

# Quis Custodiet Ipsos Custodies? The Current State of Sexual Assault Reform Within the U.S. Military and the Need for the Use of a Formal Decisionmaking Process in Further Reform

*Danielle Rogowski\**

*The views presented are those of the author and do not necessarily represent the views of the Department of Defense or its components.*

## I. INTRODUCTION

Who will guard the guards themselves? Who watches the watchmen? Though actually written by the Roman poet Juvenal, the Latin phrase, *quis custodiet ipsos custodies*, was thought to embody the paradox found in Plato's Republic where the elite warrior-guardian class was in charge of protecting the civilian polity.<sup>1</sup> Unlike Plato's Republic, the guardians of the civilian polity in the United States are not ruling elite, but instead, an all-volunteer force drawn from across the nation. Today, the 2,266,883<sup>2</sup> men and women currently serving in the U.S. Armed Forces are our friends, brothers, sisters, sons, daughters, husbands, wives, mothers, and fathers. Yet, who protects those who protect the nation? Who ensures that they are provided a system where their grievances can be heard and crimes against them can be prosecuted?

In the United States, these responsibilities are levied upon the U.S. Congress, which has Constitutional authority to "make rules for the Government and Regulation of the land and naval Forces."<sup>3</sup> As such, the U.S. military currently has a robust and well-developed judicial system gov-

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\* Captain Danielle Rogowski currently serves as an Aircraft Maintenance Officer in the United States Air Force. J.D. Candidate, Seattle University School of Law, 2015; M.A. University of Oklahoma, 2011; B.S. Political Science, United States Air Force Academy, 2009. Many thanks to Prof. Brooke Coleman.

1. See, e.g., Timothy Besley & James A. Robinson, *Quis Custodiet Ipsos Custodes? Civilian Control Over the Military*, 8 J. EUR. ECON. ASS'N 655, 663 (2010).

2. *By The Numbers: Today's Military*, NPR (July 3, 2011), <http://www.npr.org/2011/07/03/137536111/by-the-numbers-todays-military>.

3. U.S. CONST. art. I, § 8.

erned by the Uniform Code of Military Justice (UCMJ). Yet critics have attacked this system during the past two decades by alleging that it fails to adequately prevent and prosecute sexual assault within the ranks. Following scandals at the 1991 Tailhook Convention, Aberdeen Proving Grounds, and the United States Air Force Academy, critics of the military justice system wrote several articles calling for reform.<sup>4</sup> While the government subsequently enacted several initiatives in response to this criticism,<sup>5</sup> recent events clearly demonstrate that there is still significant work to be done regarding sexual assault in the armed forces. This Note has two primary purposes. The first is to chronicle recent events in the U.S. military's ongoing battle against sexual assault within the ranks, including several recent reforms to the military justice system. The second is to advocate for the use of a technical decisionmaking process, instead of recent Congressional reliance on individual narratives, to consider whether major reform that removes a military commander's charging decision authority is appropriate.

Part II of this Note provides a brief overview of the initial incidents listed above and continues the story by discussing the recent sexual assault scandal at Lackland Air Force Base (AFB).<sup>6</sup> Examination of these incidents in brief evidences the fact that there are still ongoing systemic flaws in the armed forces when it comes to the prevention and prosecution of sexual assault. Part III discusses recent efforts to hold senior Department of Defense (DoD) officials responsible for the prevalence of sexual violence in the armed forces through the civil justice system and the reluctance of the Judicial Branch to involve itself in military affairs. Of the three branches of government, the Judicial Branch has typically been viewed as a safeguard for individual liberty. Yet, Part III demonstrates the propensity for the courts to prioritize national security concerns in civil litigation over individual interests. Part IV details recent small-scale changes in the workings of the military justice system and examines two of the more controversial articles in the Uniform Code of

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4. See, e.g., Kingsley R. Browne, *Military Sex Scandals From Tailhook to the Present: The Cure Can Be Worse Than the Disease*, 14 DUKE J. GENDER L. & POL'Y 749 (2007); Jessica L. Cornett, *The U.S. Military Responds to Rape: Will Recent Changes Be Enough*, 29 WOMEN'S RTS. L. REP. 99 (2008); Tara D. Zickefoose, *Battling the Unforeseen Enemy: The Constitutional Attack on Military Sexual Assault*, 48 TULSA L. REV. 143 (2012).

5. The Sexual Assault Prevention and Response Office (SAPRO) is responsible for oversight of the Department of Defense's sexual assault policy. Detailed information on all current and prior Department of Defense actions taken to prevent and respond to sexual assault is posted on their website: <http://www.sapr.mil>.

6. See *infra* Part II.D.

Military Justice, Article 60 and Article 120.<sup>7</sup> The reforms discussed in Part IV demonstrate the difficulties in finding the appropriate balance between individual interests and national security concerns when it comes to military justice. Part V examines the current legislative debate that proposes large-scale changes to the military justice system, namely eliminating the authority of military commanders to make the charging decision with regard to sexual offenses. Taking into account the ideas discussed in Parts II–IV—that there are current and historical flaws in the way the military justice system prosecutes sexual offenses, that individual interests are historically placed after national security concerns, and that finding the appropriate balance when it comes to military justice reform is inherently difficult—Part V advocates for changing the current debate to include a technical analysis as to military capabilities and the role of the commander. Part V also details an example of a decisionmaking process that can be used to seemingly de-escalate the current highly charged emotional debate into a balanced discussion that will produce a just result for individual service members while at the same time preserving military readiness. Part VI concludes.

## II. SEXUAL ASSAULT IN THE UNITED STATES MILITARY

Today, the 214,098 women<sup>8</sup> currently serving in the Department of Defense and the U.S. Coast Guard make up approximately 14.6% of America's active duty military force.<sup>9</sup> At present, more than 90% of all career fields in the U.S. military are open to women,<sup>10</sup> and this percentage is expected to increase with the passage of recent legislation.<sup>11</sup> Even before the formal opening of military service to women, historical rec-

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7. Article 60 is the provision in the Uniform Code of Military Justice that once allowed a Court-Martial Convening Authority to dismiss charges and change the sentencing orders made by a court-martial. Article 120 is the primary article under which all sexual offenses are prosecuted in the military justice system. See *infra* Part IV.

8. It is important to note that there are a substantial number of male victims of sexual assault within the U.S. military as well. However, due to the largely unreported nature of the crime and the fact that female victims vastly outnumber their male counterparts, this Part uses statistics involving female victims to describe the current state of sexual assault within the military. For information on male sexual assault in the armed forces, see, for example, Matthew Hay Brown, *Breaking the Silence*, THE SUN (Dec. 14, 2013), <http://data.baltimoresun.com/military-sexual-assaults/>; James Dao, *In Debate Over Military Sexual Assault, Men Are Overlooked Victims*, N.Y. TIMES (June 23, 2013), [http://www.nytimes.com/2013/06/24/us/in-debate-over-military-sexual-assault-men-are-overlooked-victims.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/06/24/us/in-debate-over-military-sexual-assault-men-are-overlooked-victims.html?pagewanted=all&_r=0).

9. *Statistics of Women in the Military*, WOMEN IN MIL. SERV. FOR AM. MEMORIAL FOUND., INC. (Nov. 29, 2011), <http://www.womensmemorial.org/Press/stats.html>.

10. *Id.*

11. See, e.g., Chris Lawrence, *Pentagon to Open Combat Jobs to Women*, CNN (Jan. 26, 2013, 3:31 PM), <http://www.cnn.com/2013/01/23/us/combat-jobs-women/>.

ords demonstrate the participation of women in every major American military conflict since the Revolutionary War.<sup>12</sup>

Yet despite this distinguished record of service, the sad truth remains that “women serving in the U.S. military today are more likely to be raped by a fellow soldier than killed by enemy fire in Iraq.”<sup>13</sup> In 2012, the Department of Defense<sup>14</sup> received 3,374 formal reports of sexual assault within the DoD in that year alone.<sup>15</sup> Even more shocking, the DoD admitted that due to the highly unreported nature of the crime, studies placed the actual number of sexual assaults that year somewhere around 26,000.<sup>16</sup> Perhaps the best way to understand the U.S. military’s battle against sexual assault is through an overview of the highly publicized scandals in recent history. While individual sexual offenses are no less important, taken together, these separate incidents demonstrate common threads in the propensity for sexual offenses to occur and the difficulties involved in prosecution of those offenses due to the unique power relationships that are found within the military rank structure. The following analysis is merely a brief overview of the major sexual assault scandals that have affected the U.S. military during the past two decades. In addition to the statistics cited above, even a cursory examination of these incidents evidences the fact that there is still much work to be done regarding the prevention and prosecution of sexual assault in the armed forces.

#### A. Tailhook (1992)

Until the 1992 “Tailhook” scandal, the difficulties faced by female service members were largely unknown. The scandal was named for the September 1991 Tailhook Association convention that occurred at the Las Vegas Hilton and was attended by some 4,000 participants—including thirty-two active duty Navy admirals and Marine Corps generals.<sup>17</sup> Tailhook was perhaps the public’s first glimpse into what has been

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12. *Highlights in the History of Military Women*, WOMEN IN MIL. SERV. FOR AM. MEMORIAL FOUND., INC., <http://www.womensmemorial.org/Education/timeline.html> (last visited Feb. 14, 2014).

13. Michael Winerip, *Retro Report: Revisiting the Military’s Tailhook Scandal, Testimony of Rep. Jane Harman*, N.Y. TIMES (May 13, 2013), <http://www.nytimes.com/2013/05/13/booming/revisiting-the-militarys-tailhook-scandal-video.html>.

14. It is important to note that the U.S. Coast Guard is presently aligned under the Department of Homeland Security and is no longer a part of the Department of Defense. Therefore, the author uses the term “armed forces” to refer to all branches of the U.S. military, including the U.S. Coast Guard, whereas the use of the term Department of Defense typically excludes the U.S. Coast Guard.

