have extensive training and experience in military operations; therefore, they work closely with military lawyers to ensure that they (commanders) make lawful decisions when misconduct is alleged.[54] Commanders are "officer[s] who occup[y] a position of command pursuant to orders of appointment."[55] They are tasked with organizing, training, and equipping the service members within their chain of command, so that they are fit and ready for deployment at any time.[56] Their "authority over active duty military members extends to conduct both on and off the installation."[57] Similarly, "commanders always have administrative authority to hold reservists accountable for

[45] R.C.M. 912(d)-(g).
[46] *See* R.C.M. 913.
[47] *See* R.C.M. 921, 922.
[48] R.C.M. 1001.
[49] R.C.M. 1002.
[50] *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), Preamble, at I-1.
[51] *Id.*
[52] Rules for Courts-Martial (R.C.M.) 301(b), 306(a), 306(c), 401, 403, 404, 407.
[53] *Infra*, note 66.
[54] *Supra*, note 21, 7.
[55] *Id.* at 10.
[56] Secretary of the Air Force, *Air Force Policy Directive 10-26* (Aug. 20, 2019), https://fas.org/irp/doddir/usaf/afpd10.26.pdf.
[57] *Supra*, note 21, 10.

misconduct occurring on or off duty, irrespective of their military status when the misconduct occurred." [58]

Because commanders are not lawyers, they rely heavily on the advice of the staff judge advocate assigned to their installation in performing their duties as the convening authority.[59] "The staff judge advocate delivers professional, candid, independent counsel and legal capabilities" to commanders.[60] The staff judge advocate is an officer and senior military lawyer on active duty who serves as a part of the installation commander's staff.[61] This person is in an advisory role to the installation commander and to the lower-level unit commanders on the base, and also supervises the members of the base legal office (assistant judge advocates, paralegals, and reservist and civilian attorneys).[62] One of the most important duties of the staff judge advocate is to ensure that commanders take appropriate, lawful action when misconduct by service members is alleged.[63] Doing so prevents commanders from asserting unlawful influence or abusing their prosecutorial discretion.[64]

B. The Uniform Code of Military Justice

The post-World War II American military suffered from a lack of uniformity and a problem with sexually motivated crimes.[65] At that time, punishments were often found to be "consistently excessive," demonstrating the problem of commanders with excessive amounts of power.[66] In 1948, President Harry S. Truman signed the Elston Act, a revision to the Articles of War, into law.[67] It "provided for greatly increased participation by [military] lawyers at all stages and all roles" of the military justice process, gave those in the armed forces accused of crimes increased access to better-qualified counsel, and provided trial protections to criminal defendants.[68] It also expanded independent legal review by requiring a judicial council to review cases that resulted in a sentence of life in prison or a removal of an officer or cadet.[69] Similarly, The Judge Advocate General could request that any other case be reviewed. Those cases could be thrown out for "procedurally defective convictions and grossly unfair sentences."[70] The Elston Act was the origin

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[58] *Id.*
[59] *Id.* at 7.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Generally, military personnel are immune from liability for decisions made within the scope of their employment; however, they may be held personally liable for actions outside the scope of their employment or that clearly violate statutory law. "Article 138 of the UCMJ gives members of the Armed Forces who believe they have been wronged by their commanding officer the right to complain and seek redress." Matters within the scope of Article 138 include discretionary acts or omissions by a commander that adversely affect the member personally and are allegedly unlawful, clearly unjust, or beyond the legitimate authority of the commander. *Supra*, note 21, 9-10.
[65] CHRIS BRAY, COURT-MARTIAL 295 (W. W. Norton & Co., 1st ed. 2016).
[66] *Id.* at 301.
[67] *Id.* at 302.
[68] *Id.* at 303.
[69] *Id.*
[70] *Id.*

of the idea of "'unlawful command influence'" and was created to limit the power of commanders as the convening authority.[71] It proposed a complete separation of prosecutorial discretion from command; however, this section was not passed and was regarded as "an obvious assault on command authority itself."[72] Soon after, a working group of service members, lawyers, and civilian professionals began conducting research and meticulously combing through existing military law—including the Elston Act.[73]

Eventually, a new code, the UCMJ, combined much of the then-existing law with added improvements and clarification to that contained in the Articles of War.[74] It was introduced to both the House and the Senate and quickly became a fight of "lawyers versus soldiers."[75] Many lawyers who opposed the UCMJ, did so because they believed that without a separation provision, it left too much power in the hands of commanders; however, soldiers—both officers and enlisted members—felt the opposite and believed the code was "an assault on the military and its ability to protect the nation."[76] The lawyers believed that the UCMJ was still "far too military in its structure" while service members felt as though "the UCMJ turned military courts into a sorry echo of the civilian justice system."[77] Neither side was completely happy because the UCMJ was (and was intended to be) a middle ground between these two ideologies that restricted commanders and decreased the likelihood of unlawful influence in the future by increasing lawyer involvement, adding additional levels of review, and requiring uniformity in decision-making.[78]

