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**TAKING CHARGE OF COURT-MARTIAL  
CHARGES: THE IMPORTANT ROLE OF  
THE COMMANDER IN THE AMERICAN  
MILITARY JUSTICE SYSTEM**

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ABSTRACT: The authors address the repeated efforts to remove the commander, a commissioned officer in command or an officer in charge, from the military justice system and adopt a system that mirrors the procedures used in foreign countries for preferring charges, referring them to trial, and selecting court members. They offer a number of arguments for retaining the commander's role and offer a comparative analysis of the American military justice system and several other countries' military justice systems. They urge

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Congress not to adopt the procedures used in foreign countries absent clear evidence that doing so will greatly enhance American military justice. They conclude there are insufficient reasons to make dramatic changes to the American system; changes they believe would undermine the commander's authority to enforce discipline and justice.

### I. INTRODUCTION

If there is one aspect of the American military justice system that seems to draw the most criticism, it is the role of the commander. Although the commander has played an essential role in military justice since the beginning of the republic,<sup>1</sup> reformers over the decades have banged the drum for change, which would either reduce or remove the commander's prosecutorial discretion.<sup>2</sup>

The proposals to limit or remove the commander's powers to prefer court-martial charges or convene a court-martial generally fall into three categories. The first category of proposals recommends that the decision to charge an accused with a crime should be made

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<sup>1</sup> See generally DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE*, § 1-4, et. seq. (10th ed. 2018) (discussing the historical roots of the court-martial and the commander's role).

<sup>2</sup> See, e.g., Michal Buchhandler-Raphael, *Breaking The Chain Of Command Culture: A Call For An Independent And Impartial Investigative Body To Curb Sexual Assaults In The Military*, 29 WIS. J. L. GENDER & SOC'Y 341, 371-75 (2014) (recommending that DOD strip military commanders of authority to dispose of sexual assault complaints; authority to handle cases should rest with independent and impartial body after military police conduct a comprehensive investigation); Don Christensen, *Commanders Flunk on Military Justice Reforms*, THE HUFFINGTON POST (Dec. 3, 2014, 8:34 AM), archived at <https://perma.cc/Q8AS-MTH8> (criticizing the current military justice system and proposing reform); Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1400 n.10 (1973) (noting that proposed legislative reforms had been introduced by Senators Bayh and Ervin and by Congressman Bennett that included limiting a commander's role and limiting court-martial jurisdiction); Schiesser & Benson, *A Proposal to Make Courts-Martial Courts: The Removal of Commanders from Military Justice*, 7 TEX. TECH. L. REV. 559 (1976).

by a commander outside the accused's chain of command, but still within the military command structure.<sup>3</sup> These proposals, which are not entirely new,<sup>4</sup> are grounded in the view that a commander may be biased in favor of an accused and decide, for improper reasons, not to charge said accused.<sup>5</sup> Ironically, in the past, reformers pushed for changes in the military justice system because they believed the system was unfair; they argued that heavy-handed commanders were tipping the scales of justice to obtain convictions.<sup>6</sup> The recent

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<sup>3</sup> See, e.g., Laura Basset, *Senators Shoot Down Gillibrand's Military Sexual Assault Reform Bill*, THE HUFFINGTON POST (Dec. 11, 2013, 2:10 PM), archived at <https://perma.cc/J8EH-GHUD>. As discussed, *infra*, Senator Gillibrand introduced essentially the same bill in 2020 (discussing Senator Gillibrand's sponsorship of the Military Justice Improvement Act (MJIA) which proposed that commanders would no longer have jurisdiction over specified offenses and the commander's power to grant post-trial clemency would be limited. S. 967, 113th Cong. (2013). Her proposal ultimately failed in the Senate).

<sup>4</sup> See, e.g., Eugene R. Fidell, *What is to be done? Herewith a Proposed Ansell-Hodson Military Justice Reform Act of 2014* (May 13, 2014), archived at <https://perma.cc/4WMA-9HSX> (proposing "Ansell-Hodson Military Justice Reform Act of 2014" which would have reduced commander's authority and transferred authority of convening authority to court-martial administrator).

<sup>5</sup> See Lindsay Hoyle, *Command Responsibility – A Legal Obligation to Deter Sexual Violence in the Military*, 37 B.C. INT'L & COMP. L. REV. 353, 360 (2014) (noting that commanders are often biased in favor of an accused with whom they have a good working relationship). But the opposite is also true. Critics of the system argue commanders may be biased against a service member and treat that service member unfairly; it was that criticism which in part led to the adoption of the Uniform Code of Military Justice following World War II. See David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 131, 158 (1980) (noting the perceived injustice toward service members in World War II); Frederick Bernays Weiner, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109, 112 (1989) (noting prosecution of enlisted service members, in part, prompted the "Crowder-Ansell" dispute during World War I concerning court-martial practices and its underlying currents). Yet another related criticism is commanders may treat similarly situated service members differently. James W. Smith, *A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System*, 27 WHITTIER L. REV. 671, 693 (2006) (using the term "different spansks for different ranks" and arguing the military justice system failed by treating officers and enlisted members differently in Abu-Ghraid courts-martial).

<sup>6</sup> See *supra* note 5 and accompanying text.

push for removing the commander seems to rest on the proposition that not enough alleged offenders are being prosecuted for sexual assault.

A second category of proposals recommends that civilian prosecutors handle prosecution of military offenses, which is the approach in certain other countries.<sup>7</sup> The proponents of that approach argue that the change would be consistent with emerging international norms. The argument is if that approach works well in other countries, it would likely work well in the American military justice system.<sup>8</sup>

Finally, there have been proposals to transfer, in whole or in part, the commander's prosecutorial powers to military lawyers.<sup>9</sup> One of

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<sup>7</sup> See generally Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195, 197 (2000) (noting that changes in country after country are being made as to how military cases are prosecuted, and by whom and that American military justice "pays precious little attention to developments in other countries' systems;" the author is a frequent advocate for reducing the role of the commander in the military justice system); Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1400 (1973) (noting that in considering potential changes to the military justice system, other countries' approaches are "especially relevant").

<sup>8</sup> See Editorial, *No Hope for Justice*, N.Y. DAILY NEWS (Mar. 17, 2014, 4:00 AM), archived at <https://perma.cc/844K-CY46> (discussing reasoning of supporters such as New York Senator Kirsten Gillibrand for removing sexual assault crimes in the U.S. military justice system from the chain of command, in the same manner as Canada, Israel and Germany have done); *Remove Prosecution of Sexual Assault from Military Chain of Command*, Nat'l Org. for Women, archived at <https://perma.cc/8LMS-8ALW> (discussing the need to remove sexual assault crimes from the chain of command in the U.S. military justice system and adopt a separate system like Britain, Canada, and Israel); Op-Ed., *Gillibrand Should Keep Up the Pressure to End Sexual Assaults in The Military*, THE BUFFALO NEWS (Mar. 13, 2014), archived at <https://perma.cc/S398-3GXV> (emphasizing that removal of sexual assaults from the chain of command has already occurred in Britain, Canada, and Israel, and should occur in the United States military justice system).

<sup>9</sup> See, e.g., Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in The Court-Martial Process*, 220 MIL. L. REV. 129, 175 (2014) (proposing that military lawyers obtain prosecutorial discretion over disposition of offenses); Letter

the arguments supporting that approach is that armed forces lawyers are in the best position to assess whether a particular charged offense warrants a court-martial<sup>10</sup> and that, again, is the approach taken in certain other countries.<sup>11</sup>

It is this third and final category of proposals that is the focus of this article. There are currently two proposed legislative provisions along these lines that would adversely affect the commander's prosecutorial discretion and undermine the commander's ability to enforce good order and discipline. The first proposed provision was included in Section 540F of the 2020 National Defense Authorization Act, where Congress mandated that the Department of Defense report to the congressional armed services committees. This would be based on the feasibility of creating a pilot program, which would remove a commander's authority to prefer and refer to trial court-

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from Heidi Boghosian, Exec. Dir., National Lawyers Guild to Mr. Paul S. Koffsky, Deputy Gen. Counsel, Dep't of Defense (June 30, 2014), archived at <https://perma.cc/B3C8-NEPR> (recommending that prosecutorial discretion be placed in the hands of independent prosecutors).

<sup>10</sup> See, e.g., Murphy, *supra* note 9, at 175-76 (2014) (listing reasons for military attorneys to exert prosecutorial discretion instead of commanders).

<sup>11</sup> See Sherman, *supra* note 2, at 1425 (arguing the American military justice system should follow the model used in the British or West German-Swedish military systems); see also *No Hope for Justice*, *supra* note 8 (discussing the reasoning of supporters such as New York Senator Kirsten Gillibrand for removing sexual assault crimes in the U.S. military justice system "from the chain of command to independent prosecutors," in the same manner as used in Canada, Israel and Germany); *Remove Prosecution of Sexual Assault from Military Chain of Command*, Nat'l Org. for Women, *supra* note 8 (discussing the need to remove sexual assault crimes from the chain of command in the U.S. military justice system and adopt a separate system like Britain, Canada, and Israel); *Gillibrand Should Keep Up the Pressure to End Sexual Assaults in The Military*, *supra* note 8 (emphasizing that the removal of sexual assaults from the chain of command has already occurred in Britain, Canada, and Israel, and should also occur in the United States military justice system).

martial charges for serious offenses, and instead place that authority in the hands of senior armed forces lawyers.<sup>12</sup>

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<sup>12</sup> National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 540F, 133 Stat. 1198 (2019). This section provides:

SEC. 540F. REPORT ON MILITARY JUSTICE SYSTEM INVOLVING ALTERNATIVE AUTHORITY FOR DETERMINING WHETHER TO PREFER OR REFER CHARGES FOR FELONY OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

**(a) REPORT REQUIRED.** –

(1) **IN GENERAL.** – Not later than 300 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the results of a study, conducted for purposes of the report, on the feasibility and advisability of an alternative military justice system in which determinations as to whether to prefer or refer charges for trial by court-martial for any offense specified in paragraph (2) 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 member subject to the charges rather than by a commanding officer of the member who is in the chain of command of the member.

(2) **SPECIFIED OFFENSE.** – An offense specified in this paragraph is any offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), for which the maximum punishment authorized includes confinement for more than one year.

**(b) ELEMENTS.** – The study required for purposes of the report under subsection (a) shall address the following:

(1) Relevant procedural, legal, and policy implications and considerations of the alternative military justice system described in subsection (a).

(2) An analysis of the following in connection with the implementation and maintenance of the alternative military justice system: (A) Legal personnel requirements. (B) Changes in force structure. (C) Amendments to law. (D) Impacts on the timeliness and efficiency of legal processes and court-martial adjudications. (E) Potential legal challenges to the system. (F) Potential changes in prosecution and conviction rates. (G) Potential impacts on the preservation of good order and discipline, including the ability of a

The second proposal appears in the “Military Justice Improvement Act of 2020” (S.1932), introduced by Senator Kirstin Gillibrand (D-N.Y.), and would dramatically reduce the commander’s authority and responsibility for preferring and referring felony-level offenses to trial by court-martial, and transfer that authority to senior judge advocates.<sup>13</sup>

This article argues that those proposals, and others like them, should be rejected for the following reasons:

- Commanders play a critical and necessary role in the American military justice system (*See* Sections II & IV, *infra*);
- Transferring prosecutorial discretion from commanders to judge advocates will undermine commanders’ authority to maintain good order and discipline (*See* Section V, *infra*);

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commander to carry out nonjudicial punishment and other administrative actions. (H) Such other considerations as the Secretary considers appropriate.

(3) A comparative analysis of the military justice systems of relevant foreign allies with the current military justice system of the United States and the alternative military justice system, including whether or not approaches of the military justice systems of such allies to determinations described in subsection (a) are appropriate for the military justice system of the United States.

(4) An assessment of the feasibility and advisability of conducting a pilot program to assess the feasibility and advisability of the alternative military justice system, and, if the pilot program is determined to be feasible and advisable— (A) an analysis of potential legal issues in connection with the pilot program, including potential issues for appeals; and (B) recommendations on the following: (i) The populations to be subject to the pilot program. (ii) The duration of the pilot program. (iii) Metrics to measure the effectiveness of the pilot program. (iv) The resources to be used to conduct the pilot program.

<sup>13</sup> The Military Justice Improvement Act, S. 1932, 116th Cong. (2020).



- Transferring the decision to prosecute and refer charges to a court-martial will create unintended consequences (*See Section VI, infra*);
- Changing the American military justice system to emulate the systems of other countries is not warranted or advisable. Comparison of sexual assault prosecution rates of the United States military with four United States allies in 2013 and with three allies more recently does not necessitate adopting their systems of removal of command responsibility for prosecuting serious sex crimes (*See Section VII, infra*);
- The proposed amendments will adversely affect the delicate balance between justice and discipline (*See Section VIII, infra*);
- Recent studies of command decisions to prosecute sexual assaults demonstrates that the current system is working (*See Section IX, infra*); and
- Congress should await implementation of the reforms outlined in the Military Justice Act of 2016 for oversight and accountability (*See Section X, infra*).

Finally, this article recommends Congress should reaffirm the role of the commander to enforce good order and discipline (*See Section XI, infra*).

## II. THE COMMANDER'S CURRENT ROLE IN THE MILITARY JUSTICE SYSTEM

Before addressing the specific concerns about the proposals to reduce or remove the commander from the military justice system, it is important to first address the typical military chain of command and how the individuals in that chain can be involved in the processing of court-martial charges.

## A. THE MILITARY CHAIN OF COMMAND

The chain of command of an accused in an Army infantry division, for example, begins with the immediate commander or unit commander usually at the level of a company commander (captain or O-3 rank in command of 200 personnel), followed by a battalion commander (lieutenant colonel or O-5 in command of 1,000 personnel), brigade commander (colonel or O-6 rank in command of 5,000 personnel) and then by a division commander, who is a general court-martial convening authority (major general or O-8 rank in command of 15,000 personnel).