15. Winerip, *supra* note 13.

16. *Id.*

17. Kingsley R. Browne, *Military Sex Scandals From Tailhook to the Present: The Cure Can Be Worse Than the Disease*, 14 DUKE J. GENDER L. & POL’Y 749, 751 (2007).

described as “an out of control fraternity party” that involved the nation’s top military aviation professionals.<sup>18</sup>

The most infamous of the activities occurred on Saturday night. A ‘gauntlet’ . . . —a double line of male aviators, one on each side of the hallway—was set up, and those women who had the . . . misfortune . . . of finding themselves in the hallway were fondled and groped as they walked through.<sup>19</sup>

Later, investigators determined that eighty-three women and seven men had been sexually assaulted.<sup>20</sup> While the investigation was plagued with problems,<sup>21</sup> the initial lack of prosecutions (or perceived lack of prosecutions) led many to call into question—for the first time—the U.S. Navy’s ability and willingness to bring perpetrators of such crimes to justice.<sup>22</sup>

#### *B. Aberdeen Proving Grounds (1996)*

The U.S. military faced its next sexual assault scandal in 1996, a scandal that demonstrated that the military’s struggles with sexual assault were not limited to the Navy and Marine Corps. Investigators discovered that the drill sergeants at Aberdeen Proving Grounds (then home of the U.S. Army Ordinance Training Center and School) were participating in what was called “the GAM,” a contest to see which drill sergeant could sleep with the most trainees.<sup>23</sup> In his book chronicling the investigation, Major General (ret.) Robert Shadley noted that the sergeants felt they were “pretty good at picking out the young women who would sleep with them” as he later found that “51 percent of the women who came into the Army exhibited several criteria for being victims of sex abuse.”<sup>24</sup> Unlike the prior Tailhook scandal, which concerned the debauchery of similar ranked military aviators, the abuse at Aberdeen showcased another disturbing aspect of military sexual assaults: the propensity for a drill sergeant’s authority over a young 19-year-old recruit to be abused.<sup>25</sup> Unique

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18. *Id.*

19. *Id.*

20. Winerip, *supra* note 13.

21. For a discussion about the reliability of testimony and the difficulties involved, see Browne, *supra* note 17, at 752–56.

22. Winerip, *supra* note 13.

23. Bryana Zumer, *Retired APG General: The Players Change but the ‘GAM’ Remains the Same*, BALTIMORE SUN (May 23, 2013), <http://www.baltimoresun.com/news/maryland/harford/aberdeen-havre-de-grace/ph-ag-military-scandal-0524-20130522-story.html>. For a comprehensive overview of the scandal, see ROBERT D. SHADLEY, *THE GAME: UNRAVELING A MILITARY SEX SCANDAL* (2013).

24. *Id.*

25. *Id.*

to the military, rank structure and imbalances in power created an entirely new dimension with regard to sexual offenses. In total, nearly fifty women made sexual abuse charges, with twenty-six rape accusations.<sup>26</sup> In the end, the Army brought charges against twelve instructors; only one was cleared, and the remaining eleven were convicted via court-martial or punished administratively.<sup>27</sup>

### C. U.S. Air Force Academy (2003)

With the Navy, Marine Corps, and Army already gripped in scandal, reports that female cadets were being deterred from reporting sexual assault at the United States Air Force Academy left no doubt that the problem had permeated throughout the armed forces.<sup>28</sup> In 2003, twenty-two women made formal accusations that academy officials not only failed to investigate reports of sexual assault, but also actively discouraged women from filing reports of abuse and retaliated against them when they did.<sup>29</sup> Sadly, it appeared that the refusal to investigate and prosecute reports of sexual misconduct was standard operating procedure. The investigation later disclosed that older female cadets were advising young survivors of sexual assault not to report instances of misconduct because it would get them expelled from the school.<sup>30</sup> This time, reaction was swift as Air Force officials replaced Lt. Gen. John Dallanger, the commanding officer of the institution, and three other top officers from the academy in April of that same year.<sup>31</sup> While Lt. Gen. Dallanger maintained that he was being transferred and not removed, a statement issued by then-Secretary of the Air Force James Roche explained that Lt. Gen. Dallanger was being stripped of one of his three stars and that he would be retiring at the rank of Major General, which left little doubt that the removal was disciplinary in nature.<sup>32</sup>

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26. *The List: Military Scandals*, WASH. TIMES, Jan. 8, 2011, available at <https://web.archive.org/web/20110111082441/http://www.washingtontimes.com/news/2011/jan/8/list-military-scandals/>.

27. *Id.*

28. See Cathy Booth Thomas, *Conduct Unbecoming*, TIME (Mar. 6, 2003), <http://content.time.com/time/magazine/article/0,9171,428045-2,00.html>.

29. *Id.*

30. *Id.*

31. Diana Jean Schemo, *Ex-Superintendent of Air Force Academy is Demoted in Wake of Rape Scandal*, N.Y. TIMES (Jul. 12, 2003), <http://www.nytimes.com/2003/07/12/us/ex-superintendent-of-air-force-academy-is-demoted-in-wake-of-rape-scandal.html>.

32. *Id.*

*D. Lackland Air Force Base (2013)*

Ten years later, a scandal at Lackland Air Force Base (AFB) would lead the American public to wonder whether the Air Force and the U.S. military had truly learned their lessons from the prior Tailhook, Aberdeen, and the Air Force Academy incidents. Despite years of reform, countless new policies, trainings, and zero tolerance statements, the U.S. military once again found itself gripped in yet another sexual assault scandal. Similar to the previous scandals, abuse of power became a common theme as female Air Force trainees made allegations of sexual assault against a dozen military training instructors (MTIs).<sup>33</sup> In the summer of 2013, roughly thirty-one female trainees at Lackland AFB, the home of the Air Force's Basic Military Training (BMT) Program, alleged incidents ranging from inappropriate Facebook posts to dorm room rapes.<sup>34</sup> The allegations led Lackland AFB commanders to remove thirty-five instructors from their posts and implement multiple changes in the BMT program including the establishment of a new hotline for the reporting of inappropriate contact, new comment boxes to allow for anonymous reports of abuse, and several other major policy changes regarding the way MTIs were selected and trained.<sup>35</sup> This time, reaction came from the highest authority in the U.S. military, as President Obama made his stance on the issue clear during a speech at Camp Pendleton: "I want you to hear it directly from me, the commander-in-chief, it undermines what this military stands for . . . when sexual assault takes place within."<sup>36</sup> The President further expressed his frustration with the issue by explaining, "I don't want just more speeches or awareness programs or training, but ultimately, folks look the other way. If we find out somebody is engaging in this stuff, they've got to be held accountable—prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period."<sup>37</sup> The actions at Lackland AFB proved that years of mandatory sexual assault educational programs, the creation of resources for sexual assault survivors, and implementation of new poli-

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33. Rick Jervis, *Sex-Assault Scandal Casts a Pall over Lackland AFB*, USA TODAY (July 20, 2013), <http://usatoday30.usatoday.com/news/military/story/2012-07-19/lackland-air-force-sex-scandal/56332956/1>.

34. *Id.*

35. *Id.*

36. Jeff Mason, *Obama: Military Sexual Assault 'Undermines' What We Stand For*, HUFFINGTON POST (Aug. 7, 2013), [http://www.huffingtonpost.com/2013/08/07/obama-military-sexual-assault\\_n\\_3721679.html](http://www.huffingtonpost.com/2013/08/07/obama-military-sexual-assault_n_3721679.html).

37. Lolita C. Baldor, *Chuck Hagel Looks to Blunt Obama Military Sexual Assault Comments*, HUFFINGTON POST (Aug. 15, 2013), [http://www.huffingtonpost.com/2013/08/15/chuck-hagel-obama\\_n\\_3763084.html](http://www.huffingtonpost.com/2013/08/15/chuck-hagel-obama_n_3763084.html).

cies at all levels of command have not yet served to curb the problem of large-scale sexual assault in the U.S. military.

In sum, examination of these incidents in brief, combined with recent statistics showing that sexual assault continues to be a problem within all branches of the military,<sup>38</sup> evidences the fact that there are still ongoing systemic flaws in the armed forces when it comes to the prevention and prosecution of sexual assault.

### III. CIVIL REMEDIES AND THE JUDICIAL BRANCH'S RELUCTANCE TO "RUN THE ARMY"

Historically, courts have been reluctant to involve themselves in military affairs. As the Court explained in 1983, "Judges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates."<sup>39</sup> Victims of sexual assault have responded to recent criticism of the military justice system's perceived failings with regard to the handling of allegations of sexual assault by bringing civil claims against senior Department of Defense (DoD) officials.<sup>40</sup> Through the use of a civil remedy known as a "*Bivens*" claim,<sup>41</sup> sexual assault victims have charged senior DoD officials with failing to establish a justice system in which grievances can be brought and tested with all due process requirements.<sup>42</sup> In response, federal courts have reiterated their desire to remain independent of any military justice concern and maintained their traditional stance that control of the armed forces is best left to the Exec-

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38. See *infra* Part IV.

39. Chappell v. Wallace, 462 U.S. 296, 301 (1983).

40. See Cioca v. Rumsfeld, 720 F.3d 505 (4th Cir. 2013); Klay v. Panetta, 924 F. Supp. 2d 8 (D.D.C. 2013).

41. "In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court held that a violation of a person's Fourth Amendment rights by federal officers, acting under the color of federal law, gives rise to a federal cause of action for damages for the unconstitutional conduct. As a rule, subject to certain exceptions, victims of a violation of the Federal Constitution by a federal officer have a right under *Bivens* to recover damages against the officer in federal court despite the absence of any statute conferring such a right. Such suits are commonly referred to as 'Bivens actions.'" Michael A. Rosenhouse, Annotation, *Bivens Actions—United States Supreme Court Cases*, 22 A.L.R. FED. 2D 159 (2007); see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that violation of a Constitutional command by a federal agent acting under the color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct) (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1803): "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

42. See *Cioca*, 720 F.3d 505; *Klay*, 924 F. Supp. 2d 8. For a detailed explanation of these claims, see *infra* text accompanying notes 58–61.

utive and Legislative Branches.<sup>43</sup> After examining earlier civil suits involving criminal conduct by military officials, civil suits regarding racial discrimination, and the more recent civil suits brought by victims of sexual assault, it becomes clear that any remedy sought by military victims of sexual assault will not come from the civilian federal court system. Furthermore, the rationale of the judiciary in denying service members' claims leads one to conclude that when individual remedial interests and national security interests conflict, national security appears to trump individual concerns.

The Supreme Court first recognized the relationship between the government and service members as "special" in *Feres v. United States*, where a service member's executrix was unsuccessful in recovering money damages for the government's role in a negligent barracks fire that ultimately led to the service member's death.<sup>44</sup> The Court not only stated that a unique relationship existed between the government and military personnel, but further explained that this relationship reduced, and in most cases eliminated, the government's liability to service members.<sup>45</sup> In subsequent decisions, the Court examined the "special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty."<sup>46</sup> Furthermore, in the 1981 case *Stanley v. CIA*, the Fifth Circuit considered the tort claim of a U.S. Army soldier who was given LSD as part of a volunteer program to aid in the Army's development of defense methods against chemical warfare.<sup>47</sup> As a result of negligent administration of the program, Master Sergeant Stanley suffered tremendous consequences to his personal life.<sup>48</sup> Ignoring the facts that the program was "so patently illegal that it could not be considered activity incident to service," the soldier had "volunteered to participate in the experimental program in lieu

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43. See *Cioca*, 720 F.3d 505; *Klay*, 924 F. Supp. 2d 8.

44. *Feres v. United States*, 340 U.S. 135 (1950).