Today, the UCMJ remains the codified law that governs all of the United States' Armed Forces, and it is often revised to meet the military's evolving needs.[79] It grants military commanders broad discretion in dealing with disciplinary issues within their chain of command.[80] In its current form, the UCMJ gives commanders options, including: no action, administrative action (i.e. Letter of Reprimand, Article 15, administrative discharge), and punitive action (i.e. preferral to court-martial).[81] Commanders have the power to make final decisions on what type of punishment is appropriate for a service member after consulting with the installation's staff judge advocate.[82]

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[71] *Id.*
[72] *Id.* at 304.
[73] *Id.* at 306.
[74] *Id.* at 307.
[75] *Id.* at 308.
[76] *Id.*
[77] *Id.* at 309.
[78] *See id.*
[79] Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C.A. Ch. 47 (West).
[80] David A. Schlueter and Lisa M. Schenck, *A White Paper on American Military Justice: Retaining the Commander's Authority to Enforce Discipline and* Justice, 5, https://www.court-martial-ucmj.com/files/2020/07/White-Paper-on-Military-Justice-Reforms-2020-w-App.pdf.
[81] *Id.*
[82] *Id.*

In January 2019, the Military Justice Improvement Acts of 2016 and 2018 brought several needed changes to the UCMJ.[83] These changes were made in response to repeated pushes for increased scrutiny on the decisions commanders make.[84]

Commanders, as well as other officers and enlisted members, are now required to undergo "periodic training regarding the purposes and administration" of the UCMJ.[85] This is to ensure that commanders know the laws governing the armed forces, as well as when and what actions are appropriate in different situations.[86] These trainings vary between branches and constantly change as the needs of the individual branch changes.

An updated Appendix to the Manual for Courts-Martial now gives commanders factors to consider when deciding whether they will prefer charges in cases of alleged misconduct.[87] These factors include: the interest of justice, victim disposition preference, harm caused to victims of the offense, good order and discipline, and any other special factors, such as whether the accused might be prosecuted in another jurisdiction.[88]

Additionally, when a convening authority makes a decision that is contrary to what an installation's staff judge advocate believes to be the proper course of action, the staff judge advocate, as well as the Secretaries of the Service for Review conduct an internal review.[89] If the staff judge advocate and commander agree that certain cases, such as those involving sexual assault allegations, should not be referred to a court-martial, the case is referred to the immediate superior in the chain of command for review.[90] These additional levels of review were added to the UCMJ in an effort to limit commanders' authority and decrease the likelihood of an abuse of discretion by increasing scrutiny on their decisions.

Finally, the revised UCMJ also states that judge advocates should serve as Preliminary Hearing Officers (PHOs) in Article 32 hearings whenever practicable.[91] Article 32 hearings are held after the preferral of charges on the accused member and prior to the referral of charges to a court-martial.[92] These are comparable to a probable cause hearing in the civilian world.[93] The accused, defense counsel, and prosecution go before a PHO (usually a judge advocate) and explain what charges they desire to have brought before the court and any arguments as to why those

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[83] Meghann Myers, *Here's what you need to know about the biggest update to the UCMJ in decades*, MILITARY TIMES (Jan. 15, 2019), https://www.militarytimes.com/news/your-army/2019/01/15/heres-what-you-need-to-know-about-the-biggest-update-to-ucmj-in-decades/.
[84] *Supra*, note 1.
[85] Article 137, 10 U.S.C. § 937.
[86] *See id.*
[87] *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), App'x.
[88] *Id.*
[89] *See supra*, note 21.
[90] *See* id.
[91] Article 32, 10 U.S.C. § 832.
[92] *Id.*
[93] *See supra*, note 36.

charges should or should not be brought.[94] The PHO then determines whether there is enough evidence against the accused to appropriately convene a member panel and proceed to a court.[95]

C. Proposed Transfers of Prosecutorial Discretion

Beginning in 2013, New York Senator, Kristen Gillibrand, began pushing for a change in the military justice system that would give less power to commanders and more to military lawyers in an effort to increase the prosecution rate in crimes involving sexual misconduct.[96] In response to various high-profile cases, Senator Gillibrand has now proposed seven versions of the 2013 Military Justice Improvement Act.[97] The most notable aspect of these proposals and the portion at issue is the request that Congress strip military commanders of their prosecutorial discretion in felony-level, common law offenses and to grant that discretion to high-ranking military lawyers.[98]

In 2020, there were two proposals before Congress with the same goal of taking prosecutorial discretion from commanders for certain offenses and granting it to judge advocates.[99]

1. Military Justice Improvement Act 2020

The first proposal before Congress is a portion of the Military Justice Improvement Act of 2020. This bill is similar to the Military Justice Improvement Acts of 2013, 2014, 2015, 2016, 2017, and 2019 that the Senate previously rejected, despite New York Senator Kirsten Gillibrand's repeated attempts.[100] This is largely attributed to the fact that nearly every expert involved in studies of the American military justice system stated that the prosecutorial decision-making process should not be changed.[101]

The Military Justice Improvement Act of 2020 proposes an amendment to title ten of the United States Code, "to reform procedures for determinations on disposition of charges and the convening of courts-martial for certain offenses under the Uniform Code of Military Justice."[102] It includes the transfer of discretion with respect to charges under chapter 47 of title 10 of the United States Code (the UCMJ) for the following offenses: those for which the maximum punishment includes confinement for more than one year; those for obstruction of justice under 10 U.S.C. § 931b (UCMJ art. 131b), regardless of the maximum punishment authorized; those for retaliation for reporting a crime under 10 U.S.C. § 932 (UCMJ art. 132), regardless of the maximum punishment authorized; those for conspiracy to commit an offense punishable under 10 U.S.C. § 881 (UCMJ art. 81); those for solicitation to commit an offense under 10 U.S.C. § 882 (UCMJ art.