Various command levels above the division level are also general courts-martial convening authorities, including the corps commander (lieutenant general O-9 rank in command of 45,000 personnel), major command commander (general O-10 in command of 90,000 personnel), then Secretary of the Army (civilian), Secretary of Defense (civilian), and President.<sup>14</sup> Each higher level commander in the chain of command has authority to overrule a decision of a lower level of commander in the referral to trial of a court-martial offense.<sup>15</sup>

## B. PREFERRING AND REFERRING COURT-MARTIAL CHARGES

Under the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial, commanders (usually the company commander in the Army, for example) are responsible for

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<sup>14</sup> See Department of Defense, Military Units: Army-Department of Defense, archived at <https://perma.cc/J6JL-CF2P>. See also 10 U.S.C. § 822 (listing general court-martial convening authorities).

<sup>15</sup> See Manual for Courts-Martial (2019) [hereinafter MCM]; Rule for Courts-Martial 306 [hereinafter RCM].

conducting a thorough and impartial inquiry into alleged offenses.<sup>16</sup> In carrying out those duties, they review reports prepared by law enforcement personnel and regularly obtain legal advice from a judge advocate, who is assigned to the military organization, or otherwise charged with providing legal advice to the commanders.<sup>17</sup>

The UCMJ<sup>18</sup> includes punitive articles which proscribe both strictly military offenses,<sup>19</sup> such as desertion<sup>20</sup> and disobedience of an order<sup>21</sup> as well as common law offenses, such as larceny.<sup>22</sup> If it appears that a service member has violated a punitive article, the commander has broad discretion to decide how to dispose of an accused's misconduct. For example, the commander may simply counsel the service member or issue a written or oral reprimand,<sup>23</sup> begin proceedings to administratively discharge the service member,<sup>24</sup> or impose nonjudicial punishment.<sup>25</sup> Under this third option, the commander decides whether the service member is guilty

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<sup>16</sup> RCM 303.

<sup>17</sup> See UCMJ art. 37 (2018) (including requirement that before convening a general court-martial the convening authority must consider the advice of the staff judge advocate). This is sometimes referred to as the "pretrial advice." SCHLUETER, *supra* note 1 at § 7-3(A) (10th ed. 2018)

<sup>18</sup> UCMJ arts. 1-146 (2018).

<sup>19</sup> See generally DAVID A. SCHLUETER, CHARLES H. ROSE, VICTOR HANSEN, & CHRISTOPHER BEHAN, *MILITARY CRIMES AND DEFENSES* § 3.2 (3d ed. 2018) (discussing punitive articles in UCMJ).

<sup>20</sup> UCMJ art. 85 (2018).

<sup>21</sup> UCMJ art. 90 (2018).

<sup>22</sup> UCMJ art. 121 (2018).

<sup>23</sup> See SCHLUETER, *supra* note 1 at § 1-8 (10th ed. 2018) (listing various options available to the military commander).

<sup>24</sup> See SCHLUETER, *supra* note 1 at § 1-8(B) (10th ed. 2018) (discussing nonpunitive measures such as administrative discharge).

<sup>25</sup> UCMJ art. 15 (2018). Unless the service member is assigned to a vessel, the service member may demand a court-martial in lieu of the nonjudicial punishment. *Id.* The term "vessel" is defined in 1 U.S.C. § 3 (2012). "The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3 (2018).

and, if so, adjudges the punishment.<sup>26</sup> Finally, the commander may formally *prefer* court-martial charges against the service member.<sup>27</sup>

Article 33, of the Uniform Code of Military Justice, requires the President to provide non-binding guidance for factors that commanders are to consider in disposing of charges.<sup>28</sup> The President has set out those factors in Appendix 2.1.2 of the Manual for Courts-Martial, which lists the following factors:

- a. The mission-related responsibilities of the command;
- b. Whether the offense occurred during wartime, combat, or contingency operations;
- c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command;
- d. The nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense;
- e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;
- f. The extent of the harm caused to any victim of the offense;
- g. The availability and willingness of the victim and other witnesses to testify;
- h. Admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial;

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<sup>26</sup> See RCM 306(c)(2).

<sup>27</sup> Although technically, any person subject to the UCMJ may prefer charges against another; the preferral is almost always done by the service member's immediate commander.

<sup>28</sup> UCMJ art. 33 (2018).

- i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;
- j. The truth-seeking function of trial by court-martial;
- k. The accused's willingness to cooperate in the investigation or prosecution of others;
- l. The accused's criminal history or history of misconduct, whether military or civilian, if any;
- m. The probable sentence or other consequences to the accused of a conviction; and
- n. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.<sup>29</sup>

If, after considering those factors, a commander prefers court-martial charges, those charges are forwarded up the chain of command, described *supra*, for recommendations and actions. If the commander concludes that the charges are serious enough to justify a general court-martial, which are equivalent to a civilian felony trial, the commander orders an Article 32 hearing.<sup>30</sup> At that hearing, which approximates a preliminary hearing in civilian criminal justice trials, the service member is entitled to be present, to have the assistance of defense counsel, to cross-examine witnesses, and to have witnesses produced.<sup>31</sup>

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<sup>29</sup> Non-Binding Disposition Guidance § 2.1, MCM, App. 2.1-2.

<sup>30</sup> UCMJ art. 32. (2018).

<sup>31</sup> UCMJ art. 32. (2018).

If a convening authority, a commander authorized by the UCMJ to “convene” a court-martial, decides to *refer* the charges to a court-martial, that officer selects the court members.<sup>32</sup> The convening authority does not select the counsel or the military judge.<sup>33</sup> A commander convenes a court-martial to hear a specific case.<sup>34</sup>

Specific provisions in the UCMJ prohibit a convening authority from unlawfully influencing the participants in the court-martial or the outcome of the case.<sup>35</sup> In many cases, the accused and the convening authority engage in plea bargaining and execute a pretrial agreement.<sup>36</sup> Typically, those agreements require the accused to plead guilty in exchange for a capped maximum sentence.<sup>37</sup>

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<sup>32</sup> UCMJ arts. 23–24 (2018) (authority to convene general courts-martial, special courts-martial, and summary courts-martial).

<sup>33</sup> SCHLUETER, *supra* note 1 at § 8-3(D) (10th ed. 2018) (discussing the process for selecting individuals to sit as court members).

<sup>34</sup> See UCMJ arts. 22–24 (2018) (designating those with power to convene general, special, and summary courts-martial); RCM 504 (setting out procedure for convening courts-martial). The UCMJ provides that the President of the United States and a service Secretary may convene a general court-martial. UCMJ art. 24(a), (2012).

<sup>35</sup> See UCMJ art. 37 (2018). Unlawful command influence has been the subject of considerable commentary and case law. See generally Martha Huntley Bower, *Unlawful Command Influence: Preserving the Delicate Balance*, 28 A.F. L. REV. 65 (1988) (discussing unlawful command influence); Anthony P. DeGiulio, *Command Control: Lawful Versus Unlawful Application*, 10 SAN DIEGO L. REV. 72 (1972) (examining the disciplinary policies established by command directives, the rule which blocks the accused from serving as the convening authority, and command control over counsel and military judges); James D. Harty, *Unlawful Command Influence and Modern Military Justice*, 36 NAVAL L. REV. 231 (1986) (discussing corrective measures that must be taken when commanders commit unlawful command influence); Joseph Hely, *Command Influence on Military Justice*, 15 ST. LOUIS U. L.J. 300 (1970) (discussing inherent tendency for command influence).

<sup>36</sup> SCHLUETER, *supra* note 1, ch. 9 (10th ed. 2018).

<sup>37</sup> *Id.*

Even though courts-martial are not part of the federal judiciary, the Supreme Court of the United States may ultimately review a military conviction.<sup>38</sup>

### III. OVERVIEW AND BACKGROUND OF PROPOSALS TO LIMIT THE COMMANDER'S ROLE IN THE MILITARY JUSTICE SYSTEM

As noted, *supra*, there are currently two pieces of legislation pending in Congress that would shift prosecutorial discretion from commanders to senior judge advocates, both attempting to emulate the systems used in other countries. Notably, not all cases would be affected by the shift in responsibilities from commanders to senior judge advocates. Only disposition of serious offenses would be affected. Offenses that are considered to be military in nature, and not common law offenses, would remain untouched.

While neither of the proposed legislative provisions outline any of the alleged problems that they are designed to address, attempts to remove commanders from the military justice system are not new. Similar legislation was proposed and rejected in 2013.<sup>39</sup> Since that

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<sup>38</sup> UCMJ art. 67(h) (2018); 28 U.S.C. § 1259 (2018). *See, e.g.*, *Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018) (holding that Court has jurisdiction to hear appeals from the United States Court of Appeals for the Armed Forces). *See generally* Andrew Effron, *Supreme Court of Review of Decisions by the Court of Military Appeals: The Legislative Background*, ARMY LAW., Jan. 1985, at 59 (reviewing the Military Justice Act, which placed the Court of Military Appeals directly under the U.S. Supreme Court's review).

<sup>39</sup> In 2013, Senator Gillibrand sponsored the Military Justice Improvement Act (MJIA) which proposed that commanders would no longer have jurisdiction over specified offenses and the commander's power to grant post-trial clemency would be limited. S. 967, 113th Cong. (2013). As with the currently proposed legislation, her bill would have required that for offenses where the maximum punishment included confinement for more than one year (in effect a felony grade offense), the decision to file court-martial charges and refer charges to general or special courts-martial would be made by someone in the rank of at least O-6, with significant experience in trying courts-martial, and outside the chain of command. *Id.* That responsibility would be handled by officers established by the Chiefs of Staff of each Service. *Id.* Although

time, a series of advisory panels comprised of civilian, non-governmental experts have reviewed the role of the commander and rejected such a wide-sweeping change, because such change was not justified. Specifically, the Response Systems to Adult Sexual Assault Crimes Panel (RSP) (congressionally mandated to assess the impact of removing disposition authority from commanders) in June 2014 reported that:

Congress should not further limit the authority of convening authorities under the UCMJ to refer charges of sexual assault crimes to trial by court-martial . . . [and] [a]fter reviewing the practices of Allied militaries and available civilian statistics and hearing from many witnesses, the Panel determined the evidence [did] not support a conclusion that removing convening authority from senior commanders [would] reduce the incidence of sexual assault . . . or improve the quality of investigations or prosecutions . . . .<sup>40</sup>

And even before the extensive changes enacted in the Military Justice Acts of 2016 and 2018, the Panel warned that systematic changes “should be considered carefully in the context of the many changes” made to the “form and function of the military system.”<sup>41</sup> In 2015, the Military Justice Review Group focused on measures to improve the process rather than revisiting the issue after the RSP’s thorough review, and specifically recommended “[re]taining the current procedures for the exercise of disposition discretion based upon the interlocking responsibilities of military commanders, [S]taff

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Senator Gillibrand’s bill had bipartisan support, it eventually failed in the Senate by a close vote. *See* Basset, *supra* note 3.

<sup>40</sup> Response Systems to Adult Sexual Assault Crimes Panel Report 6 (2014), archived at <https://perma.cc/8Q7U-CUJG>.

<sup>41</sup> *Id.*



[[J]udge [A]dvocates, and judge advocates.”<sup>42</sup> In 2019, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) (tasked with reviewing specific case dispositions), based on a review of 164 military investigative cases, found that “commanders’ disposition of penetrative sexual assault complaints [were] reasonable in 95% of the cases.”<sup>43</sup> *See* Section IX, *infra*.

Furthermore, since 2013, extensive substantive changes to the Uniform Code of Military Justice (UCMJ) (e.g., the Military Justice Acts of 2016 and 2018) and Manual for Courts-Martial have been put in place, and those changes require time for implementation and reassessment of the military justice system before additional reforms should be made. Provisions are in place requiring that convening authorities’ decisions not to refer sexual assault cases must be reviewed (*See* Section X, *infra*), while also substantially limiting their clemency authority. An appendix to the Manual for Courts-Martial now provides commanders with factors they should consider in all misconduct cases (e.g., “interests of justice,” “the views of the victim as to disposition,” “the harm caused to any victim of the offense,” and “good order and discipline”), inappropriate factors (e.g., “the accused’s race or religion” and “political pressure”), and special considerations (e.g., “whether the accused might face prosecution in another jurisdiction”).<sup>44</sup> Pursuant to the Military Justice Act of 2016, convening authorities must have “periodic training regarding the purposes and administration” of the UCMJ.<sup>45</sup> Additionally, judge

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<sup>42</sup> Military Justice Review Group, Report of the Military Justice Review Group Part I: UCMJ Recommendations 300 (2015), archived at <https://perma.cc/58Y7-528X>.

<sup>43</sup> Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) Third Annual Report 31 (2019), archived at <https://perma.cc/82DG-VCKS>.

<sup>44</sup> *See* Non-Binding Disposition Guidance § 2.1, Manual for Courts-Martial 2019, App 2.1-2 [hereinafter MCM].

<sup>45</sup> UCMJ art. 137(d).

advocates are to serve as Article 32, Preliminary Hearing Officers, whenever practicable.<sup>46</sup>

**IV. THE UCMJ, THE MANUAL FOR COURTS-MARTIAL, AND  
REGULATIONS RECOGNIZE THE CRITICAL ROLE OF THE  
COMMANDER IN THE MILITARY JUSTICE SYSTEM**

A. IN GENERAL

The UCMJ<sup>47</sup> and the Manual for Courts-Martial<sup>48</sup> entrust commanders at all levels in the chain of command with responsibility for the military justice system. In the Army regulation that defines and describes the nature of command responsibility, there is a not-so-subtle link between the UCMJ and the “purpose of military discipline” related to the “controls and obligations imposed on them by virtue of their military Service.”<sup>49</sup> Furthermore, “[c]ommanders are responsible for everything their command does or fails to do.”<sup>50</sup> Congress, and not just the President, also weighs in on the scale and scope of this responsibility. Section 3583 of Title 10 of the United States Code, detailing the requirements for a commanding officer’s exemplary conduct, reads:

All commanding officers and others in authority in the Army are required ... [t]o show in themselves a good example of virtue, honor, patriotism, and subordination ... [t]o be vigilant in inspecting the conduct of all persons who are placed under their command, ... [t]o guard against and suppress all dissolute and immoral practices, and to correct,

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<sup>46</sup> See RCM 405(d)(A).