45. *Id.* at 143–46. The Court also noted that Congress, through prior enactments, had already provided to service members "simple, certain, and uniform compensation for injuries or death of those in the armed services." *Id.* at 144. Furthermore, the absence of adjustment to any of these remedies was persuasive in determining that Congress had no intent for the Federal Tort Claims Act to apply to injuries incident to military service. *Id.*

46. *United States v. Brown*, 348 U.S. 110, 112 (1954).

47. *Stanley v. CIA*, 639 F.2d 1146, 1149 (5th Cir. 1981).

48. *Id.* at 1149. Stanley, a Master Sergeant in the United States Army, claimed that he suffered "severe physical and mental injuries which caused him continual problems in the performance of his military duties and ultimately disrupted his marriage" due to the failure of the government to monitor and debrief him after testing. *Id.*

of his regular duties,” and that the program was “not the kind of activity which might reasonably be anticipated as ancillary to military service,” the Court found that the *Feres* doctrine applied, thereby rendering the United States immune from suit.<sup>49</sup>

Later on, the consequences of the unique relationship articulated in *Feres* would expand considerably to limit liability in cases brought under the newly formed *Bivens* remedy.<sup>50</sup> When it created the *Bivens* remedy against federal officials, the Court was careful to note that the case at hand involved, “no special factors counseling hesitation in the absence of affirmative action by Congress.”<sup>51</sup> As a result, courts were able to use the presence of previously unarticulated “special factors counseling hesitation” in combination with the *Feres* doctrine, to further limit government liability in future cases.<sup>52</sup> In *Chappell v. Wallace*, a suit by four enlisted men against their superior officers for racial discrimination, the Court listed the “unique disciplinary structure of the military establishment” and congressional activity regarding the formulation of the Uniform Code of Military Justice (UCMJ) as “special factors.”<sup>53</sup> Based on these factors, the court concluded “it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers.”<sup>54</sup>

Despite the widespread public interest in eliminating racial discrimination from all public spheres, when it came to the military, the Court explained, there was no action the judiciary could take:

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appro-

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49. *Id.* at 1152–53.

50. For an explanation of *Bivens* actions, see A.L.R., *supra* note 41.

51. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

52. *See Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

53. *Id.* at 304.

54. *Id.*

priately vested in branches of government which are periodically subject to electoral accountability.<sup>55</sup>

Although, as former Chief Justice Warren explained, “our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes,” the fact remained that the Court felt it was unable to adequately determine the impact its decisions would have on military discipline.<sup>56</sup> This reality, combined with the fact that Congress had already created the military justice system to address the grievances of service members, meant that, for the most part, courts were unavailable to provide remedies for wrongs suffered in the armed forces.

In deciding that federal courts were unable to provide remedies for wrongs suffered in the armed forces, the Court relied, in large part, on the availability for service members to utilize the military justice system to provide a redress for grievances.<sup>57</sup> Recent civil litigation, however, alleged that the military justice system was inadequate and as a result, victims of sexual crimes were unable to receive relief for harms suffered at the hands of federal officials. In 2013, twenty-eight current and former members of the armed forces brought suit against former Secretary of Defense Donald Rumsfeld and his successor, Robert Gates.<sup>58</sup> In their *Bivens* claim, the plaintiffs in *Cioca v. Rumsfeld* alleged that the former secretaries’ acts and omissions in their official capacities contributed to a “culture of tolerance” in the military for the sexual crimes perpetrated against the plaintiffs.<sup>59</sup> Decided in the same year, *Klay v. Panetta* sought to hold senior DoD officials responsible for “creating and maintaining a hostile military environment that permitted sexual assault and retaliation to continue unabated.”<sup>60</sup> Unlike *Chappell* and prior cases, *Cioca* and

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55. *Id.* at 302 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 4 (1973) (emphasis in original)).

56. Chief Justice Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187–88 (1962).

57. “It is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline; and Congress and the courts have acted in conformity with that view.” *Chappell*, 462 U.S. at 300.

58. See *Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2013); see also *THE INVISIBLE WAR* (Chain Camera Pictures, Rise Films 2012) [hereinafter *THE INVISIBLE WAR*].

59. *Cioca*, 720 F.3d at 507–08.

60. *Klay v. Panetta*, 924 F. Supp. 2d 8 (D.D.C. 2013). In the complaint, plaintiffs charged Senior DoD officials with: (1) failing to implement certain congressional and statutory mandates designed to reduce sexual assault in the military; (2) a lack of leadership in the face of a known climate that condoned and perpetuated violence and retaliation against service members; (3) failing to “take any steps, let alone systemic and effective steps, to identify and punish the personnel who retaliated against” those who reported sexual assault; (4) granting moral waivers that permitted felons to serve in the military; (5) presiding over a dysfunctional system that permitted all but a small handful of rapists to evade any form of incarceration; (6) allowing military commanders to interfere

*Klay* went one step further by alleging that the system established by Congress to handle the grievances of sexual assault victims was so ineffective that it grossly violated the victims' right to due process of law.<sup>61</sup>

While acknowledging the severity of the plaintiffs' allegations, the court remained firm in its deference to Congress and the Executive Branch's control in matters regarding military oversight.<sup>62</sup> Looking back to the rationale used in *Stanley*, the court explained that if Congress had wanted service members to have a remedy in the civil court system for injuries sustained while on active duty, it would have created one.<sup>63</sup> The fact that Congress had not expressly created such a remedy in the twenty-five years since *Stanley* was decided, the court concluded, was evidence of congressional intention regarding the control of military affairs.<sup>64</sup> As the Constitution explicitly allocated oversight of the military to the Legislative and Executive Branches, such intention by Congress was entitled to the utmost deference.<sup>65</sup>

In sum, as noted constitutional scholar Erwin Chemerinsky explained, "the law is now settled that *Bivens* suits are never permitted for constitutional violations arising from military service, no matter how severe the injury or how egregious the rights infringement."<sup>66</sup> Examination of early civil suits involving criminal conduct by military officials, civil suits regarding racial discrimination, and the more recent civil suits brought by victims of sexual assault suggests that any remedy sought by military victims of sexual assault will not come from the judiciary. The above-chronicled cases further suggest that when individual remedial interests and national security interests—in the form of military readiness—conflict, national security appears to trump individual concerns. Even the judiciary, the very branch of government created to protect against the "tyranny of the majority,"<sup>67</sup> seems unwilling to assist, leading

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with the impartiality of criminal investigations; (7) accepting nonjudicial punishment of alleged violators; (8) allowing alleged rapists to be charged with adultery instead of rape; (9) ensuring that military, and not civilian, authorities investigated and prosecuted rape and sexual assault charges; (10) failing to accurately report the conviction rates of rape in the military; and (11) permitting the destruction of forensic evidence. See Amended Complaint, *Klay v. Panetta*, 924 F. Supp. 2d 8 (D.D.C. Mar. 6, 2012) (No. 1:12-cv-00350), 2012 WL 5356589.

61. See *Cioca*, 720 F.3d 505; *Klay*, 924 F. Supp. 2d 8.

62. *Cioca*, 720 F.3d at 517–18.

63. *Id.*

64. *Id.* at 517.

65. *Id.* at 517–18.

66. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 621–22 (5th ed. 2007).

67. Jeffrey Rosen, *The Supreme Court: The Court and Democracy*, PBS, <http://www.pbs.org/wnet/supremecourt/democracy/history.html> (last visited Mar. 21, 2015).

to the conclusion that service members must look elsewhere for relief from harms suffered.

#### IV. SMALL-SCALE CHANGES TO THE MILITARY JUSTICE SYSTEM

Recent policy decisions and legislative actions have shown that the Department of Defense and Congress are open to military justice reform. However, finding the appropriate balance has proven to be difficult. Unlike its civilian counterpart, the military justice system must, in addition to providing a forum for the redress of individual wrongs, serve as a tool for commanders to maintain good order and discipline, and thus combat readiness, in their units. This Part details recent small-scale changes in the workings of the military justice system and examines two of the more controversial articles in the UCMJ: Article 60 and Article 120. Despite significant improvement, Part IV concludes that finding the appropriate balance between individual interests and national security concerns in the context of military justice reform is inherently difficult.

##### *A. Initial Disposition Authority: Why Service Members Are Not Guaranteed Their Day in Court*

The military justice system differs substantially from the civilian system in that it lacks an independent prosecutorial authority.<sup>68</sup> Whereas charging decisions in the civilian system are left to a criminal prosecutor, the military vests its prosecutorial authority solely in military commanders.<sup>69</sup> It is important to note that military commanders, though highly trained professionals, are not lawyers. Instead, commanders have the authority to make disciplinary decisions as part of their duties to maintain good order and discipline within their units and to maintain a constant state of combat readiness.<sup>70</sup> Oftentimes, the military commander plays the role of prosecutor, judge, and jury when administering punishment to members of their unit.<sup>71</sup> Historically, this allocation of prosecutorial dis-

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68. Diane H. Mazur, *Military Values in Law*, 14 DUKE J. GENDER L. & POL'Y 977, 995–96 (2007).

69. *Id.* at 995.

70. “Commanders are responsible for both enforcing the law, protecting [s]oldiers’ rights, and protecting and caring for victims of crime.” THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER’S LEGAL HANDBOOK 7 (2013) [hereinafter COMMANDER’S LEGAL HANDBOOK].

71. “Commanders exercise great power in the military justice system. Under the Uniform Code [of Military Justice] they serve as convening authorities, who appoint the members of a court-martial and who determine whether charges against an accused shall be dismissed or shall be referred for trial by a general, special, or summary court-martial. Unlike a grand jury, the convening authority may refer charges for trial even if the officer who conducts the pretrial investigation recommends to the contrary. After trial, the convening authority decides whether to affirm findings of guilt and how

cretion has proved to be a vital tool for the military commander to ensure his or her unit functions effectively and meets all objectives.<sup>72</sup>

When it comes to sexual assault within the military justice system, an allegation can be filed through a variety of channels.<sup>73</sup> Ultimately, if unrestricted, the service's respective criminal investigation unit will investigate the report.<sup>74</sup> Once complete, the report regarding the investigation of the offense is given to the commanding officer of the accused.<sup>75</sup>

Typically, at this point, most commanders consult with their service judge advocates.<sup>76</sup> "The mission of the Judge Advocate General's Corps is to deliver professional, candid, independent counsel and full-spectrum legal capabilities to command and the warfighter."<sup>77</sup> At this point, the commander, based in part on the advice from the judge advocate, makes the decision whether to: (1) do nothing and essentially dismiss the allegation; (2) pursue nonjudicial punishment<sup>78</sup> under Article 15 of the UCMJ; or (3) pursue court-martial action and prefer charges.<sup>79</sup> Should the commander decide to do nothing, his or her decision cannot be appealed by

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much of the sentence adjudged by the court-martial shall be approved." Robinson O. Everett, *The 50th Anniversary of the Uniform Code*, 16 CRIM. JUST. 21, 22 (2001). For further discussion of the commander's role in the military justice system in comparison to the civilian counterpart, see Mitsie Smith, Comment, *Adding Force Behind Military Sexual Assault Reform: The Role of Prosecutorial Discretion in Ending Intra-Military Sexual Assault*, 19 BUFF. J. GENDER, L. & SOC. POL'Y 147 (2011).