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[94] *Id.*
[95] *Id.*
[96] *Supra*, note 1.
[97] *Id.*
[98] *See id.*
[99] *See generally supra*, note 9.
[100] Kyle G. Phillips, *Military Justice and the Role of the Convening Authority*, U.S. NAVAL INSTITUTE (May 2020), https://www.usni.org/magazines/proceedings/2020/may/military-justice-and-role-convening-authority.
[101] *Id.*
[102] S. 1789, 116th Cong. (2020).

82); and those for attempt to commit an offense under 10 U.S.C. § 880 (UCMJ art. 80).[103] Per the proposed legislation, discretion would be transferred to high-ranking, experienced judge advocates.[104]

> (1) The determination whether to prefer such charges or refer such charges to a court-martial for trial, as applicable, shall be made by a commissioned officer of the Armed Forces designated in accordance with regulations prescribed for purposes of this subsection from among commissioned officers of the Armed Forces in grade O–6 or higher who—
> (A) Are available for detail as trial counsel under 10 U.S.C. § 827 (UCMJ art. 27);
> (B) Have significant experience in trials by general or special court-martial; and
> (C) Are outside the chain of command of the member subject to such charges.[105]

If a judge advocate were to choose to prefer or refer charges to court-martial, it would be for all known offenses, even if some of those offense fall within the commander's discretion.[106] The judge advocate's decision would be binding on the convening authority.[107] However, if a judge advocate were to choose to not prefer or refer charges to a general or special court-martial, the commander would retain the authority to refer charges to a summary court-martial or impose non-judicial punishment as authorized by 10 U.S.C. § 815 (UCMJ art. 15).[108]

2. 2020 National Defense Authorization Act

The second proposal is found in § 540F of the 2020 National Defense Authorization Act. It requires publication of the results of a study on the feasibility and advisability of an alternative military justice system in which determinations as to whether to prefer or refer charges for trial for any UCMJ offense, for which the maximum punishment authorized includes confinement for more than one year, is made by a judge advocate in grade O-6 or higher who has significant experience in criminal litigation and is outside of the chain of command of the accused rather than by an officer who is in the accused's chain of command.[109]

The language of this proposal is very similar to that of the Military Justice Improvement Act.[110] The passage of the Military Justice Improvement Act would actually remove the commander's ability to decide to prosecute and transfer that discretion to military lawyers.[111] It would also transfer the commander's authority to empanel juries for cases involving senior-level officers.[112]

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[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] S. 1790, 116th Cong. (2020).
[110] *See generally* S. 1790, 116th Cong. (2020); *see also* S. 1789, 116th Cong. (2020).
[111] *See* S. 1790, 116th Cong. (2020).
[112] *Id.*

Senators Levin and McCaskill's proposal within the National Defense Authorization Act "directs the Secretary of Defense to study and report . . . on a proposed 'alternative military justice system.'"[113] "This proposal, if implemented, would at a minimum invert a time-tested and carefully calibrated command-lawyer relationship, making the commander the advisor and the lawyer the decision maker."[114] This would effectively mean that commanders would play no legitimate role in responding to allegations of misconduct on the part of service members they are responsible for.[115]

Advocates for the transfer of prosecutorial discretion believe that the current military justice system "prevents victims of sexual assault from coming forward, as those who committed the crime are often superiors."[116] They believe that giving military lawyers will provided "an objective review of the facts by someone who knows what they're doing, who is trained to be a prosecutor, [and] who understand[s] prosecutorial discretion."[117] This in turn would, theoretically, increase accountability when those who are in leadership are accused of engaging in misconduct.[118]

In response to § 540F and the Military Justice Improvement Act proposals, former commanders and military lawyers have expressed their opposition.[119] These high-ranking, former military officials recognize that efforts to improve the military's response to allegations that a commander has committed sexual misconduct have "resulted in a number of important statutory and policy changes, but after careful consideration almost every expert involved in studying the military justice system rejected proposals to remove or transfer commanders' prosecutorial authority."[120]

Over one-hundred former commanders and judge advocates wrote their opinions in a letter to Congress that emphasized their concerns that "stripping commanders of this authority would jeopardize the national security of the United States" by preventing commanders from adequately ensuring the military's readiness for missions.[121] They also stated that they have various logistical concerns, including the lack of qualified legal personnel and the overall infeasibility of the transfer of discretion.[122]

D. High Profile Cases & The Media

When military commanders take action that others find controversial—or when they fail to take any action at all—their choices attract vast amounts of media attention. The most recent

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[113] *Supra*, note 9.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *See id.*
[119] *Supra*, note 12.
[120] *Id.*
[121] *Id.*
[122] *Id.*

instance of this comes from the lack of action taken by the installation commander at Fort Hood in Killeen, Texas.