<sup>47</sup> UCMJ arts. 1-146a.

<sup>48</sup> See generally MCM.

<sup>49</sup> See Army Regulation (AR) 600-20, *Army Command Policy*, para. 1-5c.(4)(b)).

<sup>50</sup> *Id.* para. 2-1b.

according to the laws and regulations of the Army, all persons who are guilty of them, ... [t]o take all necessary and proper measures, under the laws, regulations, and customs of the Army, [and] [t]o promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.<sup>51</sup>

The commander's critical role in the system has been part of this country's military justice system since the founding of the country.<sup>52</sup> "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 in the military establishment, and thereby to strengthen the national security of the United States."<sup>53</sup> The commander's critical role in the system has been part of this country's military justice system since the founding of the country.<sup>54</sup> Commanders must have substantial authority, especially in combat situations, because it may be necessary to order military personnel to accomplish hazardous missions. The burden must be on the proponent of any limitation of the commander's authority to justify the limitation because limitations on the commander's authority automatically detract from the effectiveness of units in combat.

Commanders for hundreds of years have praised the attributes of good order and discipline and its positive impact on combat effectiveness. General George Washington said, "[d]iscipline is the

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<sup>51</sup> 10 U.S.C. § 3583.

<sup>52</sup> See SCHLUETER, *supra* note 1 at §§ 1-4 to 1-6 (10th ed. 2018) (discussing history of the court-martial).

<sup>53</sup> MCM, pt. I, ¶ 3.

<sup>54</sup> See SCHLUETER, *supra* note 1 at §§ 1-4 to 1-6 (10th ed. 2018) (discussing history of the court-martial and discussing role of commanders in the system throughout that history).

soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all.”<sup>55</sup> More recently, General William Westmorland commented:

Discipline is an attitude of respect for authority which is developed by leadership, precept, and training. It is a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed. Discipline conditions the soldier to perform his military duty even if it requires him to act in a way that is highly inconsistent with his basic instinct for self-preservation. Discipline markedly differentiates the soldier from his counterpart in civilian society. Unlike the order that is sought in civilian society, military discipline is absolutely essential in the Armed Forces.<sup>56</sup>

The Army Field Manual defined “disciplined soldiers” as “orderly, obedient, controlled, and dependable. They do their duty promptly and effectively in response to orders, or even in the absence of orders.”<sup>57</sup> Lieutenant General A. S. Collins, Jr., said:

The essential characteristics of a good army are that it be well trained and well disciplined. These two characteristics are apparent in every unit achievement, whether in peace or war. Discipline derives and flows from training and serves to emphasize a fundamental point essential to a philosophy of

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<sup>55</sup> U.S. Army Center of Military History, *Washington takes command of Continental Army in 1775*, (Apr. 15, 2016), archived at <https://perma.cc/WY5F-WAHW>.

<sup>56</sup> General (Retired) William C. Westmoreland, *Military Justice—A Commander’s Viewpoint*, 10 AM. CRIM. L. REV. 1, 5 (1971-1972).

<sup>57</sup> Army Field Manual 22-100, Headquarters, Department of the Army, Washington, DC, (July 31, 1990) 42.

training. That training is all encompassing. Training permeates everything a military organization does.<sup>58</sup>

Additionally, commanders should be held accountable for ensuring subordinates are disciplined for sexual assault offenses and shifting that responsibility outside the chain of command will reduce command emphasis on enforcing standards of good order and discipline.

B. UNDER THE CURRENT AMERICAN MILITARY JUSTICE SYSTEM, THE COMMANDER'S PROSECUTORIAL DISCRETION IS BROAD

Military courts have recognized that the commander is vested with broad discretion to decide how to best deal with discipline problems in his or her command.<sup>59</sup> As noted *supra*, the commander's options range from no action, verbal counseling, administrative actions (such as a written letter of reprimand in the service member's file), or an administrative discharge, and even punitive actions such as nonjudicial punishment or court-martial charges.<sup>60</sup> Decisions on serious allegations are made after consulting with the Staff Judge Advocate or a military prosecutor, who are themselves members of the command.<sup>61</sup> The Staff Judge Advocate is expected to provide sound legal advice based on the nature and extent of the alleged

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<sup>58</sup> *Id.* at 49 (citing Arthur S. Collins, Jr., *Common Sense Training*, San Rafael, CA: Presidio Press, 1978).

<sup>59</sup> *See, e.g.,* *United States v. Baker*, 14 M.J. 361, 365 (C.M.A. 1983) (commenting on the authority to charge violations of the UCMJ, court indicated that the "convening authority ... is free to decide the number of offenses to charge...." The convening authority decides what charges, if any, of those preferred should be referred to trial); *United States v. Hagen*, 25 M.J. 78 (C.M.A. 1987) (courts are hesitant to review decisions whether to prosecute, and there is a strong presumption that convening authorities perform their function without bias).

<sup>60</sup> *See* RCM 306.

<sup>61</sup> *See* UCMJ art. 30.

criminal activity, the availability and admissibility of evidence against the accused, the needs of the command, the time necessary to investigate and prosecute the case, and the likely outcome of a trial on the merits.<sup>62</sup> Those are the types of decisions that local district attorneys and United States Attorneys make on a daily basis.<sup>63</sup>

However, in the military that decision is for the commander to make, and not the lawyer. That is because the commander, not the lawyer, is responsible for morale as well as good order and discipline within the command.<sup>64</sup>

C. UNDER THE CURRENT AMERICAN MILITARY JUSTICE  
SYSTEM, IT IS CRITICAL THAT THE COMMANDER HAVE  
TRUST AND CONFIDENCE IN HIS OR HER LEGAL  
ADVISORS

Under the current system, Staff Judge Advocates serve as legal advisors for the commanders of major commands, and for the subordinate commands. It is critical the commanders trust and confide in those legal advisors on matters involving military justice, which in turn impact morale and good order and discipline. That trust and confidence inures to the overall benefit of the command when the command is deployed and commanders must count on

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<sup>62</sup> See UCMJ art. 37 (before convening a general court-martial the convening authority must consider the advice of the staff judge advocate). This legal advice is generally referred to as the “pretrial advice.” SCHLUETER, *supra* note 1 at § 7-3(A) (10th ed. 2018).

<sup>63</sup> *Definition: District Attorney (DA)*, Legal Information Institute, archived at <https://perma.cc/W39Y-EW8H> (last visited Feb. 3, 2021).

<sup>64</sup> See *Brown v. Glines*, 444 U.S. 348 (1980) (“a commander is charged with maintaining morale, discipline, and readiness”); *Greer v. Spock*, 424 U.S. 828, 840 (1976) (holding “nothing in the Constitution . . . disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.”); *Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355, 367 (1971) (holding it is “[t]he responsibility of the military commander for maintenance of order in his command and his authority to maintain that order.”).

their legal advisors in matters far beyond military justice, such as operational law, international agreements, and important military and civilian personnel matters.

The proposed amendments establish a legal office outside the chain of command that decides disposition of serious, non-military offenses and would eliminate a major connection between legal advisors and commanders. The commander's legal advisor and the convening authority would have no reason to meet to discuss decisions about disposition of these offenses. The absence of these direct, professional contacts would undermine this critical relationship, not only in regard to military justice matters, but also with respect to the broader legal issues commanders face at military installations both in the United States and when deployed.

#### V. THE PROPOSED CHANGES WOULD UNDERMINE A COMMANDER'S RESPONSIBILITY TO MAINTAIN GOOD ORDER AND DISCIPLINE

##### A. THE PURPOSE AND FUNCTION OF THE MILITARY JUSTICE SYSTEM – GOOD ORDER AND DISCIPLINE

It is critical that Congress, in considering any amendments to the UCMJ, recall that the primary function and purpose of the military justice system is to enforce good order and discipline in the armed forces.<sup>65</sup>

Traditionally, those who view military justice as primarily a system of justice tend to see the commander's role as a hindrance to justice, nothing more than a relic of the past.<sup>66</sup> Those who view the

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<sup>65</sup> See David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1 (2013) (presenting historical and contemporary analysis of purpose and functions of military justice and concluding that primary purpose of military justice has always been, and should remain, enforcement of good order and discipline).

<sup>66</sup> See *supra* note 2.

system as primarily one for maintaining good order and discipline instead see the commander's role as indispensable.<sup>67</sup> In *Curry v. Secretary of the Army*,<sup>68</sup> the Court of Appeals for the District of Columbia Circuit affirmed the district court's decision that the role of the convening authority in taking various actions in a court-martial case was constitutional. The court stated:

The power of the convening authority to refer charges to the court-martial is justifiable on two grounds. First, prosecutorial discretion may be essential to efficient use of limited supplies and manpower. The decision to employ resources in a court-martial proceeding is one particularly within the expertise of the convening authority who, as chief administrator as well as troop commander, can best weigh the benefits to be gained from such a proceeding against those that would accrue if men and supplies were used elsewhere. The balance struck is crucial in times of crisis when prudent management of scarce resources is at a premium. Second . . . maintenance of discipline and order is imperative to the successful functioning of the military. The commanding officer's power to refer charges may be necessary to establish and to preserve both.

Most of the governing rules and regulations in the military justice system attempt to balance the need for justice and discipline.<sup>69</sup> More recently, critics have accused commanders of failing to ensure prosecution of those accused of sexual assault. Despite the views of some commentators that the military justice system is primarily a

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<sup>67</sup> See Schlueter, *supra* note 65.

<sup>68</sup> 595 F.2d 873, 878 (D.C. Cir. 1979).

<sup>69</sup> See, e.g., *United States v. Littrice*, 13 C.M.R. 43, 47 (C.M.A. 1953) (identifying "the necessity of maintaining a delicate balance between justice and discipline.").



system of justice, the system's function and purpose have not changed since the original Articles of War were adopted in the 1700s.<sup>70</sup> Establishment of the current system's framework in 1950 occurred only after numerous congressional hearings and multiple studies, and that system has fared well. Notably, the United States Supreme Court recently stated in *Ortiz v. United States*<sup>71</sup> that "[t]he procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal."<sup>72</sup>

Notwithstanding all of the reforms that have taken place since the founding of the nation, the American military justice system remains a system designed to enforce discipline and good order.<sup>73</sup>

Based on the low levels of prosecutions of sexual assault offenses in the nations of several allies that have implemented the proposed changes, the evidence does not support the theory that the change will increase the level of U.S. military sexual assault prosecutions. Because the United States military has an excellent reputation as a combat-effective organization, the proponent for change should have the burden of proving there is first of all a problem with military prosecutions of sexual assaults, and the proposed remedy has a reasonable probability of accomplishing the goal without creating new problems. The proposed changes would be a severe and unnecessary blow to the commander's authority to enforce good order and discipline and, if the result is the same as in allied

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<sup>70</sup> See Schlueter, *supra* note 65.

<sup>71</sup> 138 S.Ct. 2165 (2018).

<sup>72</sup> *Id.* at 2174 (2018) (citing SCHLUETER, *supra* note 1 at § 1-7, p. 50 (10th ed. 2018)).

<sup>73</sup> See *id.* at 2200 ("it is possible today to mistake a military tribunal for a regular court and thus to forget *its fundamental nature as an instrument of military discipline*") (emphasis added); Schlueter, *supra* note 65.

militaries, the change likely would result in fewer prosecutions of perpetrators of serious crimes, including sexual assaults.

#### B. COMPARISON TO CIVILIAN PROSECUTORIAL DECISIONS

The proposed amendments to Article 30, UCMJ, which would remove the commander as the decision maker in the military justice process, would undermine the commander's broad prosecutorial discretion and would transfer the local commander's decision to an unspecified command structure outside the commander's chain of command, requiring the recommendations of a senior armed forces lawyer, an individual disconnected in time and space from the command.<sup>74</sup> Such a modification would be tantamount to informing a local district attorney that the decision to prosecute or not prosecute serious cases would be made in the state capital by the State Attorney General, or in the case of a federal criminal prosecution, in Washington D.C.—and that the decision would be binding on local authorities. Not only would that system undermine the effectiveness of the district attorney's and United States Attorney's offices, it would undermine the populace's confidence in the ability of local authorities to take care of local crime. The same is true in the military, with commanders. Once members of a command discover that a person with no connection to the command is making the decision regarding court-martial charges, they will view the commander as powerless to deal with serious offenses in a quick and efficient manner.<sup>75</sup>

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<sup>74</sup> See The Military Justice Improvement Act, S. 1932, 116th Cong. (2020) (requiring disposition of charges be referred to designated commissioned officers in grade O-6 or higher).