72. See COMMANDER'S LEGAL HANDBOOK, *supra* note 70, at 11–15.

73. Under the Department of Defense's Confidentiality Policy, victims of sexual offenses are offered two reporting options: restricted and unrestricted reporting. When an unrestricted report is filed, the chain of command and relevant law enforcement officials are notified. When a restricted report is filed, the victim remains anonymous and yet still receives access to a variety of medical and counseling services. For a more thorough discussion of reporting options, see Jodie Friedman, Note, *Reporting Sexual Assault of Women in the Military*, 14 CARDOZO J. L. & GENDER 375 (2008).

74. "Each branch of the military has their own investigative agency. The agency for the Army is the Central Investigation Division (CID). Army Regulation 10–87 Ch. 4 (2007) and Army Regulation 195–2 (2009) outline the specific functions and responsibilities of the CID as investigators of all serious crimes within the Army. Navy Criminal Investigative Service (NCIS) operates under authority of the Secretary of the Navy (SECNAV). See Navy Instructions 5430.107 (2005). The Air Force Office of Special Investigation (OSI) operates under the direction of the Air Force Inspector General to conduct criminal investigation involving Air Force personnel in accordance with P. L. No. 99–145, 99 Stat. 583 (1985), and counter-intelligence under Exec. Order 12333." See Smith, *supra* note 71.

75. For a comprehensive discussion of prosecutorial authority in the armed forces and the role of the commander, see Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is It Time For A Change*, 19 AM. J. CRIM. L. 395, 399–405 (1992).

76. "Service Judge Advocate" is a term that describes a lawyer serving in any branch of the armed forces.

77. THE JUDGE ADVOCATE GENERAL'S SCH., THE MILITARY COMMANDER AND THE LAW 7 (11th ed. 2012).

78. Cole, *supra* note 75, at 401–02.

79. COMMANDER'S LEGAL HANDBOOK, *supra* note 70, at 12–13.

the victim of the offense.<sup>80</sup> Instead, the only option for the individual is to pursue a complaint through his or her service's Inspector General component or lodge a formal congressional complaint.<sup>81</sup> As explained earlier, in the analysis regarding *Klay* and *Cioca*, such decisions regarding the dismissal of sexual assault complaints were rarely reviewed by senior officials and the disposition of complaints by low-level commanders was often left unquestioned.<sup>82</sup>

Recognizing the propensity for sexual assault complaints to be dismissed at low levels of command, the Secretary of Defense directed (effective June 28, 2012) that the initial disposition authority in certain sexual assault cases<sup>83</sup> be elevated to "commanders who possess at least special court-martial convening authority and who are in the O-6 grade or higher."<sup>84</sup> The purpose of this change in initial disposition authority was twofold. First, commanders in the rank of O-6 and above are highly seasoned and generally have more command experience than their lower ranking counterparts. Second, the Secretary of Defense wanted to ensure that these decisions were being made by commanders who were regularly advised by legal counsel, presumably providing trained lawyers the opportunity to advise on issues of sufficiency of evidence.<sup>85</sup> To date, all components of the Department of Defense and the National Guard Bu-

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80. Cole, *supra* note 75, at 401–02.

81. The mission of the Department of Defense Inspector General is to "provide independent, relevant, and timely oversight of the Department of Defense that: supports the warfighter; promotes accountability, integrity, and efficiency; advises the Secretary of Defense and Congress; and informs the public." Office of Inspector General, *Mission*, U.S. DEP'T OF DEFENSE, [http://www.dodig.mil/About\\_Us/mission.html](http://www.dodig.mil/About_Us/mission.html) (last visited Mar. 15, 2014).

82. For an analysis of this issue, see THE INVISIBLE WAR, *supra* note 58.

83. "Pursuant to my general court-martial convening authority under Article 22 of the Uniform Code of Military Justice (UCMJ) and Rules for Courts-Martial 306, 401, and 601, I hereby withhold initial disposition authority from all commanders within the Department of Defense who do not possess at least special court-martial convening authority and who are not in the grade of O-6 (i.e., colonel or Navy captain) or higher, with respect to the following alleged offenses: (i) rape, in violation of Article 120; (ii) sexual assault, in violation of Article 120 of the UCMJ; (iii) forcible sodomy, in violation of Article 125 of the UCMJ; and (iv) all attempts to commit such offenses, in violation of Article 125 of the UCMJ; and (iv) all attempts to commit such offenses, in violation of Article 80. Additionally, this withholding applies to all other alleged offenses arising from or relating to the same incident(s), whether committed by the alleged perpetrator or the alleged victim of the rape, sexual assault, forcible sodomy, or the attempts thereof." Memorandum from Leon E. Panetta, Sec'y of Def. to the Sec'y's of the Military Dept's, Chairman of the Joint Chiefs of Staff, Commanders of the Combatant Commands, Inspector Gen. of the Dep't of Def. (Apr. 20, 2012), *available at* [http://www.dod.gov/dodgc/images/withhold\\_authority.pdf](http://www.dod.gov/dodgc/images/withhold_authority.pdf).

84. U.S. DEP'T OF DEFENSE SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012, VOL. 1, 21 (2012), *available at* [http://www.sapr.mil/public/docs/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-VOLUME\\_ONE.pdf](http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf).

85. *Id.*

reau have successfully implemented the Secretary of Defense's directive.<sup>86</sup>

*B. Article 60: The Ultimate Disposition Authority*

Another unique aspect of the military justice system recently reexamined by senior Department of Defense officials and Congress is the court-martial convening authority's<sup>87</sup> Article 60 power. Article 60 of the Uniform Code of Military Justice allows a court-martial convening authority to dismiss a guilty verdict or change the specification on which an individual was found guilty to a lesser included offense.<sup>88</sup> Prior to 2014, the convening authority's only restriction in exercising this power was that they had to obtain and consider a written recommendation from their Staff Judge Advocate or legal officer.<sup>89</sup> This power dates back to 1775 when it was first granted to commanders of the newly formed American military by the Continental Congress.<sup>90</sup> Today, however, many American allies have eliminated this authority due to the perception that it grants too much influence over the court-martial process to commanders.<sup>91</sup> Despite its rare use, some top American military legal authorities maintain that the power is essential to maintaining good order and discipline.<sup>92</sup> The Air Force's leading authority testified before the Senate Armed Service Committee and explained that "[a] convening authority's ability to exercise some accountability on every aspect of an [airman, soldier, sailor, etc.]'s . . . behavior is incredibly important, creating a responsive, disciplined force."<sup>93</sup>

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86. *Id.*

87. A Court-Martial Convening Authority is a senior commissioned officer who occupies one of the positions specified in the UCMJ or any commander designated by the secretary of the service concerned or empowered by the President. For General Court-Martial Convening Authority Positions, see Article 22(a); for Special Court-Martial Convening Authority Positions, see Article 23(a). MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 504(b)(1) discussion (2012).

88. UCMJ art. 60(c) (2012). Prior to amendment, the UCMJ provided:

(3) Action on the findings of a court-martial by the convening authority or other person acting on the sentence is not required. However, such person, in his sole discretion, may-

(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or

(B) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

89. UCMJ art. 60(d) (2012).

90. *Hagel Reviewing Appeal to Change UCMJ's Article 60*, AIR FORCE TIMES (Mar. 31, 2013), <http://www.airforcetimes.com/article/20130331/NEWS/303310005> [hereinafter *Hagel*].

91. Allies that have made changes to limit Article 60 authority include the United Kingdom, New Zealand, Canada, and Israel. *Id.*

92. *Id.*

93. *Id.*

This resounding call for change started with the pardoning of Lt. Col. James Wilkerson<sup>94</sup> by Lt. Gen. Craig Franklin in March of 2012. Using his Article 60 authority, General Franklin dismissed the charges against Lt. Col. Wilkerson based on what the General felt was a lack of evidence.<sup>95</sup> In a six-page letter addressed to then-Secretary of the Air Force Michael Donley, General Franklin explained his decision by stating, “After my extensive and full review of the entire body of evidence and my comprehensive deliberation spanning a three-week period, I only then finally concluded there was insufficient evidence to support a finding of guilt beyond a reasonable doubt.”<sup>96</sup> The letter also discusses how the General reviewed the clemency request, trial evidence, and trial transcripts in detail, explaining:

Letters from Lt Col and Mrs Wilkersons’ family, friends, and fellow military members painted a consistent picture of a person who adored his wife and 9-year old son, as well as a picture of a long-serving professional Air Force officer. Some of these letters provided additional clarity to me on matters used effectively by the prosecution in the trial to question the character and truthfulness of both Lt Col Wilkerson and Mrs Wilkerson. Some letters were from people who did not personally know the Wilkersons, but wanted to convey their concerns to me about the evidence and the outcome of the case.<sup>97</sup>

Next, General Franklin discussed his systematic evaluation of the actual evidence in detail, explaining which parts of the evidence caused him to form his reasonable doubt as to Lt. Col. Wilkerson’s guilt—a question of fact typically reserved for a jury in the American trial system.<sup>98</sup> As one of the listed examples states:

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94. “A military jury in November convicted Wilkerson, a former inspector general at Aviano Air Base in Italy, of aggravated sexual assault and other charges. He was sentenced to one year in prison and dismissal from the service. But a commander overturned the verdict and dismissed the charges, saying he found Wilkerson and his wife more believable than the alleged victim.” Wilkerson was later assigned to Davis-Monthan AFB, in Tucson, AZ, where approximately half of the alleged victim’s family lives. Jacques Billeaud, *Kimberly Hanks Stunned By Reversal of Lt. Col. James Wilkerson’s Conviction*, HUFFINGTON POST (Apr. 25, 2013), [http://www.huffingtonpost.com/2013/04/25/kimberly-hanks-james-wilkerson\\_n\\_3156868.html](http://www.huffingtonpost.com/2013/04/25/kimberly-hanks-james-wilkerson_n_3156868.html).

95. Craig Whitlock, *Air Force General Defends Overturning Sexual-Assault Conviction*, WASH. POST (Apr. 10, 2013), [http://articles.washingtonpost.com/2013-04-10/world/38428317\\_1\\_franksin-commanders-conviction](http://articles.washingtonpost.com/2013-04-10/world/38428317_1_franksin-commanders-conviction).

96. Letter from Craig A. Franklin, Lieutenant Gen. of the U.S. Air Force to Michael B. Donley, U.S. Sec’y of the Air Force (Mar. 12, 2013) [hereinafter Franklin Letter], available at <http://www.scribd.com/doc/135203535/Air-Force-General-explains-why-he-overturned-the-decision-in-sexual-assault-case>.