Vanessa Guillen went missing from the parking lot of her barracks at Fort Hood in April 2020.[123] Her remains were discovered in a shallow grave in June, and she is believed to have been bludgeoned to death.[124] Guillen had spoken to her family and her leadership about her suspected killer, Aaron Robinson, who she accused of sexually harassing her prior to her death.[125] As a result of Guillen's murder, the media and politicians have heavily and publicly scrutinized her leadership's failure to take action.[126] Because people believe commanders are not taking appropriate action or being held accountable for those choices, Guillen's death is being used to advance the agenda of moving prosecution decisions in sexual misconduct crimes out of the military chain of command.[127]

III. MILITARY COMMANDERS SHOULD RETAIN CONVENING AUTHORITY

Congress should make minor changes to the preamble of the UCMJ and reject both proposals for the transfer of prosecutorial discretion. Changes to the preamble, combined with other recent changes to the UCMJ, when used correctly, are sufficient to ensure that justice is carried out. Senator Gillibrand's proposed changes to the structure of the military justice system would negatively impact the system, without adequately addressing the concerns of Congress or the public. Part A of this Section includes proposed additional language for the preamble of the UCMJ and discusses its potential impact on military justice. Part B explores problems with the proposed changes before Congress by evaluating how it goes against the statutory intent of the UCMJ as well as logistical concerns in the form of structure and a lack of qualified personnel. Next, Section C discusses counterarguments to this Comment. Section D then presents a hypothetical explaining how Vanessa Guillen's case would have been handled had those in her chain of command followed the law.

A. Proposed Additional Language for the UCMJ

Advocates for commanders retaining prosecutorial discretion have proposed that language be added to the UCMJ to "reaffirm the view that the primary purpose of the military justice system is to enforce good order and discipline."[128] The preamble to the Manual for Courts-Martial states, "the purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness, and . . . to strengthen the national security of the United States."[129] Military commanders are tasked with the responsibility of

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[123] Raja Razek, *Army says Vanessa Guillen died 'in the line of duty' and affords family some benefits*, CNN (Oct. 20, 2020, 9:29 PM) https://www.cnn.com/2020/10/20/us/vanessa-guillen-army-death-determination/index.html.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Supra*, note 80.
[129] *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), Preamble, at I-1.

"promot[ing] justice" and "maintain[ing] good order and discipline."[130] The proposed language would similarly "reflect[] the long-standing and tested view that the military justice system is designed primarily to promote good order and discipline."[131] The following language has been recommended to be added as 10 U.S.C. § 801a:

> § 801a. Art. 1a. Purpose of Military Law:
>
> The purpose of military law is to assist in maintaining good order and discipline in the armed forces, to provide due process of law, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.[132]

Had the commanders at Fort Hood abided by this provision and complied with their duties as set out in the UCMJ and the Manual for Courts-Martial, Vanessa Guillen's case would likely have had an entirely different result.[133] Her leadership was required to assist in maintaining good order in discipline and to provide due process of law.[134] As a result, when Guillen reported to her immediate supervisor that she was being sexually harassed, her unit-level commander should have notified the proper authorities and initiated an investigation into her claims.[135] Had this investigation occurred at the outset, it is likely Guillen's life would have been spared, as she would have been separated from her abuser almost immediately upon reporting, and any retaliation against her would have become much more difficult to accomplish. Similarly, the misconduct would have been discovered; charges would have likely been preferred and subsequently referred; and appropriate action could have been taken to hold her abuser accountable, ensure justice, and deter other service members from engaging in further, similar misconduct. Had Guillen's leadership taken appropriate action in her case and in others, Fort Hood would not be so plagued with crime, particularly that of a sexual nature.[136]

B. Congress Should Reject Both the Defense Authorization Act and Military Justice Improvement Act and Allow Military Commanders to Retain Convening Authority Power

The 2020 versions of the Military Justice Improvement and National Defense Authorization Acts each propose the transfer of prosecutorial discretion from commanders to military lawyers in all felony-level crimes, including those that are military specific. If Congress were to accept either of the current proposals and give prosecutorial discretion to high-ranking military lawyers, there would be a number of unintended, negative consequences on the military justice system, as commanders would lose the ability to maintain the crucial balance of justice and

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[130] *Id.*
[131] *Supra*, note 80.
[132] *Supra*, note 80.
[133] *See* Jared Serbu, *Army fires, disciplines 14 leaders for failed command climate at Fort Hood*, FEDERAL NEWS NETWORK (Dec. 9, 2020, 7:16 AM), https://federalnewsnetwork.com/army/2020/12/army-fires-disciplines-14-leaders-for-failed-command-climate-at-fort-hood/.
[134] *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), Preamble, at I-1.
[135] *See* R.C.M. 701.
[136] *See supra*, note 133.

discipline within the armed forces.[137] Commanders are to organize, train, and equip those below them in their chain of command.[138] Because they are responsible for the actions of those members, they are also responsible for disciplining them when misconduct is alleged so the unit or installation remains deployable and fit for duty at all times.[139]