<sup>75</sup> See generally Victor M. 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,

C. THE PROPOSED CHANGES WOULD RESULT IN  
ACADEMIC OR IVORY TOWER DECISIONS

Because a high-ranking lawyer outside the command would be making decisions concerning serious court-martial charges, some may view that exercise as primarily “academic,” being disconnected from the real-world problems of the command – a true “ivory tower” decision.<sup>76</sup>

The decision to prosecute almost always involves an armed forces prosecutor personally interviewing potential witnesses, reviewing the law enforcement reports, speaking personally to the commanders in the chain of command, and providing an informed “on the ground” assessment of the strengths and weaknesses of the case against an accused.<sup>77</sup> In deciding whether to prosecute an accused, the prosecutor must make an informed assessment of whether the available evidence supports the charges alleged.<sup>78</sup> Experienced litigators know that a case which looks strong on paper can take on a different light after they personally interview witnesses face-to-face, go over their pretrial statements, assess their demeanor, and then decide whether they will be strong or weak witnesses. Depending on the location of any central legal center charged with deciding whether to go forward with charges, counsel in that office will miss that opportunity. Most of those critical elements in the decision-making process would be missing if the primary decision authority rests in a high-ranking military lawyer, separated from the

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266 (2013) (noting potential adverse impact on discipline if personnel perceive that their commander is not able to punish them).

<sup>76</sup> *Ivory Tower Definition*, Dictionary.com (2021), archived at <https://perma.cc/YP9R-7YXJ> (defining an ivory tower as “an attitude of aloofness from or disdain or disregard for worldly or practical affairs”).

<sup>77</sup> SCHLUETER, *supra* note 1 at § 6-1(A)(3) (10th ed. 2018) (discussing factors that commanders are to consider in preferring court-martial charges).

<sup>78</sup> *Id.*

real-world problems of that particular command. Electronic evidence, memos, and e-mails are not an adequate substitute for a decision made by the local commander after a careful assessment by the commander's local legal advisor. Thus, there is a real danger that the senior armed forces lawyers would be making an ivory-tower assessment of the evidence.

D. THE PROPOSED CHANGES WOULD UNDERMINE THE  
CHAIN OF COMMAND

Under the current system, as discussed *supra*, it is the unit or company commander who usually initiates the charging process by asking the prosecutor assigned to their unit to prepare a charge sheet, i.e., "preferring charges."<sup>79</sup> Usually, a decision is made after consulting the prosecutor assigned to that unit.<sup>80</sup> Each commander in the chain of command is charged with considering the possible charges and providing another level of assessment before it reaches the desk of the commander who would be the convening authority on the case.<sup>81</sup> The proposed changes to the system are clearly intended to disrupt the normal chain of command, and potentially create doubt in the minds of the service members whether the commander has any real disciplinary authority over them. One commentator has noted that removing the commander's authority to prefer or refer charges

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<sup>79</sup> Any person subject to the UCMJ may prefer charges. RCM 307(a). Charges are preferred through use of a charge sheet, DD Form 458. Charge sheets are typically prepared by the legal office after conferring with the accused's commander; the commander then signs the charge sheet, and swears or affirms that he or she has personal knowledge of the charges, or has investigated them, and that they are true. RCM 307(a)(2).

<sup>80</sup> SCHLUETER, *supra* note 1 at § 6-1(A)(3) (10th ed. 2018) (noting that commanders usually seek advice from the military prosecutor).

<sup>81</sup> *See id.* at § 6-2 (discussing forwarding of charges through summary court-martial convening authority and the special court-martial convening authority to the general court-martial convening authority).

would seriously undermine that commander's authority within the unit; in future cases the members of the unit might question or doubt the commander's ability to initiate disciplinary proceedings against them.<sup>82</sup> At most the immediate commander would be able to make a non-binding recommendation to the referral authority about initiation and disposition of offenses.

Under the proposals, the decision to prosecute or not prosecute would be made completely out of the chain of command, and not by the very commanders and lawyers who are in the best position to make decisions that directly affect good order and discipline in that command. Thus, the proposals would undermine the authority of the commander to enforce discipline and justice in his or her unit.

E. FOR PURPOSES OF GOOD ORDER AND DISCIPLINE,  
THERE IS NO DISTINCTION BETWEEN COMMON LAW  
OFFENSES AND MILITARY OFFENSES

In stripping the commander of the discretion to dispose of serious offenses, the proposed changes appear to distinguish what some refer to as “common-law” crimes from military crimes.<sup>83</sup> For

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<sup>82</sup> See generally Victor M. 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, 266 (2013). See also LTC Kyle G. Phillips, *Military Justice and the Role of the Convening Authority*, U.S. Naval Institute, Vol. 146/5/1,407, May 2020, where the author writes:

The authority to administer discipline and hold people accountable is woven into the fabric of the military system. Training, unit culture, esprit de corps, and shared goals are essential for a healthy unit. The authority to discipline and hold people accountable under the law is the backbone of command authority. Stripping court-martial convening authority from command authority would have the effect of severing the spinal cord – the other movements of the “body” will be severely limited if not completely incapacitated.

Archived at <https://perma.cc/73NV-R9FE>.

<sup>83</sup> See SCHLUETER ET AL., *supra* note 19 at § 3.2 (3d ed. 2018) (providing an overview of military crimes, including common law offenses and military-specific crimes).

purposes of the military justice system, that distinction is meaningless. In *Solorio v. United States*,<sup>84</sup> the Supreme Court concluded that a court-martial had jurisdiction to try a Coast Guard member who committed sexual misconduct offenses that occurred in the civilian community. Among other sources, the Supreme Court quoted General George Washington's General Order dated February 24, 1779 which states:

All improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other.<sup>85</sup>

This reasoning remains just as valid today as it did when General Washington wrote it over 240 years ago. Service members who commit common law crimes such as larceny (Art. 121), sexual assault (Art. 120), and murder (Art. 118), pose as much of a threat to good order and discipline as do the crimes of desertion (Art. 85), disobedience of an order (Art. 90), and conduct unbecoming an officer and a gentleman (Art. 133),<sup>86</sup> and as such, are all proper objects for the military justice system.

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<sup>84</sup> 483 U.S. 435 (1987).

<sup>85</sup> *Id.* at 445 n.10 (citing 14 WRITINGS OF GEORGE WASHINGTON 140-141 (J. Fitzpatrick ed. 1936)).

<sup>86</sup> See e.g., *United States v. Morgan*; 40 C.M.R. 583, 586 (A.B.R. 1969) ("That a 'barracks thief' creates problems for a unit commander is . . . common knowledge within the military community."). Most members of the military community, enlisted and officers, understand the real danger to discipline and morale in a unit where an accused has stolen a possession from a fellow service member in arms. It can undermine trust and confidence in the ranks—qualities that are indispensable for good order and discipline.

#### F. THE PROBLEM OF MIXED OFFENSES

The proposed amendments create another issue when the accused has committed multiple offenses—some of which are in the excluded list of offenses (e.g., military offenses) and some of which are on the included list (e.g., common-law offenses). Under the proposals, who will make the ultimate decision to proceed with court-martial charges in these mixed cases? For example, an accused may be charged with sexual assault, conduct unbecoming an officer and a gentleman, and disobedience of an order of a superior officer to avoid contact with the sexual assault victim. Is that a decision for the commander? Or the senior legal officer unconnected with the command? Under the current system, that decision is made efficiently by the local command without regard to whether the offense is military in nature or a civilian-type offense. Additionally, if the commander proceeds with offering the accused a summary court-martial or nonjudicial punishment for the “purely” military offenses, but the accused decides to demand trial by court-martial, who will refer that case? (*See* Section VII, *infra*).

The proposed system creates a needless and complicated bifurcated system and an additional level of bureaucracy that in all likelihood will present unintended consequences.

#### G. THE PROPOSED AMENDMENTS THREATEN THE ABILITY TO HOLD THE COMMANDER RESPONSIBLE FOR THE OFFENSES OF MEMBERS OF THE COMMAND

Furthermore, if commanders no longer have the necessary disciplinary role in preferring charges or referring them to trial for service members’ misconduct, it could be difficult to hold them personally responsible for the delicts of the service members under their command.

CEOs of large organizations know that responsibility for the organization must be accompanied by the authority to manage the organization. To an even greater extent, the same holds true in the military, because commanders make life and death decisions on the

battlefield. They should be held accountable for their inability to enforce good order and discipline, prospects which are undermined by the proposed amendments.

H. THE AMENDMENTS APPARENTLY REINSTITUTE  
PROCEDURES LONG-SINCE ABANDONED FOR  
APPOINTING THE PARTICIPANTS TO A COURT-  
MARTIAL

In the early days of the UCMJ, if a convening authority referred court-martial charges to trial, that officer also appointed the members of the court-martial panel, the trial counsel, and the defense counsel. Over the years, the procedures changed. Now, the convening authority appoints only the panel members who will serve as the finders of fact at the court-martial.<sup>87</sup> They are the military's counterpart to jurors for a state or federal criminal case. The military judge is assigned to the case by the independent Service's trial judiciary command.<sup>88</sup> The defense counsel is assigned to represent an accused by an independent chain of command for defense counsel.<sup>89</sup> The trial counsel (prosecutor) is selected by the Staff Judge Advocate.<sup>90</sup>

Thus, the proposed amendments appear to reinstate a system that has not existed in many years. It would apparently require the Service Chiefs of Staff, located in the Pentagon, to create an office to select not only the court-martial members, but also the military

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<sup>87</sup> UCMJ art. 25.

<sup>88</sup> RCM 503(b)(1).

<sup>89</sup> For example, in the Army defense counsel are appointed by the Chief, United States Army Trial Defense Service or his delegee. Army Regulations 27-10, para. 6-9.

<sup>90</sup> See Army Regulations 27-10, para. 5-3 (detailing of trial counsel by Staff Judge Advocate or his delegee).



judge, prosecutor, and defense counsel.<sup>91</sup> That leaves a clear impression with the accused, and members of the public, that the system has reverted to the day when it appeared that the court-martial was stacked against the accused. In contrast to those proposals, no United States Attorney or district attorney in the civilian criminal justice systems has authority to select these trial participants for cases being tried by their offices.

This scheme of someone other than an officer in the service's judiciary command making the appointment of a judge to a particular court-martial could be perceived as the command hand-picking a judge, and thus impacting the impartiality and independence of the military judge. It could certainly be attacked in the courts as depriving an accused of due process.<sup>92</sup>

## VI. THE PROPOSED CHANGES WOULD CREATE UNINTENDED CONSEQUENCES

### A. UNINTENDED CONSEQUENCE: COMMANDER'S INABILITY TO IMPOSE NONJUDICIAL PUNISHMENT OR CONVENE SUMMARY COURT-MARTIAL

Under the proposed amendments to Article 30, a decision by a lawyer not connected to the command would undermine the

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<sup>91</sup> See The Military Justice Improvement Act, S. 1932, 116th Cong. (2020) (requiring "[e]ach Chief of Staff of the Armed Forces or Commandant" to "establish an office to . . . convene general and special courts-martial" and detail the members of courts-martial).

<sup>92</sup> Cf. *Weiss v. United States*, 510 U.S. 163, 180 (1994) ("Article 26 places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer. . . . [W]e believe this structure helps protect [judicial] independence. . . . Judge Advocates General . . . have no interest in the outcome of a particular court-martial . . ."). The problem could arise where someone in the prosecutorial chain of command believed that a particular military judge was lenient on sentencing convicted service members and the appointing authority picked a judge who was more inclined to impose harsher punishments.

commander's ability to deal with the alleged offenses in some other forum. For example, the amendment indicates that a decision not to proceed with court-martial charges would not limit the ability of the commander to proceed with a summary court-martial<sup>93</sup> or nonjudicial punishment.<sup>94</sup> But that creates potential problems with actual implementation. Article 15 provides that unless a service member is attached to a vessel, the service member can turn down the commander's proposed Article 15 procedures and demand a court-martial. The same is true for a summary court-martial; the accused must consent, whether or not the accused is assigned or attached to a vessel. If the commander offers the accused an Article 15 for certain offenses, or prefers summary court-martial charges, the accused can refuse to proceed, and the centralized legal authority could choose to prohibit a court-martial for those offenses. Thus, the accused can effectively "check-mate" the commander from enforcing decisions to conduct a summary court-martial or impose nonjudicial punishment under Article 15.

B. UNINTENDED CONSEQUENCE: DECIDING WHETHER TO IMPOSE PRETRIAL CONFINEMENT

Under the current system, a commander may place an accused in pretrial confinement pending disposition of the charges.<sup>95</sup> The system provides for both command review and judicial review of that decision by a military magistrate or judge.<sup>96</sup> The current system is an integrated and coordinated decision by the chain of command, which in large part depends on the probable disposition of the charges. The proposed scheme—which takes the decision to refer a

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<sup>93</sup> UCMJ art. 24.

<sup>94</sup> UCMJ art. 15.

<sup>95</sup> RCM 305.

<sup>96</sup> *Id.*

case to trial out of the chain of command – creates uncertainty as to whether that current system of dealing with pretrial confinement issues can be maintained because the immediate commander will no longer be the person who decides whether there is probable cause that the person being confined committed the offense.<sup>97</sup> The function of deciding that sufficiency of the evidence will be transferred to the centralized legal authority, and having one Department of Defense (DOD) entity put the accused into pretrial confinement and another DOD entity refuse to initiate charges would be incongruous, inefficient, and reflect poorly on the immediate commander or the centralized legal authority or both.

C. UNINTENDED CONSEQUENCE: THE PROPOSED SCHEME  
COULD PRESENT SPEEDY TRIAL PROBLEMS

The military justice system currently recognizes several speedy trial protections – constitutional, statutory, and regulatory.<sup>98</sup> Those protections are triggered by the preferral of court-martial charges and/or pretrial confinement of the accused. Under the current system commanders and legal advisors work together to ensure that the case moves in a timely and efficient manner. Vesting the decision to refer charges to a court-martial in a legal office, separated by time and distance, poses significant speedy trial concerns.

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<sup>97</sup> See generally, MCM; RCM 305(d):

When a person may be confined. No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that: (1) An offense triable by court-martial has been committed; (2) The person confined committed it; and (3) Confinement is required by the circumstances.

<sup>98</sup> See SCHLUETER, *supra* note 1 at § 13-3(D) (10th ed. 2018) (discussing speedy trial rights available to a military accused under the Fifth Amendment, the Sixth Amendment, the UCMJ, and the Manual for Courts-Martial).