97. *Id.* at 2.

98. *Id.* at 3–4.

Additionally, witness testimony about the Wilkerson marriage before the night in question and in the immediate days and weeks after that night, showed no perceptible tension or change in their relationship. Had the alleged sexual assault taken place as the alleged victim claimed, it would be reasonable to believe that their relationship would change and that close friends would perceive this change.<sup>99</sup>

While General Franklin quickly pointed out in his memorandum that the UCMJ does not require a court-martial convening authority to offer an explanation of its decision,<sup>100</sup> his explanation reads like an appellate court opinion with distinct conclusions regarding both questions of fact and law.

This letter reveals two problems with Article 60 authority. First, General Franklin, though an exceptionally qualified military officer and fighter pilot, has minimal legal training. This fact calls into question his ability to make findings regarding the sufficiency of evidence, a function typically reserved for appellate court judges in the civilian court system. Second, General Franklin's evaluation of the evidence and the resulting discrepancies demonstrate a chilling assumption of authority regarding the resolution of questions of fact, questions historically reserved in the American trial system for a jury. Indeed, what General Franklin saw as an unrequired explanation authored to explain his decisions in "the court of public opinion" served as direct evidence for the claim that Article 60 authority had gone too far in allowing senior commanders to influence the outcomes of the American military justice system.<sup>101</sup>

Far from a routine exercise of command authority, General Franklin's decision would provoke response from across the Department of Defense and Congress.<sup>102</sup> Senators Jeanne Shaheen (D-NH) and Barbara Boxer (D-CA) called on Secretary of Defense Chuck Hagel to determine if General Franklin's decision could be overturned by a higher authori-

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99. *Id.* at 4.

100. *Id.* at 1.

101. *See id.*

102. General Franklin is not the only Court-Martial Convening Authority to have exercised his or her Article 60 authority. Lt. Gen. Susan J. Helms' nomination to become the vice commander of Air Force Space Command is currently being blocked by a member of the Armed Services Committee who is requesting examination of Helms's decision to overturn a sexual assault conviction of a Captain at Vandenberg Air Force Base. *See* Craig Whitlock, *General's Promotion Blocked over Her Dismissal of Sex-Assault Verdict*, WASH. POST (May 6, 2013), [http://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528\\_story.html](http://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528_story.html); *see also* Jennifer Steinhauer, *A Sexual-Assault Measure to Be Cut From Military Bill*, N.Y. TIMES (June 11, 2013), <http://www.nytimes.com/2013/06/12/us/politics/proposed-measure-to-curb-sexual-assault-in-military-to-be-cut-from-bill.html>.

ty.<sup>103</sup> In his response, Secretary Hagel explained that General Franklin's decision could not be overruled because under the UCMJ neither the Secretary of Defense nor other high-ranking officials had the authority to alter the decision.<sup>104</sup> Despite this unfortunate consequence, Secretary Hagel responded to Senator Boxer's concerns by stating, "I believe this case does raise a significant question [of] whether it is necessary or appropriate to place the convening authority in the position of having the responsibility to review the findings and sentence of a court-martial, particularly prior to the robust appellate process made available by the UCMJ."<sup>105</sup> Therefore, while nothing could be done to overturn General Franklin's decision, key representatives of both the Executive and Legislative Branches seemed to be in agreement that the time had come for reform.

Reform would not take long, as the 2014 National Defense Authorization Act for Fiscal Year 2014 placed new, significant limitations on a court-martial convening authority's abilities under Article 60 of the UCMJ.<sup>106</sup> Unlike the previous version, the current version of Article 60 provides that should the convening authority choose to "disapprove, commute, or suspend, in whole or in part, the sentence of the court-martial for an offense," the convening authority is required to provide a written explanation of the reasons for such action.<sup>107</sup> That written explanation later becomes part of the trial record.<sup>108</sup> Furthermore, the reformed Article 60 now provides that only "qualified offenses" are eligible for Article 60 review.<sup>109</sup> A "qualified offense" is now defined as one that: (1) the maximum sentence of confinement that may be adjudged does not exceed two years; and (2) the sentence adjudged does not include dismissal, a dishonorable or bad conduct discharge, or confinement for more than six months.<sup>110</sup> In addition, the reformed Article 60 specifically prevents any convictions under Articles 120(b) and 125 (which concern

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103. See Molly O'Toole, *Chuck Hagel Calls For Ending Military Law Option to Overturn Court Martial*, HUFFINGTON POST (Apr. 8, 2013), [http://www.huffingtonpost.com/2013/04/08/chuck-hagel-military-law\\_n\\_3040116.html](http://www.huffingtonpost.com/2013/04/08/chuck-hagel-military-law_n_3040116.html).

104. *Id.*

105. Press Release, U.S. Senator Barbara Boxer, Boxer Encouraged by Sec'y Hagel's Response to Air Force Sexual Assault Case (Mar. 11, 2013), *available at* <http://www.boxer.senate.gov/press/release/boxer-encouraged-by-secretary-hagels-response-to-air-force-sexual-assault-case/>.

106. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat 672 § 1702 (2014).

107. 10 U.S.C. § 860(c)(2)(C) (2014).

108. *Id.*

109. *Id.*

110. 10 U.S.C. § 860(c)(3)(D) (2014).

sexual assault) from being reviewed and dismissed by a court-martial convening authority.<sup>111</sup>

While it is still too soon to predict how the current Article 60 will be used in the administration of military justice, the recent reform represents a commitment from both key Executive and Legislative officials to balance the individual rights of service members with the military commander's need to maintain a responsive, disciplined force. At present, court-martial convening authorities still retain some ability to modify court-martial results. This broad power, however, is now tempered by restrictions that prohibit alteration of jury verdicts (except via the military appellate court process) for the most heinous crimes.

### *C. Article 120 Reform: When Protection Became Unconstitutional*

Calling for legislation to amend Article 60 authority has not been the Department of Defense's sole reaction to the perceived inability of the UCMJ to serve the needs of sexual assault victims. Since 2004, the Department of Defense and Congress have enacted several other reforms in an attempt to improve the functioning of the military justice process. While the DoD has frequently been accused of not doing enough to ensure appropriate responses to crimes of sexual misconduct are taken, some now argue that recent reforms in the military justice system have gone too far. In particular, changes to the offense structure of Article 120 of the UCMJ (the primary article under which charges for sexual offenses are brought) has led to several questions of whether the protections extended to victims have gone too far in that they infringe on the constitutional rights of the accused.<sup>112</sup> The recent history of the U.S. military sexual assault statute embodies the struggle to find the perfect balance between the rights of victims to seek justice and the rights of perpetrators to remain innocent until proven guilty. This section chronicles this struggle through the evolution of Article 120, the Article primarily used to prosecute sexual offenses in the armed forces.

Prior to 2007, Article 120 of the UCMJ defined the crime of rape as "an act of sexual intercourse by force and without consent."<sup>113</sup> Therefore, in order to obtain a conviction, the prosecution was required to prove two

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111. 10 U.S.C. § 860(e)(3)(D)(ii)(II) (2014).

112. See, e.g., Lieutenant Keith B. Lofland, *The Neglected Debate Over Sexual Assault Policy in the Department of Defense*, 55 NAVAL L. REV. 311, 319 (2008); Brigadier General (Ret.) Jack Nevin & Lieutenant Joshua R. Lorenz, *Neither a Model of Clarity Nor a Model Statute: An Analysis of the History, Challenges, and Suggested Changes to the "New" Article 120*, 67 A.F. L. REV. 269 (2011).

113. MANUAL FOR COURTS-MARTIAL UNITED STATES app. 27, 45(a) (2012), available at <http://armypubs.army.mil/epubs/pdf/mcm.pdf>.

elements: (1) that the accused committed an act of sexual intercourse and (2) that the act of sexual intercourse was done by force and without consent.<sup>114</sup> Despite the attractiveness of its simplicity, modern military courts found the pre-2007 Article 120 to be ill-fitted to the reality of the types of sexual crimes that were occurring throughout the armed forces:

Article 120 is antiquated in its approach to sexual offenses. In particular, the article does not reflect the more recent trend for rape statutes to recognize gradations in the offense based on context. These [recent rape] statutes incorporate the legal realization that the force used may vary depending on the relationship and familiarity, if any, between perpetrator and victim, but the essence of the offense remains the same—sexual intercourse against the will of the victim. Because Article 120 is dated, its elements may not easily fit the range of circumstances now generally recognized as “rape,” including date rape, acquaintance rape, statutory rape, as well as stranger-on-stranger rape.<sup>115</sup>

In advance of any congressional action, military courts established a variety of case law to supplement Article 120’s inability to deal with the complexities of modern sexual crimes.<sup>116</sup> Congressional action came with the signing of the 2005 National Defense Authorization Act (NDAA), which required the Secretary of Defense to improve “issues relating to sexual assault” and align military justice provisions “more closely to other Federal laws and regulations.”<sup>117</sup>

In response to the call for change, the Department of Defense tasked a subcommittee of the Joint Service Committee to study the possible effects of any changes to the UCMJ.<sup>118</sup> Despite the fact that the subcommittee unanimously recommended against any changes to the UCMJ—asserting that “any rationale for significant change [would be] outweighed by the confusion and disruption that such change would cause”<sup>119</sup>—change came in 2006 when the President signed the NDAA into law, which included a complete rewrite of Article 120.<sup>120</sup> The second version of Article 120 applies to sexual offenses committed during

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114. *Id.*

115. *United States v. Leak*, 61 M.J. 234, 246 (C.A.A.F. 2005) (citations omitted).

116. *See id.* *See also* *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003); *United States v. Palmer*, 33 M.J. 7 (C.M.A. 1991); *United States v. Henderson*, 4 U.S.C.M.A. 268 (1954).