1. Statutory Intent

In 1951, Congress passed the bill containing the UCMJ, and the Code was enacted.[140] Put simply, it was created in an effort to streamline justice.[141] It was a means of avoiding the problem of commanders taking inconsistent or inappropriate action and has led to the creation of many other, non-military laws.[142] It intentionally left certain powers, such as that of prosecutorial discretion, with commanders because they have specialized, military knowledge and a unique ability to understand the types of cases that arise in the military.[143] Taking prosecutorial discretion and the convening authority power away from commanders is directly averse to the statutory intent of the UCMJ. This is because commanders are responsible for making an array of decisions regarding those within their chain of command (i.e. who does what jobs, who engages in combat relations, who works when, etc.).[144] They are also responsible for accomplishing the mission and for the things those in their chain of command do (or do not) do.[145] As a result, it is vital that commanders continue to remain "vested with the authority to initiate disciplinary action using all the tools historically validated as contributing to this objective."[146] If the military is to be effective, service members must have the discipline to follow orders commanders give them, and commanders must be entrusted with the power to take action when service members fail to follow such orders.[147]

If discretion were to be transferred to military lawyers, those lawyers would essentially take over the leadership role by undercutting and making ineffective commanders' decisions.[148] Under the current proposals, if a qualified judge advocate were to make the decision to refer charges to a special or general court-martial, that decision would become binding on the commander.[149] As a result, the commander would be unable to negotiate a pre-trial agreement with the accused that resulted in the dropping of a serious charge.[150] Pre-trial agreements, like plea agreements in civilian law, play a crucial role in the military justice system. They often incentivize

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[137] *See id.*
[138] *Supra,* note 56.
[139] Lieutenant Colonel Joe Doty & Captain Chuck Doty, *Command Responsibility and Accountability*, MIL. REV (Jan. 2012), https://www.armyupress.army.mil/Portals/7/military-review/Archives/English/MilitaryReview_20120229_art009.pdf.
[140] *Supra,* note 65, 309.
[141] *See id.*
[142] *See id.*
[143] *See id.*
[144] Supra, note 12.
[145] *Id.*
[146] *Id.*
[147] *See id.*
[148] *Supra,* note 12.
[149] *Id.*
[150] R.C.M. 705.

members to admit to crimes they have committed in exchange for a lesser punishment.[151] This removes some of the load on the military court system and maximizes efficiency.[152]

These binding decisions also prevent commanders from taking the preferred progressive discipline approach.[153] If the decision is made to prefer or refer charges, the commander loses the ability to issue non-judicial punishment such as a letter of reprimand or Article 15.[154] This zero to one hundred approach would keep members from having the opportunity to learn from their mistakes and be rehabilitated before more serious action, such as a court-martial, demotion in rank, or administrative discharge, is taken even though these are extremely severe punishments that have the ability to impact a member's life in significant ways that a conviction in civilian court cannot.

Military lawyers are ill-equipped to take over the commander's leadership role because they lack the training, knowledge, and experience, specifically in an operational capacity, to effectively make these types of decisions, especially in deployed areas.[155] If either of these proposals is enacted, "lawyers would have exclusive prosecutorial authority" over "a range of offenses unique to military operations and the conduct of hostilities to include aiding the enemy, desertion, espionage, looting/pillaging, malingering, misbehavior before the enemy, mutiny/sedition, and spying," which would be dangerous because of military lawyers' lack of operational knowledge and their not being present in deployed/combat areas.[156] For the most part, military lawyers do not serve in the actual unit, so they lack both the requisite skill and knowledge to evaluate the potential harm of choosing to refer charges when a member is deployed or engaged in complex operations.[157]

Court-martial offenses in the military are not "one size fits all" like they are in the civilian world.[158] As a result, the same crime is not always appropriately dealt with in the same way—circumstances have a substantial impact on what type of discipline may be appropriate.[159] For example, if a member who is employed as a watchman derelicts his duties on a base within the continental United States, he, according to the black letter of the law, commits the exact same offense as a member who is employed as a watchman and derelicts his duties in Afghanistan. However, these two crimes should not be dealt with in the same manner because in reality, they likely have substantially different impacts on the safety of the unit.[160] This is dissimilar to crimes in the civilian world, which are to be treated the same, regardless of who commits them and under what circumstances. Because military lawyers are not trained or experienced in operations, they

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[151] Stephen P. Karns, *Military Pre-Trial Agreements*, KARNS LAW FIRM, https://www.usmilitarylawyer.com/military-pre-trial-agreements.asp (last visited Nov. 6, 2020).
[152] *See id.*
[153] UCMJ, 10 U.S.C.A. Ch. 47 (West).
[154] *See supra*, note 80.
[155] *See generally, supra*, note 12.
[156] *Id.*
[157] *Id.*
[158] Elizabeth Cameron Hernandez, *Is "Mandatory Justice" Right for the Military?*, FED. SENT'G REP., https://online.ucpress.edu/fsr/article-abstract/27/3/131/43353/Is-Mandatory-Justice-Right-for-the-Military?redirectedFrom=PDF.
[159] *Id.*
[160] *Id.*

are unable to make effective, appropriate decisions regarding punishment in situations such as this one.

Units can also be impacted substantially if one of their members is referred to a special or general court-martial while deployed, as that member must immediately be taken from the unit and shipped back to the United States. The same is true if the member is a victim or witness that is needed to testify in a court-martial. Members being stripped from their units in deployed environments is a national security concern and will often result in the inability to complete the mission.