D. UNINTENDED CONSEQUENCE: THE PROPOSED SCHEME  
COULD ADVERSELY AFFECT PLEA BARGAINING

As in the civilian community, the military justice system depends heavily on the ability of a convening authority and an accused to enter into a pretrial agreement.<sup>99</sup> Those agreements typically require the accused to enter a plea of guilty in return for reduction of charges, dismissal of some of the charges, or a sentence limitation.<sup>100</sup> The proposed amendments fail to address that critical feature of the system. If the centralized legal authority decides to proceed with court-martial charges, that decision is binding on any convening authority. Does that mean that a convening authority could not subsequently enter into plea bargaining with the accused which results in the dismissal of a serious charge? The answer to that question does not lie in drafting additional statutory language, nor in directing the President to solve the problem through a myriad of amendments to the Manual for Courts-Martial or existing Service regulations—those measures would simply add a level of bureaucracy to a system that currently operates efficiently and fairly.

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<sup>99</sup> See generally Bradford D. Bigler, *A New Paradigm for Plea Agreements Under the 2016 MJA*, ARMY LAW. no. 6, 2019, at 48 (in-depth discussion of changes to plea bargaining after 2016 Military Justice Act; author compares the “legacy” system of plea bargaining to the new system; the author notes that if the accused pleads guilty to all charges and specifications, the judge sentences the accused at an Article 39(a) session); Joseph P. Della Maria, Jr., *Negotiating and Drafting the Pretrial Agreement*, 25 JAG J. 117 (1971); Gray, *Negotiated Pleas in the Military*, 37 Fed. B.J. 49 (1978); Bruce A. Haddenhorst & Maryalice David, *Guilty Pleas: A Primer for Judge Advocates*, 39 A.F. L. REV. 87 (1996); Carlton L. Jackson, *Plea Bargaining in the Military: An Unintended Consequence of the Uniform Code of Military Justice*, 179 MIL. L. REV. 1 (2004); Donald F. Melhorn, Jr., *Negotiating Pleas in Naval Courts-Martial*, 16 JAG J. 103 (1962); Brian B. McMenamain, *Plea Bargaining in the Military*, 10 Am. Crim. L. Rev. 93 (1971). For a sample pretrial agreement, see K. JANSEN ET AL., MILITARY CRIMINAL PROCEDURE FORMS, § 4-9 (3d ed. 2009).

<sup>100</sup> See RCM 705.

E. UNINTENDED CONSEQUENCE: THE PROPOSED  
AMENDMENTS MAY ADVERSELY AFFECT AGREEMENTS  
WITH LOCAL CIVILIAN PROSECUTORS

At many installations there are agreements with local prosecutors (state and federal) as to which office—military or civilian—will prosecute an accused.<sup>101</sup> Those agreements are beneficial in promoting good community relations between the local command and the surrounding civilian community. The proposed amendments make no provision for such agreements. Is it intended that after the Judge Advocate General’s Corps Colonel (O-6) or Navy Captain (O-6) legal advisor decides to prosecute a case, the local agreements are no longer operative? Would the O-6 be bound by such agreements? Is the O-6 required to contact the local civilian prosecutor and decide on the next best steps? In either event, the local command would have no authority to resolve the issues, even though the decision could have an impact on local military-civilian relations.

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<sup>101</sup> See MCM, App. 4. Memorandum of Understanding Between the Departments of Justice and Transportation (Coast Guard) Relating to the Investigations and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction; see also Office of the District Attorney, 27<sup>th</sup> Judicial District of Texas, Bell County (“Through an agreement with the Commanding General for III Corps and Fort Hood, virtually all felony cases involving military defendants are deferred to the Army for prosecution by court martial under the Uniform Code of Military Justice. An aggressive liaison program between the III Corps Staff Judge Advocate’s office and the District Attorney’s Office insures that common problems are dealt with effectively.”), archived at <https://perma.cc/BN89-KV93>. Several cases illustrate the three jurisdictions that may choose to prosecute a case. See, e.g., *Jones v. United States*, 527 U.S. 373 (1999) (army retiree, convicted of kidnapping a private from an Air Force base and murdering her, sentenced to death by a district court); *United States v. Hennis*, 79 M.J. 370 (CAAF 2020) (former Army member, convicted of murdering the wife and two daughters of an Air Force captain, sentenced to death by an Army court-martial); *United States v. Gray*, 51 M.J. 1 (CAAF 1999) (servicemember, convicted of two murders, sentenced to life in prison by a state court).

For example, in the current system if a commander elects not to refer sexual offenses to courts-martial, a superior convening authority may refer the offense to courts-martial. If the offense occurred on a military installation with exclusive federal jurisdiction, the United States Attorney may prosecute the case in a United States District Court. If the offense occurred elsewhere in the United States, a district attorney could prosecute the case. Thus, the commander's decision not to prosecute does not end the case – there may still be prosecution in other venues.

**VII. CONGRESS SHOULD NOT LOOK TO OTHER COUNTRIES'  
SYSTEMS AS MODELS FOR AMERICAN MILITARY JUSTICE  
UNLESS THERE IS CLEAR EVIDENCE THAT THOSE FOREIGN  
SYSTEMS ARE MORE EFFECTIVE**

A. IN GENERAL

The proposed amendments seem to rest on the view that first, military commanders are not to be trusted in exercising prosecutorial discretion,<sup>102</sup> and second, that Congress should follow the lead of other countries and adopt procedures used in countries such as Canada, Australia, and the United Kingdom. That argument is reminiscent of debates over whether other countries' laws should serve as a model for American legal systems. In hearings on earlier similar legislative proposals, some commentators have urged Congress to go further and apply this approach to the prosecution of all cases by civilian prosecutors. The argument is that the United States' military justice system is an "outlier" that is somehow deficient. Presumably justice systems used in other democratic

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<sup>102</sup> Cf. Don Christensen, *A Comment on the Latest White Paper, Global Military Justice Reform* (July 26, 2020), archived at <https://perma.cc/F8MG-LVNY> (suggesting that commanders are not capable of making decisions about which cases should be tried by court-martial).

countries are designed to suit the political and military goals of those particular countries, and those democratic countries are profoundly different from the United States in numbers of military personnel, military budgets, and worldwide size and type of military operations. There may be aspects of those systems that could be effectively applied to the United States military. However, before changes from our allies are applied to the United States military they should at least meet a threshold showing that they are applied to prosecute enough cases to show they are indeed effective.

The American military justice system is similar to the civilian justice system.<sup>103</sup> This procedural similarity makes the military justice system easier for civilians to understand, and the same rationale for decentralized decisions for most prosecutions has the same basis in both systems. Civilians recognize that a decentralized decision whereby local district attorneys and U.S. attorneys decide whether a person is charged is best for fairness because local circumstances are considered. There is no need to look to other countries for guidance on who should make the charging decision for the military any more than one should seek foreign guidance on whether authority to prosecute should be shifted to a centralized authority for civilians.

Dramatic changes should not be considered before the evidence establishes there is a problem in the military's prosecution of sexual assault offenses. Any change that is made should not be made before there has been testing and analysis. Allied militaries in democracies that complete a handful of sexual assault prosecutions provide limited anecdotal evidence at best and do not support change for the vastly larger United States military.

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<sup>103</sup> Cf. *Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018) (“[t]he procedural protections afforded to a service member are ‘virtually the same’ as those given in a civilian criminal proceeding, whether state or federal.”) (citing SCHLUETER, *supra* note 1 at § 1-7, p. 50 (10th ed. 2018)).

United States commanders are professional, well trained and highly educated.<sup>104</sup> Those who fail to perform are usually removed from command or denied valued promotions.<sup>105</sup> Lawyers who advise them also are well trained and highly educated, and there are consequences if they fail to perform. Before Congress gives any serious consideration to adopting the procedures used in other countries, it should compare those systems in terms of size of the military force, the world-wide and geographical disbursement of military personnel, purpose of those military justice systems, the history and experience of those systems, and the country's expectations for its commanders in enforcing good order and discipline.

Commentators have written that “[t]he [foremost] distinctive factor that separates the United States military from all other militaries is its ability to ‘command the commons.’”<sup>106</sup> “America is

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<sup>104</sup> See generally Kimberly Jackson et. al., *Raising the Flag: Implications of U.S. Military Approaches to General and Flag Officer Development*, 30–44 (Rand Corporation, 2020), archived at <https://perma.cc/Y5FW-JHB> (detailing military assignment history, professional military and civilian education, special training, and evaluation requirements of officers in the Armed Forces).

<sup>105</sup> For example, in December 2020, 14 Army leaders at Fort Hood, Texas, including two major generals were suspended or relieved from command after an investigation determined that they had a command climate that “allowed sexual assault and harassment to proliferate, and that Army CID agents at the post were under-experienced and over-assigned.” Kyle Rempfer, *Fourteen leaders relieved or suspended after scathing report on Fort Hood*, ARMY TIMES (Dec. 8, 2020), archived at <https://perma.cc/KLR3-R7FB>. See also *Report of the Fort Hood Independent Review Committee*, U.S. ARMY iii, 64, 75 (Nov. 6, 2020) (noting problems with the handling of victims, deficiencies in the Sexual Harassment/Assault Response and Prevention (SHARP) Program, inexperienced investigators, and “a large number of sexual assault cases were lost or dismissed at court-martial partially due to investigations that are rote and lack essential evidence.”), archived at <https://perma.cc/QEH3-DMNR>.

<sup>106</sup> CRAIG CARUANA, AMERICAN POWER: STILL THE BEST HOPE FOR PEACE 77 (2012).



the only country that can project military might globally.”<sup>107</sup> “The military justice system . . . goes wherever the troops go—to provide uniform treatment regardless of locale or circumstances.”<sup>108</sup> Given the global nature of America’s armed forces, commanders must have the ability to “expeditiously deal with misconduct to prevent degradation of the unit’s effectiveness and cohesion.”<sup>109</sup>

Legal counsel to the former Chairman of the Joint Chiefs of Staff has stated that:

While many countries can afford for the center of the[ir] military justice systems to be located . . . far from the arenas of international armed conflict, we require a more flexible capability that can travel with the unit as it operates in any part of the world.<sup>110</sup> Any delay in “disciplinary action will invariably prejudice good order.”<sup>111</sup>

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<sup>107</sup> Stephen Calabresi, “A Shining City On A Hill”: *American Exceptionalism And The Supreme Court’s Practice Of Relying On Foreign Law*, 86 B.U. L. REV. 1335, 1392 (2006) (quoting JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA* (2004)).

<sup>108</sup> James B. Roan and Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 191 (2002).

<sup>109</sup> *Id.*

<sup>110</sup> *Report of the role of the Commander Subcomm. to the Response Systems to Adult Sexual Assault Crimes Panel 108* (2014), archived at <https://perma.cc/N6LJ-9HFM> (testimony of Brigadier General Richard C. Gross, U.S. Army).

<sup>111</sup> In this same vein the late Judge Robinson O. Everett, former Chief Judge of the Court of Military Appeals, cogently pointed out: “[J]ustice delayed is justice defeated. . . . In military life, where to maintain discipline, the unpleasant consequences of offenses must be quick, certain and vivid – not something vague in the remote future.” *Id.* (quoting ROBINSON O. EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* (1956)).

Finally, as discussed in the following sections, it is important to point out that the American military justice system deals with different types of caseloads.<sup>112</sup>

Even assuming that there is some merit in adopting another country's approach to military justice, the burden is on the reformers to show that the American model is indeed lacking, and that adopting the other countries' models will not adversely impact good order and discipline.

B. STATISTICAL COMPARISONS BETWEEN THE UNITED STATES AND THREE COUNTRIES WHERE ATTORNEYS REFER CASES TO COURTS-MARTIAL

On April 20, 2020, a Shadow Advisory Group (SAG) issued a report to the Senate Armed Services Committee and the House Armed Services Committee.<sup>113</sup> The report addressed Section 540F of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (Dec. 19, 2019) (FY20 NDAA), and noted (as mentioned previously) that Section 540F(b)(a)(3) of the National Defense Authorization Act directs a report containing, among other elements,

(3) A comparative analysis of the military justice systems of relevant foreign allies with the current military justice system of the United States and the alternative military

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<sup>112</sup> As noted by the legal counsel to the former Chairman of the Joint Chiefs Staff: "[T]he scope and scale of our allies' caseloads are vastly different than ours. None of our allies handle the volume of cases that the U.S. military does. This is likely due to the greater size of our military forces in comparison." See Report of the role of the Commander, *supra* note 110.

<sup>113</sup> *Shadow Advisory Report Group of Experts, Alternative Authority for Determining Whether to Prefer or Refer Charges for Felony Offenses Under the Uniform Code of Military Justice*, Apr. 20, 2020 [hereinafter SAG Report].

justice system, including whether or not approaches of the military justice systems of such allies to determinations described in subsection (a) are appropriate for the military justice system of the United States.<sup>114</sup>

The SAG Report indicated that 7 of 15 relevant allies do not prosecute non-military offenses, such as sexual assault, by courts-martial during peace time that occur in their countries.<sup>115</sup> The remaining 8 allies utilize lawyers to charge offenses and refer them to trial.<sup>116</sup> The military forces of two allies (Ireland and New Zealand) have fewer than 10,000 personnel in their militaries.<sup>117</sup> Five allied countries—Australia, Canada, Israel,<sup>118</sup> Italy, and the United

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<sup>114</sup> *See id.* (addressing Section 540F of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (Dec. 19, 2019) (FY20 NDAA)).