117. Nevin & Lorenz, *supra* note 112, at 277.

118. *See id.* at 278. The Joint Service Committee is responsible for reviewing the Manual for Courts-Martial and proposing any changes to the UCMJ. *Id.* The committee is comprised of both civilian and military legal representation. *Id.*

119. *Id.*

120. *Id.* at 278–79.

the period of October 1, 2007 through June 27, 2012; this version responded to judicial critiques by dividing the crimes of rape, sexual assault, and other sexual misconduct into a range of offenses that took into account the surrounding circumstances of the crime.<sup>121</sup> With regard to the creation of several new independent sexual offenses, the reform was generally accepted as it seemed to bring Article 120 into the modern age with regard to the prevailing legal views.<sup>122</sup>

Unfortunately, this benefit was soon overshadowed by the realization that the wording of the new article provided for an unconstitutional shift in the burden of proof regarding the element of consent. The pre-2007 Article 120 listed a “lack of consent” as one of the elements necessary to obtain a conviction of rape.<sup>123</sup> The post-2007 Article 120 now required only one element to prove the crime of rape by using force: “that the accused causes another person, who is of any age, to engage in a sexual act by using force against that other person.”<sup>124</sup> In other words, pre-2007, the prosecution was required to prove lack of consent in order to obtain a conviction. Post-2007, the defense was required to plead and prove consent as an affirmative defense since lack of consent was no longer an element of the crime.<sup>125</sup> As the UCMJ explained in Article 120(t)(16), “[t]he accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.”<sup>126</sup>

The government’s burden of proving beyond a reasonable doubt all elements of the crime charged is a fundamental principle of the American justice system.<sup>127</sup> As such, the burden shift required by the post-2007

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121. MANUAL FOR COURTS-MARTIAL UNITED STATES app. 28, 45a (2012). For example, the crime of rape (not including the offenses regarding the rape of a child) was now divided into five distinct offenses: rape by using force, rape by causing grievous bodily harm, rape by using threats or placing in fear, rape by rendering another unconscious, and rape by administration of drug, intoxicant, or other similar substance. *Id.* In addition, similar provisions within Article 120 were added for the crimes of sexual assault and other sexual misconduct. *Id.* This is in comparison with the pre-2007 Article 120, which only listed the crimes of Rape and Carnal Knowledge. *Id.* app. 27, 45a (2012).

122. *See, e.g.,* Nevin & Lorenz, *supra* note 112.

123. MANUAL FOR COURTS-MARTIAL UNITED STATES app. 27, 45a (2012).

124. *Id.* app. 28, 45a.

125. “Lack of permission is an element of the offense in subsection (m) (wrongful sexual contact). Consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under any other subsection, *except they are an affirmative defense for the sexual conduct in issue in a prosecution* under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact).” *Id.* app. 28, 45r (emphasis added).

126. *Id.* app. 28, 45(t)(16).

127. *See In re Winship*, 397 U.S. 358, 361 (1970).

Article 120 produced a number of appeals alleging violations of the defendant's constitutional right to be proven guilty beyond a reasonable doubt.<sup>128</sup> At first, the Court of Appeals for the Armed Forces grounded its analysis on the principle that the legislature possessed the authority to define the elements of an offense and could, as long as the definition did not violate constitutional due process guarantees, force the defendant to bear the burden of proving an affirmative defense.<sup>129</sup> The court noted that the legislative purpose behind the new offense structure was to "change the focus of the criminal process away from an inquiry into the state of mind or acts of the victim to an inquiry into the conduct of the accused."<sup>130</sup> Furthermore, the court concluded that any evidence of consent could also be used to provide a reasonable doubt regarding the element of force.<sup>131</sup> In sum, the court concluded that the Constitution permitted the legislature "to place the burden on the defendant to establish an affirmative defense, even if the evidence necessary to prove the defense may also raise a reasonable doubt about an element of the offense."<sup>132</sup> Therefore, while the post-2007 Article 120 was "neither a model of clarity nor a model statute,"<sup>133</sup> it was nonetheless constitutional.<sup>134</sup>

Yet only a year later, the Court of Appeals for the Armed Forces began to shift its thinking with regard to the constitutionality of placing the burden of proving consent as an affirmative defense on the defendant. Decided in 2011, *U.S. v. Prather* involved an airman who was convicted by court-martial of violating Article 120(c)—aggravated sexual assault upon a person substantially incapacitated or substantially incapable of appraising the act, declining participation or communicating unwillingness.<sup>135</sup> Due to the statutory construction of the elements of the offense, *Prather* highlighted a significant problem regarding the interplay of sections within the post-2007 version of the article: "If an accused proves that the victim consented, he has necessarily proven that the victim had the capacity to consent, which logically results in the accused having disproven an element of the offense of aggravated sexual assault—that

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128. See, e.g., *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011); *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011); *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010).

129. *Neal*, 68 M.J. at 298.

130. *Id.* at 301 (quoting *Russell v. United States*, 698 A.2d 1007, 1009 (D.C. 1997)). *Russell*, though decided in 1997, considered a sexual misconduct statute with an affirmative defense component where the defendant bore the burden of persuasion by a preponderance of the evidence similar to that found in the post-2007 Article 120. *Id.*

131. *Neal*, 68 M.J. at 304.

132. *Id.*

133. *Id.* at 305.

134. *Id.* at 304.

135. *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011).

the victim was substantially incapacitated.”<sup>136</sup> As such, the court held that the combined effects of Article 120 (c)(2), Article 120 (t)(14), and Article 120(t)(16) resulted in an unconstitutional burden shift to the accused.<sup>137</sup> In what appeared to be a resounding call for change, the *Pra-ther* court further negated the possibility of any type of curative jury instruction to compensate for the statute’s flaws:

The problem with the provision is structural. If the trier of fact has found that the defense has proven an affirmative defense by a preponderance of the evidence, it is legally impossible for the prosecution to then disprove the affirmative defense beyond a reasonable doubt and there must be a finding of not guilty. There are simply no instructions that could guide members through this quagmire, save an instruction that disregards the provision.<sup>138</sup>

Only four years after being signed into law, the post-2007 Article 120 was again up for reform. While prosecutors and judges generally liked the modern classification of sexual offenses, which allowed for definitional variation based on the circumstances of the crime, the unconstitutional burden shift created by regarding consent as an affirmative defense was unacceptable. What was needed was a hybrid of the pre-2007 and post-2007 Article 120, maintaining the modern classification of sexual offenses, all the while ensuring the preservation of the defendant’s due process rights.

In December 2009, the Defense Task Force on Sexual Assault in the Military (DTFSAMS) reinforced the call for reform from military courts by recommending that Article 120 be reformed once more due to the unconstitutional burden-shifting and because it was a “cumbersome and confusing” statute.<sup>139</sup> On June 28, 2012, the 2012 National Defense Authorization Act formally replaced the post-2007 Article 120 with a new post-2012 version entitled “Rape and sexual assault generally.”<sup>140</sup> While keeping the additional levels of classification for sexual offenses based on the circumstances of the crime, the post-2012 Article 120 contained four major reforms: (1) it removed child sexual offenses and miscellaneous sexual misconduct from the statute (placing them instead in the newly created Articles 120(b) and 120(c)); (2) it addressed the constitutional problems identified by the Court of Appeals for the Armed For-

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136. *Id.* at 343.

137. *Id.*

138. *Id.* at 345.

139. MANUAL FOR COURTS-MARTIAL UNITED STATES app. 23, at A23-15 (2012).

140. *Id.*

es; (3) it expanded the definition of “sexual act” to make the offense gender-neutral; and (4) it simplified the overall statutory scheme.<sup>141</sup>

Unlike the pre-2007 Article 120, lack of consent is still not listed as an element requiring proof beyond a reasonable doubt for conviction.<sup>142</sup> Instead, the post-2012 Article 120 preserves the offender-centric focus of its predecessor by including a more complete definition of “force” that removes all victim-centric language and no longer forces the victim to resist the assault.<sup>143</sup> The unconstitutional burden shift is eliminated, however, as consent is no longer listed as a statutory-specific defense to the crime.<sup>144</sup> In fact, all statutory-specific defenses are eliminated and are instead replaced with Article 120(f), which allows the accused to raise “any applicable defenses available under this chapter or the Rules for Court-Martial.”<sup>145</sup> Because there is no general defense of consent within the UCMJ, consent is no longer a defense to a sexual crime under Article 120.<sup>146</sup> While evidence of consent may still be admitted in order to raise reasonable doubt regarding any of the elements involving force, since consent is no longer a defense, it is no longer required to be proven beyond a reasonable doubt.<sup>147</sup> Therefore, in accordance with the due process mandates of the Constitution and longstanding American criminal law jurisprudence, the defendant no longer bears the burden of proof regarding any element of the crime.

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141. *Id.*

142. At the time of publishing the 2012 edition of the Manual for Courts-Martial, the President had yet to prescribe the subparagraphs that would normally address the elements of the crime, explanations, etc., pursuant to his rule making authority under Article 36. UCMJ art. 120 (2012). The current statutory definition of the crime of rape reads as follows:

(a) Rape— Any person subject to this chapter who commits a sexual act upon another person by—

- (1) using unlawful force against that other person;
- (2) using force causing or likely to cause death or grievous bodily harm to any person;
- (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
- (4) first rendering that other person unconscious; or
- (5) administering to that person by force or threat of force, or without the knowledge or consent of that person a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct;

is guilty of rape and shall be punished as a court-martial may direct.

10 U.S.C. § 920(a) (2013).

143. See JIM CLARK, ANALYSIS OF CRIMES AND DEFENSES 2012 UCMJ ARTICLE 120 (2012), available at [http://www.lexisnexis.com/documents/pdf/20120705060050\\_large.pdf](http://www.lexisnexis.com/documents/pdf/20120705060050_large.pdf).

144. *Id.* at 7.

145. 10 U.S.C. § 920(f) (2013).

146. CLARK, *supra* note 143, at 7.

147. *Id.* at 8–9.

Naturally, it is too soon to tell whether the post-2012 Article 120 is a “model of clarity or a model statute.”<sup>148</sup> What the post-2012 Article 120 does represent, however, is an evolution in the military justice system’s thinking about the general nature of sexual offenses. Some critics would point to the immediate reform of the post-2007 Article 120 as evidence that critics were correct in arguing the original Joint Service Committee’s recommendation in 2005 that reform was unnecessary. Despite this, the fact remains that the newly reformed Article 120 not only brings the military justice system more in line with prevailing state and federal statutes, it also gives military prosecutors a greater range of options when dealing with the highly fact-specific nature of sexual offenses, thereby enabling them to seek justice for victims in ways never before available. Perhaps more important is the speed at which reform occurred; rarely in recent years have the American people seen both the Executive and Legislative Branches of government come together in a relatively short time frame and aggressively enact progressive reform. As such, the story of Article 120 provides a glimmer of hope by acting as a model for continued reform of the military justice system. When viewed in combination, the evolution from the pre-2007 Article 120 to the post-2012 Article 120 represents a commitment by all involved to preserving both the rights of the victim and the rights of the accused.

## V. THE NEED FOR A MORE INFORMED DEBATE

### *A. Why Small-Scale Reforms Simply Are Not Enough and the Current Legislative Debate*

As discussed above, the armed forces have now been actively engaged in battling sexual assault within their ranks for over two decades. This Note merely highlights a select few of the many institutional programs, policies, and changes that have come about in the past twenty years. Sadly, however, the 2012 Workplace and Gender Relations Survey of Active Duty Members reveals that there is still a significant lack of faith in the military justice system.<sup>149</sup> Of the women who experienced unwanted sexual contact,<sup>150</sup> 67% elected to not file any type of report to a

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148. See Nevin & Lorenz, *supra* note 112.