The physical separation between the member and the individual with prosecutorial discretion poses a substantial threat to the efficiency of the preferral, referral, and court-martial processes because the military consists of many constantly moving parts.[161] Commanders within an accused's chain of command having prosecutorial discretion ensures that matters involving misconduct by service members are dealt with swiftly.[162] Because of the transient nature of the military as well as the need to always be deployable, it is crucial that all of the steps of preferral and referral can be accomplished in a relatively short period of time that complies with the required timelines set out in the Manual for Courts-Martial.[163]

If discretion is transferred as proposed, a military lawyer outside of the accused's chain of command on a separate installation would make the decision to prefer or refer charges to courts-martial. This separation of time and space between the accused and the authority presents efficiency concerns and speedy trial clock concerns.[164] The entire military justice system, including the current system for investigations, would have to be re-structured completely.[165] It would also be difficult for charges to be preferred on the member in-person by the proper authorities.[166] There would be no guarantee that a member's case would or could be dealt with within the requirements of a speedy trial and before necessary witnesses moved or were deployed.[167]

2. Personnel and Structure Concerns

There are various other procedural concerns if discretion is transferred to military lawyers with significant litigation experience who are ranked O–6 or above.[168] First and foremost, the military does not have an adequate number of judge advocates who meet the qualifications in the proposals, and additional, qualified judge advocates cannot simply be hired because of the structure of the JAG corps and the military's promotion system.[169] Similarly, in 2012, the Recruit Sustainment Program (RSP) stated:

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[161] *See supra*, note 21, 52.
[162] *See id.*
[163] *See id.*
[164] R.C.M. 707.
[165] *See generally, supra*, note 12.
[166] *See id.*
[167] *See* R.C.M. 707.
[168] *Supra*, note 12.
[169] *Id.*

> The existing pool of O-6 judge advocates who meet the stated prosecutor qualifications is finite; and many of these officers routinely serve in assignments related to other important aspects of military legal practice. Therefore, implementing the MJIA's mandate, absent an increase in personnel resources, may result in under-staffing of other important senior-legal positions.[170]

Consequently, there is a fear that meeting the proposals' personnel requirements would "necessitate either an increase in personnel resources or not staffing other important senior legal positions."[171] This "would be more accurately referred to as a restructuring of the JAG Corps" because "the disparity of O-6 JAs with significant criminal litigation experience needed under §540F and the actual number of such JAs cannot be overstated."[172]

Finally, if the judge advocates with discretion have to be outside of an accused member's chain of command, the question of who the judge advocate is accountable to presents itself. Currently, the installation commander annually rates the staff judge advocates and members of the base legal office.[173] This becomes problematic and would have to be changed to comply with either of the proposals. The judge advocates would have to be separated completely, similar to the way military judges and defense counsel are, to avoid undue command influence on preferral or referral decisions. This would require a complete re-structuring of the chains of authorities for military lawyers in each branch of the Armed Forces, a task which would require substantial time and the rewriting of the codified law to complete.

C. The Challenges for Congress to Accept the Military Justice Improvement Act or Defense Authorization Act

Advocates for the transfer of discretion allege two problems with the current, commander-led military justice system: (1) that commanders abuse their discretion when making the decision to prefer or refer charges, particularly in cases involving sexual misconduct; and (2) that there is a lack of accountability when commanders commit such an abuse.[174]

When a commander takes what the public believes to be inappropriate action or fails to act at all, there is substantial backlash from service members, the media, and the general public.[175]

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[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] Major General Reginald C. Harmon, *The Lawyer in the Air Force*, THE JUDGE ADVOCATE J. 16 (May 1956), https://www.loc.gov/law/mlr/pdf/JAG_Journal-No-22.pdf.
[174] *See* Dan Maurer, *The 'Shadow Report' on Commanders' Prosecutorial Powers Raises More Questions Than Answers*, LAWFARE (May 11, 2020, 11:07 AM), https://www.lawfareblog.com/shadow-report-commanders-prosecutorial-powers-raises-more-questions-answers.
[175] *See* Christina Morales, *Family of Fort Hood Soldier Who Disappeared in April Seeks Answers*, THE NEW YORK TIMES (July 16, 2020), https://www.nytimes.com/2020/06/19/us/vanessa-guillen-fort-hood-disappearance.html; *see also Extensive search underway for Fort Hood soldier from Houston missing since April*, ABC (June 8, 2020), https://abc13.com/extensive-search-for-fort-hood-soldier-missing-for-5-days/6132298*

Instances of severe abuse of command discretion are rare, so they are highly publicized and garner a significant amount of attention.[176]

Rather than protecting the officer, the military's response is aimed at protecting the institution. Because the commander is the leader and decision-maker for everyone under him or her, those commanders who outrank the problematic commander are incentivized to take swift disciplinary action.