<sup>115</sup> *Id.* at App. 16-17. As an example, Germany no longer has peacetime courts-martial. Criminal cases are tried in the civilian courts and charging decisions are made by regular civilian authorities. Venue for the trial of offenses by deployed personnel is centralized in the civilian court in Kempten, Bavaria. *See* Act for Venue for Armed Forces Under Special Deployment Abroad (Jan. 21, 2013). Additionally, Sweden no longer has courts-martial. Criminal offenses by military personnel are prosecuted by regular civilian authorities. *See id.*

<sup>116</sup> *Id.*

<sup>117</sup> Global Firepower Nations Index, *Active Military Manpower (2020)*, archived at <https://perma.cc/L4SE-Y3AW>.

<sup>118</sup> The authors did not include Israeli statistics because the most recent information they found available about Israeli sexual assault courts-martial was from 2013. Statistics from the Israeli Forces should be considered because Israel is a democracy, an ally of the United States, and has a military that has an outstanding reputation for competence. In 2013, Israel used the centralized prosecution referral system that is outside the chain of command. In 2013, the Israeli active duty population was 176,500 or four times as large as the active duty population of Fort Hood. Yet in 2012, Fort Hood completed about the same number of military sex offense prosecutions as the entire Israeli Defense Force (Fort Hood tried 26 sex offense courts-martial in FY 2012; Israel averaged 23 indictments from 2008 to 2012). The 2013 study reported that “[t]he entire Australian military justice system prosecuted an average of three felony-level prosecutions the last two years; as compared to the U.S. military justice system that prosecutes approximately 400 times as many felony-level cases.” Schenck, L., *Fact*

Kingdom—have militaries with personnel strengths between about 60,000 and 150,000,<sup>119</sup> and the effectiveness of their prosecution systems could therefore be compared to that of the United States. Any assessment should consider the rates of sexual assault prosecutions and convictions, where available, and compare those rates with the rates of United States sexual assault courts-martial prosecutions and convictions. It may not be possible to assess the statistics of some of the allies because some of these countries might not maintain statistics. Others might be unwilling to disclose statistics on prosecutions.

The SAG Report further states:

The experience of other democratic countries that rely on courts-martial for the trial of serious offenses by military personnel with the charging power vested in a lawyer rather than a lay commander demonstrates that such a system can be put in place without compromising the effectiveness of the nation's defense capability.<sup>120</sup>

Notably, however, the SAG Report provides no measurement of the effect on defense capability of transferring authority from the commander to lawyers. The SAG Report does not give any examples where prosecutions of serious crimes were more effective than the current United States system where the convening authority refers cases to trial. The United States is known for its powerful and effective military,<sup>121</sup> and it serves as the model for our allies to

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*Sheet on Israeli Military Justice*, 11 (Sept. 9, 2013), archived at <https://perma.cc/M9R8-K9GA>.

<sup>119</sup> *Id.*

<sup>120</sup> SAG Report *supra* note 113, at 13.

<sup>121</sup> President Barack Obama said in his farewell to the U.S. Armed Forces:

emulate in many ways. None of our allies' experiences have demonstrated that the dilution of the authority of the commander to enforce good order and discipline improved the effectiveness of their military.

The Department of Defense "uses the term 'sexual assault' to refer to a range of crimes, including rape, sexual assault, forcible sodomy, aggravated sexual contact, abusive sexual contact, and attempts to commit these offenses, as defined by the [UCMJ]." <sup>122</sup> In FY 2018, convening authorities referred 66% (378) cases (penetrative and contact sexual assaults) to trial by general, special, and summary court-martial, and in FY 2017, 64% (441) were referred to court-martial. <sup>123</sup> In FY 2018, convening authorities dismissed or resolved

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America's military remains by far the most capable fighting force on the face of the earth. Our Army, tested by years of combat, is the best-trained and best-equipped land force on the planet.

Our Navy is the largest and most lethal in the world, on track to surpass 300 ships. Our Air Force, with its precision and reach, is unmatched. Our Marine Corps is the world's only truly expeditionary force. Our Coast Guard is the finest in the world. . . . [O]ur military stands apart as the most respected institution in our nation by a mile.

Mahita Gajanan, President Obama's Farewell Address to the Armed Forces, *TIME* (Jan. 4, 2017), archived at <https://perma.cc/CJ22-W5E4>. On February 5, 2020, President Donald Trump said in his State of the Union Address, "Our military is completely rebuilt, with its power being unmatched anywhere in the world — and it is not even close." Jim Garamone, *Trump Touts Military Rebuilding, Space Force, Strikes Against Terror*, *DOD NEWS* (Feb. 5, 2020) archived at <https://perma.cc/YM7B-XKEX>. See also *Global Firepower 2021*, archived at <https://perma.cc/E5T8-JNNX> (ranking the United States as the undisputed most powerful military, followed by Russia and China to complete the top three).

<sup>122</sup> Department of Defense (DOD) Annual Report on Sexual Assault in the Military: Fiscal Year 2019 (2020), at Appendix B [hereinafter 2019 SAPR Report], archived at <https://perma.cc/YL2G-4ZNS>.

<sup>123</sup> Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) Court-Martial Adjudication Data Report (Nov. 2019) at 19 [hereinafter 2019 DAC-IPAD Report], archived at <https://perma.cc/H7QZ-RYGZ>.

through alternate administrative means 34% (196) of preferred cases. Overall, 82% of referred cases in FY18 were referred to general court-martial, and in FY 2017, 77% were referred to general courts-martial. The more serious the sexual assault offense, the higher the level of court-martial. General courts-martial (GCM) have authority to sentence the accused to multiple years of confinement, whereas special courts-martial sentences to confinement are limited to one year and summary courts-martial sentences are limited to 30 days. The following table shows referral levels for penetrative and contact sexual offense cases completed in Fiscal Years 2015 through 2018.<sup>124</sup>

**Table 1**  
**Referral Levels of Penetrative Offenses and Contact Offenses**  
**in United States Courts-Martial**  
**(2015-2018)**

Referral Level of Penetrative Offenses	FY 2015	FY 2016	FY 2017	FY 2018
General Court-Martial	94% (376)	93% (350)	92% (300)	95% (272)
Lower Levels of Court-Martial	6% (23)	7% (27)	8% (25)	5% (15)
Referral Level of Contact Offenses	FY 2015	FY 2016	FY 2017	FY 2018
General Court-Martial	40% (64)	44% (51)	35% (40)	43% (39)
Lower Levels of Court-Martial	60% (96)	56% (66)	65% (76)	57% (52)

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<sup>124</sup> *Id.* at 17.

The following table depicts the number of substantiated reports of sexual assault courts-martial cases tried to verdict, convictions of any offense, and confinement adjudged.

**Table 2**  
**Substantiated Reports of Sexual Assault in United States Courts-**  
**Martial**  
**(2015-2019)**

Fiscal Year	2015 <sup>125</sup>	2016 <sup>126</sup>	2017 <sup>127</sup>	2018 <sup>128</sup>	2019 <sup>129</sup>
Unrestricted Reports <sup>130</sup>	4,584	4,591	5,110	5,805	5,699
Cases Tried for any Offense	543	389	406	307	363
Convictions	413	261	284	203	264
Confinement Adjudged	Not Indicated	196	227	157	227

<sup>125</sup> Department of Defense (DOD) Annual Report on Sexual Assault in the Military: Fiscal Year 2015 49 (2016), archived at <https://perma.cc/V9N9-VUSU>.

<sup>126</sup> Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2016 (2017), at Appendix B, archived at <https://perma.cc/RA67-RK38>.

<sup>127</sup> DOD SAPR Report, DOD Fiscal Year 2017 Annual Report on Sexual Assault in the Military, Appendix B Statistical Data on Sexual Assault at 15, 25, archived at <https://perma.cc/F279-Y3BV>.

<sup>128</sup> DOD SAPR Report, DOD Fiscal Year 2018 Annual Report on Sexual Assault in the Military, Appendix B Statistical Data on Sexual Assault at 11, 24, archived at <https://perma.cc/2FSD-N4Z3>.

<sup>129</sup> See 2019 SAPR Report, *supra* note 122.

<sup>130</sup> Restricted reports of sexual assault are confidential, protected communications. Unrestricted reports of sexual assault are referred for investigation to a military criminal investigative organization, and the command is notified of the alleged incident. 2019 SAPR Report, *supra* note 122, at 5, 11, 29.

A series of studies have compared the rates of sexual assault felony-level prosecutions in the Canadian, Australia, and United Kingdom with those in the United States Armed Forces.<sup>131</sup>

### 1. *Canada*

One study concluded that more than twice as many United States personnel per capita were tried by courts-martial for sex offenses than for Canadian Forces, even though the United States sex offense report rate (assessed by military suspect) was 27% lower than the Canadian rate. In Fiscal Year 2012, a single United States military installation, Fort Hood, alone tried 3.7 times (26 Fort Hood versus 7 Canada) as many sex offenses by courts-martial as the entire Canadian military, and obtained ten times (21 Fort Hood versus 2 Canada) as many sex offense courts-martial convictions.

The Canadian Armed Forces currently have 71,500 regular force members.<sup>132</sup> The United States Armed Forces have approximately 20 times more personnel than the Canadian Armed Forces. The number of Canadian courts-martial prosecutions with at least one sexual misconduct charge, and the number of convictions by reporting year are depicted in the following table.

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<sup>131</sup> Schenck, L., *Fact Sheet on Canadian Military Justice* (Sept. 18, 2020) [hereinafter *Canada Fact Sheet*], archived at <https://perma.cc/9942-GFKK>; *Fact Sheet on United Kingdom Military Justice (Corrected)*, (Sept. 22, 2020), archived at <https://perma.cc/LGQ4-X8ZL>; Schenck, L., *Fact Sheet on Australian Military Justice* (Sept. 13, 2013), archived at <https://perma.cc/G7QT-AUC3>.

<sup>132</sup> *National Defence and the Canadian Armed Forces*, Government of Canada (Sep. 24, 2018), archived at <https://perma.cc/X7UZ-U5TV>.



**Table 3**  
**Canadian Court-Martial Convictions**  
**(2013-2019)**

Year	'13-'14	'14-'15	'15-'16	'16-'17	'17-'18	'18-'19
Cases Tried	6	10	7	12	20	20
Convictions	4	5	7	10	15	14

During the 2018–2019 reporting period, Canada completed 20 courts-martial involving sexual misconduct charges, and 14 resulted in a finding of guilt on at least one charge.<sup>133</sup> Of the 20 personnel charged with sexual misconduct in 2018–2019, 6 were charged with sexual assault, and the other charges related to prostitution, child pornography, voyeurism, etc. None of the sexual assault charges resulted in a finding of guilty.<sup>134</sup>

In the 2017–2018 reporting period, Canada also completed 20 courts-martial involving sexual misconduct with 15 of those resulting in a guilty finding for at least one charge. However, there were only 9 charges involving sexual assault, and the other charges were for non-assault sexual crimes. Three were convicted of sexual assault and received sentences including imprisonment ranging from 9 to 22 months. In the entire Canadian military justice system during the 2018–2019 reporting period, 43 sentences were pronounced by courts-martial; however, only three cases resulted in

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<sup>133</sup> See Government of Canada, Judge Advocate General Annual Report 2018–2019 Annex B (2019), archived at <https://perma.cc/MLN2-TSFV>; Director of Military Prosecutions, National Defense (Canada), Annual Report 2018–2019 50-56 (2019) [hereinafter Canadian 2018-2019 DMP Report], archived at <https://perma.cc/F9ET-YXBZ>; Director of Military Prosecutions, National Defence (Canada), Annual Report 2017-2018 (2018), archived at <https://perma.cc/XAS3-2EZT>.

<sup>134</sup> *Id.*

sentences to any imprisonment (5 days, 5 months, and 10 months respectively). A Canadian survey revealed that in 2018, “the prevalence of sexual assault among women in the Regular Force was about four times that among men (4.3% versus 1.1%)” and totaled “approximately 900 Regular Force members . . . representing 1.6% of all Regular Force members.”<sup>135</sup> In 2018, a U.S. study estimated 1.5% of U.S. military personnel indicated they were sexually assaulted.<sup>136</sup> The Canadian study showing the number of sexual assaults committed by members of the Canadian armed forces may not be comparable to the latest U.S. study because of different survey methodology. For example, the response rate in the Canadian survey “among Regular Force members was 52%,”<sup>137</sup> and the U.S. military personnel response rate was only 17%.<sup>138</sup> A low response rate leads to the possibility of selection bias because victims of sexual assault are more likely to report in surveys that they have been sexually assaulted. Extrapolations from surveys with lower response rates are more likely to be inflated because of this selection bias. Thus, we do not compare the total number of cases prosecuted divided by the total number of cases for Canada or the United States. We do have the total number of cases prosecuted and we divided that number by

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<sup>135</sup> Adam Cotter, *Sexual misconduct in the Canadian Armed Forces Regular Force, 2018* [hereinafter *Canadian Survey*] (May 22, 2019) at 4, archived at <https://perma.cc/G8MU-H25S>.

<sup>136</sup> Annex 1: 2018 Workplace and Gender Relations Survey of Active Duty Members Overview Report [hereinafter 2018 WGRA Report] (May 2019) at vi (“In 2018, 6.2% of DOD women (an estimated 12,927 Service members) and 0.7% of DOD men (an estimated 7,546 Service members) experienced a sexual assault in the past 12 months (Figure 1). This was a statistically significant increase, from 4.3% in 2016, for DOD women. There was no significant change from 2016 for DOD men.”), archived at <https://perma.cc/824S-4MNB>. To determine the total DOD victims of sexual assault in the previous 12 months, add 12,927 women plus 7,546 men equals 20,473. The 2018 WGRA Report used a DOD population of 1,327,194. *Id.* at 19. Dividing the 1,327,194 total population by 20,473 estimated victims of sexual assault equals 1.5%.

<sup>137</sup> *Canadian Survey* at 55.