149. DEFENSE MANPOWER DATA CTR., 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS 3 (2013), [http://www.sapr.mil/public/docs/research/2012\\_Workplace\\_and\\_Gender\\_Relations\\_Survey\\_of\\_Active\\_Duty\\_Members-Survey\\_Note\\_and\\_Briefing.pdf](http://www.sapr.mil/public/docs/research/2012_Workplace_and_Gender_Relations_Survey_of_Active_Duty_Members-Survey_Note_and_Briefing.pdf).

150. The survey also reports that of the total number of male service members who experienced unwanted sexual contact in 2012, only 10% reported to some form of military authority. The primary reasons for male service members not reporting to military authorities were unlisted. *Id.* at 4.

military authority.<sup>151</sup> The main reasons given for not reporting the incident were that 70% did not want anyone to know, 66% felt uncomfortable making a report, and 51% did not think their report would be kept confidential.<sup>152</sup> Even more shocking is the fact that these numbers, for the most part, remain unchanged from similar surveys conducted in 2006 and 2010.<sup>153</sup> In addition to describing the current state of sexual assault in the military, these numbers provide clear support for the idea that further reforms are necessary.

When viewed in combination with the issues discussed in Part IV, it is apparent how certain structural elements in the military justice system would cause a victim of sexual assault to be apprehensive about reporting the offense. The determination of whether the case even goes to trial rests with a military commander who is most often in the victim's or the alleged offender's chain of command. The guidelines in the Manual for Court-Martial explain that "[i]f the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority *may* refer it."<sup>154</sup> By using the word "may," the guidelines provide that the commander is not bound by any authority to refer the case to a court-martial and remains free to dispose of the case in another fashion, as discussed previously.

The role of the military commander is and has always been central to the maintenance of good order and discipline.<sup>155</sup> As such, there have traditionally been few calls for change to the role of the commander within the military justice system. The question of whether the commander has too much authority in the decision to prefer charges is not a new debate. As one scholar concluded in 1992:

Leaving prosecutorial discretion in the hands of the commanding officer will best serve the ends of justice and discipline. The military commander has a broader range of alternatives available for handling a case than does the civilian prosecutor. He appears also to

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151. *Id.* at 3. For a discussion of the difference between restricted and unrestricted reporting options available to service members, see Friedman, *supra* note 73.

152. DEFENSE MANPOWER DATA CTR., *supra* note 149, at 3.

153. "Of the 67% of women who did not report to a military authority, the main reasons they chose not to report the incident were: they did not want anyone to know (70%; unchanged from 2006 and 2010), they felt uncomfortable making a report (66%; unchanged from 2006 and 2010), and they did not think their report would be kept confidential (51%; unchanged from 2010)." *Id.*

154. MANUAL FOR COURTS-MARTIAL UNITED STATES, R.C.M. 601(d)(1)(2012) (emphasis added).

155. See Cole, *supra* note 76, at 410.

have access to far more information about the individual accused, through extensive records, information from supervisors, and often (at smaller commands) personal familiarity with the accused. The combination of this range of options, wealth of information, and the legal advice of his trial counsel places him in an ideal position to exercise his prosecutorial discretion in a just manner.<sup>156</sup>

The argument comes back to the notion discussed in Part III that there are unique concerns involved with military justice centering on the “special relationship” between the soldier and his or her commanding officer.<sup>157</sup> Arguments in favor of the current system center on the idea that military commanders are better equipped than a civilian prosecutor to make the charging decision for two reasons: (1) they are a member of the same community as the alleged perpetrator and the victim,<sup>158</sup> and (2) military commanders are better equipped to take into account the unique ends of ensuring unit morale and discipline to achieve military objectives.<sup>159</sup>

However, what was once a forgone conclusion—that the military commander should play a central role in prosecutorial discretion—has recently come up for debate with dramatically different results. In 2013, Senator Kirsten Gillibrand (D-NY), chairwoman of the Senate Armed Services Committee’s personnel panel, proposed the Military Justice Improvement Act,<sup>160</sup> a bill that would fundamentally alter the central role of the commander in the military justice system. The Act moves the decision to prosecute any crime punishable by one year or more in confinement to “independent, trained, professional military prosecutors.”<sup>161</sup>

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156. *Id.*

157. See *Feres v. United States*, 340 U.S. 135, 143–46 (1950).

158. Thomas G. Becker, *In Defense of American Military Justice...Again: Is Congress Giving the Military Justice System a Fair Shake?*, 40 No. 1 THE REPORTER 6, 9 (2013).

159. See *supra* Part III.

160. Military Justice Improvement Act, S. 967, 113th Cong. (2013).

161. *Comprehensive Resource Center for the Military Justice Improvement Act*, <http://www.gillibrand.senate.gov/mjia> (last visited Mar. 15, 2014). The Military Justice Improvement Act reads:

Personnel. The personnel of each office established under paragraph (1) shall consist of such members of the Armed Forces and civilian personnel of the Department of Defense, or such members of the Coast Guard or civilian personnel of the Department of Homeland Security, as may be detailed or assigned to the office by the Chief of Staff or Commandant concerned. The members and personnel so detailed or assigned, as the case may be, shall be detailed or assigned from personnel billets in existence on the date of the enactment of this Act.

Military Justice Improvement Act, S. 967, 113th Cong. § 4(c)(2). The Act would exempt crimes that are “uniquely military in nature” such as absent without leave, disobeying orders, etc. *Comprehensive Resource Center for the Military Justice Improvement Act*, <http://www.gillibrand.senate.gov/mjia> (last visited Mar. 15, 2014).

However, the Act would not amend Article 15 and still allows commanders to order nonjudicial punishment for lesser offenses not directed to trial by this newly created independent prosecutorial authority.<sup>162</sup>

As expected, Senator Gillibrand's proposal faced strict opposition from top military and Armed Services Committee leaders.<sup>163</sup> In March of 2014, Senator Gillibrand's proposal fell five votes short of the sixty votes needed to overcome a filibuster and move forward for a straight up-or-down vote.<sup>164</sup> Despite strong opposition from the armed forces, many were surprised at the vast amount of support that Senator Gillibrand generated from legislators and victim advocate groups alike.<sup>165</sup> Furthermore, although they appear to be stalled at the moment, companion bills that have been introduced in the House of Representatives seem to signify that the notion of eliminating prosecutorial discretion from military commanders has gained significant support since the discussion first started in the early 1990s.<sup>166</sup>

Another signal that opinions on Capitol Hill regarding military justice appear to be changing is the Senate's recent passage of the Victims Protection Act of 2014.<sup>167</sup> The bill,<sup>168</sup> introduced by Senator Claire McCaskill (D-MO), requires several key changes to way in which sexual assault crimes are handled within the military justice system, including but not limited to: (1) mandating collaboration between the Department of Justice and the Department of Defense in efforts to prevent and respond to sexual assault;<sup>169</sup> (2) eliminating the admissibility of evidence regarding the general military character of an accused for the purpose of showing the probability of the innocence of the accused (the so-called "good soldier" defense);<sup>170</sup> and (3) establishing a process to ensure that consultation with the victim of a sexual offense occurs with "respect to

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162. *Id.*

163. Stacy Kaper, *Kirsten Gillibrand Blames White House in Failure of Military Sexual-Assault Bill*, NAT'L J. (Mar. 6, 2014), <http://www.nationaljournal.com/defense/kirsten-gillibrand-blames-white-house-in-failure-of-military-sexual-assault-bill-20140306>; Leo Shane III, *Senate Approves McCaskill Sex Assault Bill*, MIL. TIMES (Mar. 10, 2014), <http://www.militarytimes.com/article/20140310/NEWS05/303100027/Senate-approves-McCaskill-sex-assault-bill>.

164. Shane, *supra* note 163.

165. Kaper, *supra* note 163.

166. *Id.* ("A companion House bill to Gillibrand's from GOP Rep. Dan Benishek of Michigan has 71 cosponsors but has gone nowhere. Another bill from Democratic Rep. Jackie Speier of California . . . has 157 cosponsors. It would also remove commanders from the decision to prosecute sexual assaults and would place jurisdiction in the newly created, autonomous Sexual Assault Oversight and Response Office, which is comprised of civilian and military experts.").

167. Shane, *supra* note 163.

168. Victims Protection Act of 2014, S. 1917, 113th Cong. (2014).

169. *See id.* § 5(a)(1-5).

170. *See id.* § 3(g).

the victim's preference as to whether the offense should be prosecuted by court-martial or by a civilian court with jurisdiction over the offense."<sup>171</sup>

In what has been billed as a "battle" between two of the leading women of the Senate, several criticize Senator McCaskill's plan as not going far enough to ensure protection for victims.<sup>172</sup> Yet at the same time, Senator Gillibrand's proposal, which has still failed to gain the necessary support to pass the Senate, has drawn sharp criticism from military leaders who claim that it amounts to a "dismantling of the military's judiciary."<sup>173</sup> While both proposals represent what appear to be, at first glance, gains in terms of providing a military justice system that is fair to victims and alleged perpetrators alike, the most important distinction between the two is the ability of the military commander to prefer charges. As a result, the highly political and emotional debate regarding the military commander's ability to exercise this tremendous power in the military judicial system rages on.

#### *B. So Where Do We Go From Here?*

The debate needs to change. Instead of focusing on whether military commanders are *able* to exercise prosecutorial discretion in a fair and just manner, the question that needs to be examined is whether military commanders are in fact *the best entities* in the armed forces to exercise this power, as opposed to civilian counterparts or the Judge Advocate General Corps. In other words, this debate should not be about whether commanders *should* or *can* make a fair charging decision, but instead, should center on the notion of whether placing the charging decision in the military commander's hands is the *best use* of existing military capabilities. Unfortunately, and yet understandably, due to the highly charged emotional nature of the topic, the tremendous responsibility of the armed forces, and the historical importance of the role of the military commander, any discussion of this topic runs the risk of evolving into a highly charged debate that will only serve to further entrench participants in their current views. The Associated Press described the Senate floor during debate over Senator Gillibrand's bill: "One by one, proponents and opponents of [Senator Gillibrand's proposal] stood on the Senate

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171. *Id.* § 3(b)(1). The Act later provides that the victim's preference should be given "great weight" in determining whether the offense will be tried at a court-martial or the corresponding civilian authority. *Id.* § 3(b)(2).

172. In fact, Gillibrand's effort divided the Senate in ways that "smashed conventional lines on both gender and political party." Donna Cassata, *Senate Blocks Change to Military Sex Assault Cases*, LAS VEGAS SUN (Mar. 6, 2014, 2:04 PM), <http://www.lasvegassun.com/news/2014/mar/06/senate-blocks-change-military-sex-assault-cases/>. See also Shane, *supra* note 163.