When Vanessa Guillen was reported missing, her case very quickly caught the attention of the media.[177] Almost immediately, people began scrutinizing her commander for not taking action against another service member when Guillen made sexual assault allegations.[178] In response to these concerns, the Army removed the Fort Hood commander and denied him a new command role at Fort Bliss in an effort to keep him in place until a thorough investigation could be completed.[179]

There are two investigations that occurred at Fort Hood, the first of which was "an in-depth investigation into the actions taken by the post's chain of command following the disappearance of Spc. Vanessa Guillen."[180] This investigation looked at all of the actions taken (or not taken) by the commanders in leadership positions at the time of Guillen's murder.[181] The second "look[ed] at the command climate and the surrounding city of Killeen."[182] The review committee responsible for the investigations "concluded the installation's command team had created a 'permissive environment' for sexual assault, sexual harassment, and other misconduct."[183] As a result, there was dismissal or firing "of commanders and other leaders from the corps to the squad level"—14 members were fired from their positions, the highest of these being two Major Generals.[184] "The review committee found that not only is the climate at Fort Hood tolerant of sexual assault and harassment, crime in general is a problem."[185] More specifically, there have been a number of drug problems, homicides (which have gained mass media attention), violent crimes, and suicides; however, the committee also discovered the installation's command made no active attempt to fix these issues, largely because of a lack of resources and experience.[186] This is a problem that is highly specific to Fort Hood as an installation and to its leadership over the last few years.[187] The issue here was not that Guillen's leadership had too much power, but instead that they actively chose, on several occasions, to disobey the laws and disregard their roles as those responsible for

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[176] *See id.*
[177] *See id.*
[178] *See* Kyle Rempfer, *Fort Hood gets new acting commander; Army orders 'in-depth invetigation' into the chain of command*, ARMY TIMES (Sept. 1, 2020) https://www.armytimes.com/news/your-army/2020/09/01/fort-hood-gets-new-acting-commander-army-orders-in-depth-investigation-into-the-chain-of-command/.
[179] *Id.*
[180] *Id.*
[181] *See id.*
[182] *Id.*
[183] *Supra*, note 133.
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*

"promot[ing] justice" and "maintain[ing] good order and discipline."[188] Consequently, the committee was able to make many—specifically, 70—base specific recommendations for improvement at Fort Hood.[189] The public and military officials continue to heavily scrutinize Fort Hood command's decisions.[190] The military has taken the information learned from Guillen's case and used it to investigate and discipline the commanders at fault.[191] The military has shown that it has no tolerance for commanders who abuse their discretion by failing to take necessary action when misconduct by members is alleged.[192]

A number of proponents for a transfer of prosecutorial discretion cite that ally countries, such as the United Kingdom, Canada, and Australia, vest prosecutorial discretion in military or civilian lawyers; however, re-structuring the American military justice system to mimic those of other countries would be counter-productive.[193] This is one thing advocates for acceptance rely on when making arguments for the transfer of prosecutorial discretion; however, they fail to take into account the stark differences in the militaries of these countries and the United States.

The United States military consists of over 1.3 million active duty members[194], making it the third largest military in the world; whereas, the UK, Canada, and Australia each have significantly less than 200,000 active duty members.[195] American military members also undergo extensive education and training throughout their careers to ensure adequate performance and compliance with the laws.[196] These troops are held to an extremely high standard compared to that of many other militaries because of their need to be deployable and ready to fight at any given time.[197]

Because the United States maintains a deployable military and always has troops stationed and deployed all over the world, it has a unique need and ability to conduct trials outside of the United States.[198] One of the main reasons the U.S. military is capable of doing such a thing is that commanders, not military lawyers, are able to make the decision to prefer and refer charges when misconduct occurs.[199] If prosecutorial discretion is taken away from commanders, the military

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[188] *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), Preamble, at I-1.
[189] *Id.*
[190] *See id.*
[191] *See* Sarah Mervosh & John Ismay, *Army Finds 'Major Flaws' at Fort Hood; 14 Officials Disciplined*, THE NEW YORK TIMES (Dec. 8, 2020), https://www.nytimes.com/2020/12/08/us/fort-hood-officers-fired-vanessa-guillen.html.
[192] *See generally id.*
[193] *Supra,* note 80.
[194] This number does not include reserve components.
[195] *Active Military Manpower (2020)*, GLOBAL FIRE POWER, https://www.globalfirepower.com/active-military-manpower.asp (last visited Dec. 10, 2020).
[196] *See* Jessica Marmor Shaw, *Is America's military the No. 1 fighting force in the world—or not?*, MARKETWATCH (Mar. 12, 2016, 10:44 AM), https://www.marketwatch.com/story/is-america-the-no-1-military-in-the-world-or-not-2016-02-20.
[197] *See id.*
[198] Seva Johnson, *Military Tribunals and the War Against Terrorism: An Interview with Frank Moran*, SOCIAL EDUCATION, http://www.socialstudies.org/sites/default/files/publications/se/6602/660203.html (last visited Dec. 10, 2020).
[199] *Supra*, note 21, 10.

justice system will suffer, as charges will not be able to move forward and tribunals will not be able to occur until after a member's unit has been heavily disrupted because that member is required return to the United States.