<sup>138</sup> 2018 WGRA Report at iv.

the number of personnel in the Canadian military. There is no compelling evidence that U.S. military personnel commit more sexual assaults per capita than military personnel in any other country. In sum, during the last two years the Canadian prosecutor tried an average of 7.5 sexual assault cases each year and obtained an average of 1.5 convictions each year, which is a much lower rate per thousand than in the United States military justice system.

## 2. *Australia*

The Australian Defence Force (ADF) has 58,680 active duty personnel, and the United States Armed Forces is 23 times as large as the ADF.<sup>139</sup> In the Australian military, the Director of Military Prosecutions (DMP), chooses the level of trial for each accused.<sup>140</sup> Trials by a Defense Force Magistrate (DFM) or Restricted Court-Martial (RCM) have the power to impose a maximum sentence of six months' imprisonment. An Australian general court-martial (GCM) may adjudge a sentence based on a particular offense of up to confinement for life. The 2019 DMP report notes that on December 3, 2018, a captain was convicted of one count of sexual intercourse without consent by a GCM and his sentence included 3 months imprisonment. The 2017 DMP report states there was one GCM during 2017 for a trial of an accused on a charge of sexual intercourse without consent, and that accused was acquitted.<sup>141</sup> The 2016 DMP report states, "the majority of offences dealt with under the [Defence

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<sup>139</sup> Australian Government Department of Defense 2017–2018 Annual Report, Chapter 7 Strategic Workforce Management, archived at <https://perma.cc/KXT9-W9DK>.

<sup>140</sup> Director of Military Prosecutions, Department of Defence, Australian Government, Report for the Period 01 January to 31 December 2019 21-24 (2020) [hereinafter Australian 2019 DMP Report], archived at <https://perma.cc/Q3U3-3FW2>.

<sup>141</sup> Australian Government, Report for the Period 1 January to 31 December 2017 19, 22 (2018) [hereinafter Australian 2017 DMP Report], archived at <https://perma.cc/EKX9-3Y8J>.

Force Discipline Act] are acts of indecency. The more serious offences are generally dealt with by the civilian authorities unless such offending occurs overseas, where the Australian courts have no jurisdiction.”<sup>142</sup>

The following table depicts the Australian DMP referral decisions for all cases and provides the number of sexual offenses sent to the DMP for a referral decision.

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<sup>142</sup> Director of Military Prosecutions, Department of Defense, Australian Government, Report for the Period 1 January to 31 December 2016 24 (2017) [hereinafter Australian 2016 DMP Report], archived at <https://perma.cc/3W8H-7ZY4>.

**Table 4**  
**Australian Referrals to Trial by Director of Military Prosecutions**  
**(DMP)**  
**(2016-2019)**

Calendar Year	2016 <sup>143</sup>	2017 <sup>144</sup>	2018 <sup>145</sup>	2019 <sup>146</sup>
No Adverse Action	49	38	Not Available	54
Referred to unit for Summary Disposal	22	9	Not Available	37
Defense Force Magistrate	36	32	33	42
Restricted Court-Martial	3	0	4	1
General Court-Martial	0	1	1	0
Sexual Offenses Including Sexual Assaults Referred to DMP for Referral Decision	15	14	Not Available	46

<sup>143</sup> *Id.* at 22-23, 25, Annex B.

<sup>144</sup> Australian 2017 DMP Report, *supra* note 141, at 17, Annex B.

<sup>145</sup> The DMP webpage does not include the 2018 DMP Report. For the statistics provided, see Annex N to Judge Advocate General, Department of Defense, Australian Government, Defence Force Discipline Act 1982: Report for the Period 1 January to 31 December 2018 (2019), archived at <https://perma.cc/3DDT-PRRX>.

<sup>146</sup> Australian 2019 DMP Report, *supra* note 140, at 21-22, Annex A.

The Australian Inspector General Report states, “[s]uperior trials (courts martial and Defence Force magistrate trials) decreased by a further six per cent, a trend that has been observed over the past five financial years. In 2018-19 there were 30 superior trials recorded, compared to 32 trials recorded in 2017-18.”<sup>147</sup>

In sum, only two Australian cases were tried at the general court-martial level from 2016 to 2019, and one of them resulted in an acquittal of the accused. Both of those general courts-martial were for penetrative sexual assaults.<sup>148</sup> Australia should not be used for comparison with the United States as there were only two felony-level sexual assault prosecutions (trial by general court-martial) in the previous four years, and only one general court-martial sexual assault conviction.<sup>149</sup>

### 3. *United Kingdom*

The United Kingdom’s full-time trained strength as of October 1, 2017 was 137,280.<sup>150</sup> The United States Armed Forces has about 10 times more active duty personnel than the United Kingdom. Statistics from the United Kingdom Ministry of Defence indicate the

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<sup>147</sup> Inspector-General of the Australian Defence Force, Annual Report 01 July 2018 to 30 June 2019 (2019), archived at <https://perma.cc/NEV8-LNAT>.

<sup>148</sup> Australian 2019 DMP Report, *supra* note 140, at 21-24 (stating one penetrative sexual assault was tried by general court-martial in December 2019 and resulted in a finding of guilty); Australian 2017 DMP Report, *supra* note 141, at 17, 22 (stating one allegation of sexual intercourse without consent was tried by general court-martial and resulted in an acquittal); Australian 2016 DMP Report, *supra* note 142, at 46 (did not describe any general courts-martial in 2017).

<sup>149</sup> Australian 2016 DMP Report, *supra* note 142, at 46; Australian 2017 DMP Report, *supra* note 141, at 17, 22; Australian 2019 DMP Report, *supra* note 140, at 21-24.

<sup>150</sup> Ministry of Defence (United Kingdom), UK Armed Forces Monthly Service Personnel Statistics 1 October 2017 (Nov. 16 2017), archived at <https://perma.cc/K7BS-V4VA>. See also *Strength of British Military Falls for Ninth Year*, BBC News (Aug. 16, 2019), archived at <https://perma.cc/WLB4-VUDV> (indicating the strength of the U.K. military was 133,460).

following numbers for military personnel prosecuted and convicted of sexual offenses and the most serious sexual offenses, rape or sexual assault, as depicted in the following table. According to United Kingdom statistics, if a defendant is charged with both rape and sexual assault, the defendant is counted as one person in each category. Thus, the number of persons prosecuted and convicted is somewhat lower than the numbers shown on the following table.

**Table 5**  
**United Kingdom Statistics for Investigations, Prosecutions and**  
**Convictions for Sexual Assaults**  
**(2015-2018)**

Year	2015 <sup>151</sup>	2016 <sup>152</sup>	2017 <sup>153</sup>	2018 <sup>154</sup>
Rape and Sexual Assault Investigations <sup>155</sup>	69	86	93	109
Prosecutions for Rape or Sexual Assault Offenses	44	38	56	43
Convictions for Rape or Sexual Assault	19	14	17	13

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<sup>151</sup> Ministry of Defence (United Kingdom), Sexual Offences in the Service Justice System: 2016 (2017), archived at <https://perma.cc/36YJ-F6WB> (information available in the Excel spreadsheet at Tables 1 and 6).

<sup>152</sup> *Id.*

<sup>153</sup> Ministry of Defence (United Kingdom), Sexual Offences in the Service Justice System: 2017 (Mar. 20, 2019), archived at <https://perma.cc/X2VS-YTZE> (information available in the Excel Spreadsheet at Tables 1 and 6).

<sup>154</sup> Ministry of Defence (United Kingdom), Sexual Offences in the Service Justice System: 2018 (2019), archived at <https://perma.cc/NLW9-UG6M> (information available in the Excel spreadsheet at Tables 1 and 6).

<sup>155</sup> Investigations do not include command referrals for prosecution.

From 2015 to 2018, 53 United Kingdom military personnel were prosecuted for rape, and only 8 were convicted of rape, a conviction rate of 15% (8/53).<sup>156</sup> In 2018, the DAC-IPAD concluded that 431 personnel were charged with penetrative sexual assaults resulting in 81 convictions of a penetrative sexual assault offense, and 12 convictions of a non-penetrative sexual assault offenses for a conviction rate of 22% (93/431).<sup>157</sup> Thus, the United Kingdom had a significantly lower conviction rate for penetrative sexual assault offenses than the United States.

#### 4. *General Observations*

In 2019, the active duty military population of Fort Bragg, North Carolina was 52,280.<sup>158</sup> In Fiscal Year 2019, Fort Bragg alone took the following actions at general courts-martial for soldiers charged with at least one sexual assault charge involving an adult victim: 25 arraigned; 22 tried to verdict; and 13 convicted of at least one sexual assault charge.<sup>159</sup> In Fiscal Year 2019, Fort Bragg tried more sexual assault cases than the Canadian military in the most recent year (22 Fort Bragg versus 6 Canada) and obtained 13 convictions whereas the Canadian military did not obtain any sexual assault convictions. Australia had only two felony-level sexual assault prosecutions (trial by general court-martial) in the previous four years, and only one general court-martial sexual assault conviction.<sup>160</sup> The number of

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<sup>156</sup> Sexual Offences in the Service Justice System: 2016, *supra* note 151 (information available in the Excel spreadsheet at Table 6); Sexual Offences in the Service Justice System: 2018, *supra* note 154 (information available in the Excel spreadsheet at Table 6).

<sup>157</sup> 2019 DAC-IPAD Report, *supra* note 123, at A-12.

<sup>158</sup> *Fort Bragg In-depth Overview*, MILITARY INSTALLATIONS, archived at <https://perma.cc/L9VM-5DKS>.

<sup>159</sup> Statistics received on August 14, 2020, from Clerk of Court, U.S. Army Court of Criminal Appeals.

<sup>160</sup> See *supra* note 148 and accompanying text.



United Kingdom personnel convicted of rape or sexual assault is the same (13) as the number of Fort Bragg personnel convicted of sexual assault in FY 2019 even though the population of the United Kingdom military (137,280) is 2.63 times the size of the active duty military population of Fort Bragg (52,280).

Comparisons of the rates of felony-level sexual assault prosecutions with Canada, Australia, and the United Kingdom do not support removing commanders from the process for prosecuting military sexual offenses because they do not provide evidence of increased convictions for sexual assaults.

#### C. THE SAG REPORT ARGUMENTS TO ADOPT FOREIGN MODELS.

As stated previously, the SAG Report suggests that Congress emulate the practices used in other countries for determining which cases should be referred to trial or alternatively, that a pilot program could be used to test the viability of ending the commander's responsibility for ensuring prosecution of serious common law offenses.<sup>161</sup> As that group notes in its Report to the Senate and House Armed Services Committees, several allies of the United States, including the United Kingdom, Australia, and Canada have transferred responsibility for prosecution of sexual offenses from commanders to attorneys.<sup>162</sup> The rate of prosecution per thousand of active duty personnel in the United Kingdom is about the same as in the United States Department of Defense, however, the United Kingdom conviction rate for rape is only 15%, while Canada and Australia have much lower rates of prosecution of felony-level sexual assaults. For example, Canadian military prosecutors did not obtain any courts-martial convictions of military personnel for sexual

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<sup>161</sup> See SAG Report, *supra* note 113, at 12-15.

<sup>162</sup> *Id.* at App. 16-17.

assault in the most recent year in which statistics are available.<sup>163</sup> In 2019, Australia did not complete *any* general courts-martial for *any* offense.<sup>164</sup> In the Australian Armed Forces, all offenses were disposed of at military proceedings where the maximum confinement was limited to six months, and the military personnel who committed serious criminal offenses were tried in civilian courts.

As the Appendix to the SAG Report reflects, the majority of allied forces have also transferred responsibility for criminal cases from the armed forces to civilian authorities. It is important to note, however, that relinquishing jurisdiction to the civilian courts for criminal trials of U.S. service members was tried for almost twenty years and failed. Specifically, with the U.S. Supreme Court's decision in *O'Callahan v. Parker*<sup>165</sup> in 1969 until 1987, when the Court overturned *O'Callahan* in *Solorio v. United States*,<sup>166</sup> service members could be tried by courts-martial only for *service-related* crimes. Thus, the burden fell on the civilian prosecutors to decide whether they wanted to try American service members for offenses where, for example, the offense was committed against civilians or occurred in the civilian community.<sup>167</sup>

#### VIII. THE PROPOSED AMENDMENTS WILL ADVERSELY AFFECT THE DELICATE BALANCE BETWEEN JUSTICE AND DISCIPLINE

There is a danger that in rushing to "fix" what some consider to be problems in the military justice system, the delicate balance between discipline and justice will be thrown off to the detriment of the victims of the alleged offenses, those accused of committing offenses, as well as the command structure overall.

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<sup>163</sup> Canadian 2018-2019 DMP Report, *supra* note 133, at Annex A.

<sup>164</sup> Australian 2019 DMP Report, *supra* note 140, at 21-22, Annex A.

<sup>165</sup> 395 U.S. 258 (1969).

<sup>166</sup> 483 U.S. 435 (1987).

<sup>167</sup> *See supra* note 56.

The UCMJ was enacted in 1950 as a response to complaints and concerns about the operation of the existing Articles of War during World War II. In enacting the UCMJ, Congress struggled with the issue of balancing the need for command control and discipline against the view that the military justice system could be made fairer. The final product was considered a compromise. On one hand, there was concern about the ability of the commander to maintain discipline within the ranks. On the other hand, there was concern about protecting the rights of service members against the arbitrary actions of commanders. Although the commander remained an integral part of the military justice structure, the statute expanded due process protections to service members and created a civilian court to review courts-martial convictions. Since its enactment, the UCMJ has been amended numerous times, sometimes favoring the prosecution of offenses and at other times expanding the protections of the accused.

The proposed amendments clearly undermine the commander's authority. Thus, whether intended or not, the change may tip the balance in favor of the accused, even though the apparent intent is to ensure that more cases go to trial. In so doing, it affects the very core of the military justice system—the role of the commander. And it adversely affects anyone associated with the alleged offenses in the command—witnesses, counsel, and even victims. Currently, the commander and his or her legal advisor carefully consider all of those interests in deciding whether to prosecute a case or choose some other route for dealing with the issue. Placing that decision in some distant office creates the possibility that those diverse interests are not adequately considered or balanced.