173. Shane, *supra* note 163.

floor and passionately argued based on personal experiences, growing frustration with what they dismissed as fixes around the edges and horrific stories from the ranks.”<sup>174</sup>

The arguments of both sides are relatively simple and easy to understand. On one hand, proponents of an independent prosecutorial authority cite the ever-increasing amount of sexual assault within the ranks and argue that the present military justice system continues to fail men and women in uniform.<sup>175</sup> On the other hand, opponents who favor keeping the charging decision in the hands of the military commander cite the central and historical importance of a judicial system that maintains military effectiveness.<sup>176</sup> One side looks to the individual, to the service member who has been a victim of a heinous crime and has subsequently been denied justice. The other looks to the collective, to the effectiveness of the armed forces and their ability to stand ready to protect and defend the nation at a moment’s notice. Both arguments are strong, both sides are informed, and both interests are of the utmost importance. So how exactly does one decide a structural change to the military justice system? Furthermore, should this decision be made by a Congress with the lowest percentage of veterans since World War II?<sup>177</sup>

### *C. The Importance of the Decisionmaking Process—AFSO 21 and Beyond*

Behind every decision, no matter how large or small, is a process. Though often ignored, decisionmaking processes play an important role in the final outcome. In a recent interview, former Supreme Court Justice Sandra Day O’Connor remarked that the thing she liked about the judiciary, compared to the other branches of government, was that the judiciary was the sole branch of government that was required to justify all of its decisions in writing.<sup>178</sup> Demonstrating the thought process that went into a decision is vital to providing legitimacy to that decision and gaining its acceptance, especially if that decision is unpopular. This is what is

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174. Cassata, *supra* note 172.

175. *Id.*

176. *Id.*

177. Jennifer Rizzo, *Veterans in Congress at Lowest Level Since World War II*, CNN (Jan. 21 2011), <http://www.cnn.com/2011/US/01/20/congress.veterans/>. “Only 20% of the 535 members of the new Congress have served in the military, 25 from the Senate and 90 from the House of Representatives. Juxtapose that with 1975, when over 70% of those elected had served in the armed forces.” *Id.*

178. Interview by Jon Stewart with Former Supreme Court Justice Sandra Day O’Connor, on *The Daily Show with Jon Stewart* (Mar. 5, 2013), available at <http://thedailyshow.cc.com/videos/gl2yls/sandra-day-o-connor-pt-2>.

currently lacking in the debate regarding the commander's role in the military justice system. As explained earlier, commanders have played a central role in the administration of military justice since pre-Revolutionary War times. If this role is to be changed, then a sufficient justification will go a long way in obtaining support.<sup>179</sup> This Note contends that individual narratives concerning individual victims of sexual assault and denials of justice, though horrifying and compelling, will not be enough to justify a massive overhaul of military justice administration in the minds of military commanders and invoke much-needed support for this change. What is desperately needed in this debate is a decisionmaking process and an organized study focused on capabilities as opposed to highly emotional rhetoric.

In order to propose a massive overhaul of the military justice system and provide a justification for taking away the historic ability of commanders to make charging decisions, the best mechanism is to use a decisionmaking process with which military leaders are already familiar. Several processes already exist within the armed forces to analyze and realign capabilities in the most effective and efficient way possible.<sup>180</sup> While each of these processes have their strengths and weaknesses, all share an emphasis on technical analysis and provide a roadmap for decisionmaking. Viewing the benefits of one of these processes as an example, the U.S. Air Force's AFSO 21<sup>181</sup> highlights the importance of using an organized, technical approach to military justice reform.

#### *D. AFSO 21—A Technical Analysis of Military Justice*

Ultimately, the military justice system is a process—a process that is used to determine the guilt or innocence of a particular individual and

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179. Determining whether or not prosecutorial discretion should be removed from commanders is beyond the scope of this Note. For argumentation that the prosecutorial discretion should remain in the hands of commanders, see Cole, *supra* note 75. For arguments in opposition, see Kaper, *supra* note 163.

180. See *infra* Part V.D.

181. "AFSO21 is an improvement model customized to the unique environment of the United States Air Force which leverages improvement methods from various sources such as; Lean, Six Sigma, Theory of Constraints and Business Process Reengineering. AFSO21 is a transformational initiative empowering all Airmen to eliminate waste from every end-to-end process. It is about delivery of war-fighting capabilities today and tomorrow. It is about our war-fighters successfully engaging and defeating the adversaries of 2015 and beyond. AFSO21 aligns our innovative Air Force with a world-class Continuous Process Improvement culture to create a standardized, disciplined approach. AFSO21 is applicable across organizational, functional and capability boundaries with the ultimate objective of improving combat capability." AIR FORCE SMART OPERATIONS FOR THE 21ST CENTURY (AFSO 21) PLAYBOOK: VOLUME A: CONCEPT OF OPERATIONS, VERSION 2.1 (2008) [hereinafter AFSO 21].

the applicable punishment, if necessary. AFSO 21 is a process improvement tool developed and currently utilized by the U.S. Air Force to both analyze processes and suggest improvements.<sup>182</sup> While originally designed to study industrial processes, there is much benefit to be had in thinking about the military justice system in a technical way. This is because there will always be bad commanders who abuse the system, just like there will always be bad prosecutors, defense attorneys, and civic leaders. However, systemic changes cannot be justified solely by anecdotal narratives regarding individual failures. Instead, there are two primary reasons why a technical decisionmaking process such as AFSO 21 should be used: (1) these types of processes provide for the identification of all relevant stakeholders, and (2) technical processes developed with industry objectives in mind are designed to produce “better” products or, in this case, increasingly accurate convictions and dismissals.

When speaking to reporters prior to the passage of her bill in the Senate, Senator McCaskill explained that “[t]he argument was posed as victims versus commanders and whose side are you on . . . it’s not that simple.”<sup>183</sup> This is why the identification of all relevant stakeholders is important before implementation of any major reform. With any systemic change, identification of key stakeholders, including their expectations regarding the change and the development of an effective communication plan, is essential.<sup>184</sup> In this instance, the current debate centers around senior military commanders and victims. Yet mechanisms such as AFSO 21 and other related processes provide “toolkits” for identifying all relevant stakeholders and recognition of their value within the process.<sup>185</sup> In this context, there are several additional parties, such as the Judge Advocate General Corps (namely whether they have the training and experience to properly make charging decisions), servicemen and women who have not been victims of sexual assault (their opinions on who should initiate military justice proceedings in sexual offenses), and civilian prosecutors (as jurisdictional issues can arise in crimes involving military members that occur off-base, etc.) whose inputs should be con-

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182. *Id.*

183. Shane, *supra* note 163.

184. AFSO 21, *supra* note 181, at J-63.

185. A detailed explanation of the AFSO 21 decisionmaking process is beyond the scope of this article. Suffice it to say that AFSO 21 is, in effect, comprised of several smaller decisionmaking processes that operate at different stages of the decisionmaking timeframe. One of these smaller decisionmaking processes, Enterprise Value Stream Mapping and Analysis (EVSMA) is specifically tailored to identifying all the stakeholders in the value stream (military justice process) and the contribution they make to delivering value. *Id.* at J-10. For a more detailed explanation of the AFSO 21 process, see *id.*

sidered. These are only a handful of the key stakeholders whose interests must be accounted for if any major reform is to occur. If the debate is allowed to continue in a polarized fashion, without considering these additional important interests, then any major military justice system change could ultimately fail due to important considerations that were never accounted for from the onset. Attempting to change any process, whether industrial or legal, without first identifying all of the key contributors and their interests in an organized fashion is a recipe for failure.

Ultimately, the goal of any justice system is to ensure an accurate result. Six Sigma is a well-known project management and problem-solving mechanism, which is embedded within AFSO 21 and focuses on reducing product defects.<sup>186</sup> While it is far from traditional to think of a conviction (or a dismissal) as a “product,” in essence, a conviction is nothing more than a “product” of the military justice system. As such, the goal of the system should be to produce the best “products” in the form of accurate, timely convictions. Sadly, with any system, there will be failures. However, the current debate focuses on these failures and attempts to use them as justification for large-scale reforms. While individual narratives are important to consider and call attention to an important issue, the distinction must be made between a bad process and a bad actor within that process. As stated earlier, though few and far between, there will always be military commanders who will exercise their authority for unjust ends. Yet, at the same time, no matter who makes the charging decision—a commander, civilian prosecutor, or Judge Advocate—there will always be bad actors within a system. A technical analysis, such as Six Sigma, is key to making the distinction between bad actors and a bad process.

In sum, there are two primary benefits to using a technical decisionmaking process when determining whether large-scale reform of the current military justice system is necessary. Regardless of the nature of the process at hand, the identification of all relevant stakeholders and a focus on “product” variance to determine a bad actor versus a bad process are key to ensuring the success of any proposed large-scale change. In the context of the military justice system, especially when talking about altering the role of the military commander that dates back to pre-Revolutionary War times, technical decisionmaking processes provide substantial justification for change in a way that individual narratives cannot. Without this justification, any large-scale change runs the risk of untimely failure due to an overall lack of a perceived need for change.

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186. *Id.* at A-4.

Naturally, when the two interests at stake are as compelling as individual justice and national security, any unnecessary risk cannot be tolerated.

## VI. CONCLUSION

The purpose of this Note has been twofold: to chronicle recent events in the U.S. Military's ongoing battle against sexual assault within the ranks, including several recent reforms to the military justice system, and to advocate for the use of a technical decisionmaking process, versus reliance on individual narratives, when considering the idea of major reform that removes a military commander's charging decision authority. Through the use of individual statistics and a brief overview of the major sexual assault scandals that have affected the armed forces in recent years, Part II demonstrated that sexual assault continues to be a problem within the U.S. military. In the search for a solution to this problem, Parts III and IV showcased the difficult nature of the problem itself. Balancing national security interests with the interests of the individual service member in seeking relief for harms suffered has proven to be far from simple. While civilian courts have stood firm in their reluctance to "run the Army," small-scale reforms made by the Legislature and the Executive demonstrate that both branches of government are committed to military justice reform. Part V further demonstrated this commitment by chronicling the recent legislative debate and concluded with a word of caution against using individual narratives to justify large-scale changes, advocating instead for the use of a technical decisionmaking process to ensure that bad actors are not mistaken for a bad system.

To Plato, the notion of a guardian needing a guard was absurd.<sup>187</sup> Yet today, it remains tragically clear that enemy forces are not the sole threat members of the U.S. military face, both on the battlefield and in garrison. By enacting tempered and intelligent military justice reform through the use of tailored, technical decisionmaking processes, the U.S. Congress can best fulfill its role as the guardians of those who guard the nation. Throughout history, when the tasks at hand were difficult, the solutions far from simple, or the objectives anything but clear, the men and women of the U.S. military fulfilled, and continue to fulfill, their roles as guardians. As such, these service members and their families have the right to demand the same diligence and dedication from the U.S. Congress in enacting reform.

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187. Leonid Hurwicz, *But Who Will Guard the Guardians?*, 98 AM. ECON. REV. 3, 577 (2008).