Similarly, April 2020 Shadow Advisory Report Group of Experts (SARGE) findings showed that if discretion were to be transferred to military lawyers, there would be no significant statistical difference on decisions to prosecute versus when the authority to do so lies with commanders.[200]

A study conducted in response to the Military Justice Improvement Act of 2013 that was partially behind the Act's rejection showed that in the militaries of the United Kingdom, Canada, and Australia, half as many personnel were tried by courts-martial for sex offenses per capita even though the United States' reported rate per thousand of sexual abuse by military suspects was 27% lower than the Canadian rate per thousand.[201] This example demonstrates that commanders are no less likely to prosecute service members for alleged involvement in crimes involving sexual misconduct than military lawyers; thus, transferring discretion and adopting the systems of these other militaries may be counter to the goals of these proposals.[202]

In April 2020, much of this same data was collected again in response to the Military Justice Improvement and Defense Authorization Acts.[203] The statistical comparisons were extremely similar to the 2013 numbers, showing that the U.S. armed forces, with its commander-led approach, tends to take action significantly more often than the counterparts Congress is currently suggesting the military justice system be modeled after.[204]

D. Proposals for Change

The 2016 and 2018 Military Justice Improvement Acts were approved in part, bringing needed changes to the UCMJ. These changes included additional required trainings for commanders and other officers regarding the UCMJ and what constitutes appropriate versus inappropriate action when misconduct is alleged, as well as additional review of commander decisions by military lawyers and higher-ranking military officers. These changes help those in leadership positions in the military to understand the laws that govern them and encourage them to make lawful decisions. They decrease the likelihood of commanders abusing their power by educating leaders of all ranks and imposing checks on their power.

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[200] Shadow Advisory Report Group of Experts (SARGE), *Alternative Authority for Determining Whether to Prefer or Refer Charges for Felony Offenses Under the Uniform Code of Military Justice*, (Apr. 20, 2020) https://www.caaflog.org/uploads/1/3/2/3/132385649/shadow_advisory_report__april_20_2020_.pdf.
[201] DAC-IPAD Court-Martial Adjudication Report (Nov. 2019), https://dacipad.whs.mil/images/Public/08-Reports/05_DACIPAD_Data_Report_20191125_Final_Web.pdf.
[202] *Id.*
[203] *Supra*, note 80.
[204] *Id.*

1. Training Educates Commanders on the Law

One of the recent changes made to the UCMJ in 2019 was the requirement that commanders undergo periodic training on the laws governing service members and the military justice system.[205] These trainings ensure that commanders know what is required of them, what actions are appropriate in various situations, and what constitutes an abuse of power or discretion.[206]

Because each branch of the military has its own unique needs and those needs are ever-changing, the particulars of the required training are not set out in the codified law.[207] Each branch is responsible for establishing and conducting its own trainings on the UCMJ and for ensuring that their members participate as is required.[208]

For example, after the passage of Article 137, the Marines issued a mandate specifying what trainings would be required before the end of the year.[209] Leaders must attend these annually to ensure continued proficiency.[210] The mandate requires: commanders with convening authority powers receive in-person training from their staff judge advocate (SJA), commanders with convening authority incorporate the in-person training into the regular unit training to pass the information along to lower-ranking commanders, commanders ensure personnel officers attend unit training, lower-ranking commanders without convening authority powers and personnel officers attend unit training, and SJAs report completion of training for all commanders.[211]

2. Increased Review of Commanders' Decisions Decreases the Likelihood of Abuse

Another change made recently to the UCMJ adds additional levels of review for commanders' decisions to not prefer or refer charges in certain categories of cases and decisions that commanders make that are contrary to what their installation staff judge advocate believes is legally sufficient.[212] This additional check on the decisions commanders make, whether they be to take or not take legal action against an accused member, helps to ensure commanders are not taking unlawful action, as it provides an additional, qualified opinion on the matter any time a commander and military lawyer agree to take action in certain cases and when they disagree on whether or not action should be taken in any case.

If Congress is losing faith in commanders and their ability or willingness to take appropriate disciplinary action, it should impose further opportunities for military lawyers and

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[205] Article 137, 10 U.S.C. § 937.
[206] *Id.*
[207] *See id.*
[208] *See id.*
[209] *See* General Michael G. Dana, *Military Justice Act of 2016 Training for Commanding Officers with Court-Martial Convening Authority*, MARADMIN (Nov. 5, 2018), https://www.marines.mil/News/Messages/MARADMINS/Article/1682574/military-justice-act-of-2016-training-for-commanding-officers-with-court-martia/.
[210] *See id.*
[211] *Id.*
[212] *See generally* UCMJ, Article 146, 10 U.S.C.A. § 946.

other high-ranking officials to review command decisions.[213] Congress should, however, avoid taking prosecutorial discretion away from commanders altogether. Doing so would undermine commanders' ability to achieve their statutory mission and effectively lead those within their chain of command.[214] It would also place a substantial amount of decision-making power into the hands of lawyers, who do not necessarily have the requisite specialized knowledge, training, or experience to make such decisions in the context of the armed forces.[215]

IV. CONCLUSION

Although crimes of sexual misconduct are a problem in the military, and instances of commanders abusing their powers exist, the transfer of prosecutorial discretion is not necessary nor appropriate. As a result, Congress should reject both the National Defense Authorization Act and the Military Justice Improvement Act.

If either of these proposals were to be accepted, military lawyers would significantly undermine the commander's role as a leader, which would diminish commanders' control over those within their chain of command. It would also result in speedy trial clock, feasibility issues, and personnel shortages in many roles that military lawyers currently fulfill.

Instead, the focus should be on ensuring that commanders undergo enough training to become sufficiently educated on the laws that govern service members. Similarly, Congress should ensure that there is sufficient opportunity for higher-ranking military leaders and military lawyers to review the decisions of commanders.

[213] *Supra*, note 65, 308.
[214] *See id.*
[215] *See id.*