**IX. RECENT STUDIES OF COMMAND DECISIONS TO PROSECUTE  
SEXUAL ASSAULTS DEMONSTRATE THAT THE CURRENT  
SYSTEM IS WORKING**

In 2017, the DAC-IPAD formed a Case Review Working Group (CRWG) consisting of seven Committee members to review

individual cases involving sexual offenses.<sup>168</sup> The CRWG reviewed 2,055 investigative case files for probable cause against the subject accused of committing the sexual offense, and found the following:

In about half of the cases reviewed by members that resulted in no action against the subject for the penetrative sexual offense, the reviewer determined that the victim's statements to law enforcement authorities were insufficient to establish probable cause to believe that the subject committed the offense.<sup>[169]</sup>

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The CRWG found the commander's initial disposition decision to be reasonable in 155 of 164 cases (95%). In 42 of the 164 cases (26%), the command preferred charges for a penetrative sexual offense; in the remaining 122 cases (74%), the command did not prefer charges against the subject for the penetrative sexual offense.<sup>170</sup>

The committee concluded that the command reasonably decided to prefer charges in 40 of 42 cases (95%) and not to prefer charges in 115 of 122 cases (94%).<sup>171</sup> The Committee noted that, "many of the

<sup>168</sup> See Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD), Fourth Annual Report (Mar. 2020), at 19-22 [hereinafter 2020 DAC-IPAD Report], archived at <https://perma.cc/W7ZN-JJDH>.

<sup>169</sup> *Id.* at 22.

<sup>170</sup> *Id.* at 20.

<sup>171</sup> *Id.* at 20 n.33. The committee explained their determination not to prefer charges in 94% of the cases was limited:

The remaining 6% of decisions not to prefer charges for a penetrative sexual assault were found by the majority of reviewers not to be supported by the evidence reviewed in the case file. The Committee members note that these do not necessarily constitute cases in which charges should have been

cases that cannot be prosecuted for evidentiary reasons—often involve[ed] excessive alcohol consumption” by the victim of the sexual offense.<sup>172</sup>

On November 2019, the DAC-IPAD issued a court-martial adjudication data report (Nov. 2019 DAC-IPAD Report) that included assessment of courts-martial dispositions of “charge sheets, Article 32 reports, and Results of Trial forms for disposition and adjudication outcomes,”<sup>173</sup> and on March 30, 2020, the DAC-IPAD issued its Fourth Annual Report.<sup>174</sup> The DAC-IPAD database includes records of filed sexual offense charges from 4,454 cases from FY 2012 to 2018.

The 2020 DAC-IPAD annual report assessed the disposition of cases in which Article 32 Preliminary Hearing Officers concluded there was not probable cause to believe the accused committed the charged offense, and the convening authority nevertheless referred the charge to court-martial:

In FY17, 32 cases were referred to court-martial after an Article 32 [P]reliminary [H]earing [O]fficer determined that there was no probable cause to believe a penetrative sexual offense occurred. Fifteen of the 32 referred cases (47%)

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preferred; rather, the reviewers felt they would need to consider more information before they could adequately evaluate whether the disposition decision was reasonable. Such additional information could include a review of the prosecution merits memorandum and perhaps interviews with the judge advocates and commander involved. However, the Committee felt that such an endeavor would be unnecessary, since review of the 164 cases from the random sample reveals no sign of systemic problems with the reasonableness of commanders’ decisions on whether to prefer charges in cases involving a penetrative sexual assault.

2020 DAC-IPAD Report, *supra* note 168, 30.

<sup>172</sup> *Id.* at 31.

<sup>173</sup> 2019 DAC-IPAD Report, *supra* note 123, at 1.

<sup>174</sup> 2020 DAC-IPAD Report, *supra* note 168.

resulted in dismissal of the penetrative sexual offense(s). In 17 of the 32 cases (53%), the penetrative sexual offenses were tried by court-martial. Of those penetrative sexual offense cases that were tried by court-martial, more than three-fourths (76%) resulted in verdicts of not guilty. Notably, one of the guilty verdicts was overturned on appeal due to lack of evidence.

\* \* \*

In FY18, 18 cases were referred to court-martial after an Article 32 [P]reliminary [H]earing [O]fficer determined that there was no probable cause to believe a penetrative sex offense occurred. Seven of the 18 referred cases (39%) resulted in dismissal of the penetrative sexual offense(s). In 11 of the 18 cases (61%), the penetrative sexual offenses were tried by court-martial. Of those penetrative sexual offense cases that were tried by court-martial, nearly three-fourths (73%) resulted in verdicts of not guilty.<sup>175</sup>

The Article 32 Preliminary Hearing Officer is a legal officer, and these dispositions show that in at least some cases convening authorities are more willing to refer sexual assault cases to trial than lawyers.

The CRWG plans to recommend additional efforts to improve the quality and efficiency of criminal investigations, which should result in additional prosecutions.<sup>176</sup> In 2020, the Policy Working Group plans to analyze Article 32 preliminary hearings, including a comparison with federal pretrial processes and a review of the purposes and effectiveness of the Article 32 preliminary hearing.<sup>177</sup>

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<sup>175</sup> *Id.* at 52, 54.

<sup>176</sup> *Id.* at 22-26.

<sup>177</sup> *Id.* at 56.

The Policy Working Group will examine disposition guidance for judge advocates and convening authorities, and the effectiveness of the Staff Judge Advocate's pretrial advice.<sup>178</sup>

**X. CONGRESS SHOULD AWAIT IMPLEMENTATION OF THE  
REFORMS INCLUDED IN THE MILITARY JUSTICE ACT OF 2016,  
WHICH PROVIDES FOR OVERSIGHT AND STATISTICAL  
ANALYSIS**

The genesis of the proposed change to the Uniform Code of Military Justice is apparently a concern that commanders abuse their authority to decide who is prosecuted. Some observers allege that commanders are unwilling to send cases of sexual assault to court-martial notwithstanding strong evidence of guilt because of their close relationships with members of their command who may be accused of crimes or friends of the accused. The Department of Defense reduced the risk of this possibility by elevating any decision not to prosecute a sexual assault offense to the O-6 special court-martial convening authority level.

In the 2014 National Defense Authorization Act,<sup>179</sup> Congress required an additional review of convening authorities' decisions not to refer charges of certain sex-related offenses for trial by court-martial. This provision states:

In any case where a [S]taff [J]udge [A]dvocate, pursuant to section 834 of title 10, United States Code (article 34 of the Uniform Code of Military Justice), recommends that charges of a sex-related offense be referred for trial by court-martial

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<sup>178</sup> 2020 DAC-IPAD Report, *supra* note 168, at 56.

<sup>179</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 981 (2013); National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3372 (2014).

and the convening authority decides not to refer any charges to a court-martial, the convening authority shall forward the case file to the Secretary of the military department concerned for review as a superior authorized to exercise general court-martial convening authority. . . .

In any case where a convening authority decides not to refer a charge of a sex-related offense to trial by court-martial, the Secretary of the military department concerned shall review the decision as a superior authority authorized to exercise general court-martial convening authority if the chief prosecutor of the Armed Force concerned, in response to a request by the detailed counsel for the Government, requests review of the decision by the Secretary. . . .

In any case where a [S]taff [J]udge [A]dvocate, pursuant to section 834 of title 10, United States Code (article 34 of the Uniform Code of Military Justice), recommends that charges of a sex-related offense should not be referred for trial by court-martial and the convening authority decides not to refer any charges to a court-martial, the convening authority shall forward the case file for review to the next superior commander authorized to exercise general court-martial convening authority. . . .

This provision ensures that any decision not to refer a sexual assault to trial receives an additional review whenever the original convening authority decides not to refer the case to trial by court-martial. The reviewing convening authority has the authority to refer the case to a court-martial. It is implicit that the higher-level convening authorities that review a case have authority to hold any lower level convening authority accountable for showing poor judgment in referral decisions.



In the Military Justice Act of 2016,<sup>180</sup> Congress also amended Article 146, UCMJ, and created a “Military Justice Review Panel.” That panel will conduct an in-depth review of the military justice system every eight years, after its initial review in 2020. This is an important step in ensuring that a designated body, apart from Congress, will conduct thorough reviews of the system and offer proposed changes to the Department of Defense.

In addition, Congress added provisions to create more transparency for assessing the American military justice system. The new Article 140a addresses the critical subject of determining trends and issues across all of the Services.<sup>181</sup> The new article was based on an observation by the Response Systems to Adult Sexual Assault Crimes Panel that there is lack of uniform, offense-specific sentencing data from military courts which makes meaningful comparison and analysis of military and civilian courts “difficult, if not impossible.”<sup>182</sup> Additionally, Article 140a requires the government to facilitate the public’s access to all courts-martial filings and records.<sup>183</sup>

These additions to the UCMJ can be invaluable tools for reviewing and if necessary, reframing military justice procedures. Congress should await those reports before making dramatic changes to the military justice landscape that will radically change a system that currently operates fairly and efficiently.

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<sup>180</sup> Military Justice Act of 2016, Pub. L. No. 114-328, 130 Stat. 2962. *See generally*, David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 St. Mary’s L.J. 1 (2017).

<sup>181</sup> Art. 140a, UCMJ, 10 U.S.C. § 940a (2018).

<sup>182</sup> Response Systems to Adult Sexual Assault Crimes Panel Report, *supra* note 40, at 136–37.

<sup>183</sup> That means that courts-martial filings will be available to the public in a manner similar to what exists in the PACER system, which is used in the federal civilian court system.

**XI. CONCLUSION: REAFFIRMING THE CRITICAL ROLE OF  
COMMANDERS**

On August 17, 2018, Secretary of Defense James Mattis, a retired 4-star general, clearly connected military readiness and mission success with the commander's responsibility to enforce discipline. He wrote:

It is incumbent on our leaders to ensure that American Forces are always the most disciplined on the battlefield. Whatever the domain might be. . . . We must . . . remove the cancer of sexual misconduct from our ranks. . . . Enforcing standards is a critical component of making our force more lethal. Our leaders must uphold proven standards. They should know the difference between a mistake and a lack of discipline. If a subordinate makes a mistake, leaders should learn to coach them better. But we must not tolerate or ignore lapses in discipline for our enemies will benefit if we do not correct and appropriately punish substandard conduct. . . . The military justice system is a powerful tool that preserves good order and discipline while protecting the civil rights of Service members. It is a commander's duty to use it. Military leaders must not interfere with individual cases, but fairness to the accused does not prevent military officers from appropriately condemning and eradicating malignant behavior from our ranks. Leaders must be willing to choose the harder right over the easier wrong. . . . Discipline is a competitive edge we must seek and maintain each day if we are to keep America safe from its enemies. As General Washington learned first hand, discipline will make us stronger and more lethal. Therefore, let nothing prevent us

from becoming the most disciplined force this world has ever known.<sup>184</sup>

The problem of sexual assault allegations over the last decade within the Department of Defense is cause for concern and requires additional action by the chain of command, including more training of personnel and prosecution of all cases whenever warranted. But the answer to the problem does not rest in removing or reducing the commander's role. One feature of the military is that it responds and adapts, and is capable to issue orders to correct problems. It is very clear that the American military justice system has improved since its founding and will continue to make adjustments to ensure both discipline and justice.

We recommend that commanders continue to be responsible for discipline in their commands and that the proposed amendments to the UCMJ be rejected.

If Congress is to make any changes to the Uniform Code of Military Justice, it should be to first reaffirm the view that the primary purpose of the military justice system is to enforce good order and discipline, and second, retain the commander's critical role in that system without limitation.

The Supreme Court of the United States has stated that the purpose of the military is to fight and win wars.<sup>185</sup> To that end, it is absolutely essential that commanders—who are ultimately responsible for accomplishing that mission—be vested with the authority and responsibility for maintaining good order and

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<sup>184</sup> U.S. Marine Corps, *Secretary of Defense: Message to the force* (Aug. 17, 2018), archived at <https://perma.cc/ND3G-5VHF>. See also David Vergun, *DOD Taking Steps to Prevent Sexual Assault and Extremism*, DEPT. OF DEFENSE NEWS (Feb. 19, 2021) (Secretary of Defense Lloyd J. Austin III stated "Sexual assault and extremism will not be tolerated in the Defense Department" and he said a commission will assess additional actions to curb such conduct), archived at <https://perma.cc/PM3G-3BE5>.

<sup>185</sup> *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

discipline within their command. Accordingly, we recommend that the UCMJ be amended by adding the following section, 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.

That proposed language, which is a variation of similar language in the preamble to the Manual for Courts-Martial,<sup>186</sup> reflects the long-standing and tested view that the military justice system is designed primarily to promote good order and discipline.

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<sup>186</sup> The Preamble to the Manual for Courts-Martial lists the due process language first, before the language concerning good order and discipline. In our view, the order of those purposes is critical. Listing the discipline purpose first more accurately reflects the function and purpose of the military justice system.

**APPENDIX****FACT SHEETS ON MILITARY JUSTICE IN FOUR ALLIED FORCES**

**Lisa M. Schenck, Fact Sheet on Canadian Military Justice (Sept. 18, 2013)**

**Michael W. Drapeau, Review of Fact Sheet on Canadian Military Justice (Sept. 19, 2013)**

**Lisa M. Schenck, Fact Sheet on Australia Military Justice (Sept. 13, 2013)**

**Lisa M. Schenck, Fact Sheet on United Kingdom Military Justice (Corrected Copy) (Sept. 22, 2013)**

**Lisa M. Schenck, Fact Sheet on Israeli Military Justice (Sept. 9, 2013)**