

STRIKING THE BALANCE BETWEEN DISCIPLINE AND JUSTICE:
THE COMMANDER'S ROLE IN THE MILITARY JUSTICE SYSTEM AND ITS
IMPACT ON THE MILITARY PROFESSION, by Major Jennifer L. Venghaus¹

The Military Profession

Militaries around the world began professionalizing after the French Revolution and now, most scholars agree that the military is a profession.² Following its European military counterparts, the United States military began professionalizing sometime after the War of 1812 and by the end of World War I in 1918, the United States military was a profession.³ Since 1918, the United States military has gone through several periods of professional turmoil, each leading to increased emphasis on professionalism. Now, after fourteen years of conflict in Iraq and Afghanistan, the United States military faces yet another period of turmoil. As a result, military leaders have initiated dialogue and renewed emphasis on the military profession.

¹ Judge Advocate, U.S. Army. LL.M., The U.S. Army Judge Advocate General's School; J.D., University of Richmond; B.A., Southwestern University. Previous assignments include: Personnel Law Attorney, Office of the Judge Advocate General; Chief, Criminal Law, 82d Airborne Division; Command Judge Advocate, 18th Engineer Brigade, Iraq and Germany; Command Judge Advocate, Joint Task Force–East, Mihail Kogalniceanu Airbase, Romania; Operational Law Attorney, United States Army Europe; Command Judge Advocate, 513th Military Intelligence Brigade; Operational Law Attorney, Task Force 134, Multi-National Forces–Iraq; and Legal Assistance Attorney, Office of the Staff Judge Advocate, Fort Gordon, Georgia. This paper is an excerpt from a thesis submitted in partial completion of the Master of Military Art and Science degree, U.S. Army Command and General Staff College.

² *See generally* SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* (1957); MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT* (1960).

³ HUNTINGTON, *supra* note 2, at 254; WILLIAM B. SKELTON, *AN AMERICAN PROFESSION OF ARMS 1784-1861* 88 (1992); GENERAL SIR JOHN HACKETT, *THE PROFESSION OF ARMS* 129 (1983);

As military leaders renew their commitment to the military profession, debate over sexual assault and senior leader misconduct in the military has caused members of Congress to seek military justice reform. In the twenty-four month period between January 2013 and December 2014, members of Congress introduced over forty bills to amend the UCMJ.⁴ Several of the proposals sought to make significant changes to not only sexual assault cases, but to the military justice system as a whole. Senator Kirsten Gillibrand (D-NY) and Representative Jackie Speier (D-CA) proposed legislation that would remove commanders from the military justice process and replace them with lawyers.⁵

As proposals to amend the UCMJ were pending in Congress, debate began over the National Defense Authorization Act (NDAA) for Fiscal Year 2014 (FY14). After months of debate in Congress, the FY14 NDAA passed and it included several major changes to the military justice process, but the legislation did not incorporate any of the proposals to remove commanders from the court-martial process.⁶ However, some members of Congress have vowed to continue pursuing the issue.⁷

⁴ Legislation introduced during the 113th Congress from 2013-2014 can be found on The Library of Congress website. *Thomas*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/home/thomas.php> (last visited Apr. 10, 2015).

⁵ Sexual Assault Training Oversight and Prevention (STOP) Act, H.R. 1593, 113th Cong. (2013); Military Justice Improvement Act of 2014, S. 2992, 113th Cong. (2013).

⁶ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1701-1753, 127 Stat. 672 (2013); *see infra* chapter 2.

⁷ Helene Cooper, *Senate Rejects Blocking Military Commanders from Sexual Assault Cases*, N.Y. TIMES, Mar. 6, 2014, http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html?_r=0 (last visited Apr. 6, 2015); Dennis Yusko, *Gillibrand vows to keep fight for sex abuse bill*, TIMES UNION, Sept. 27, 2014,

Under the current military justice system, commanders play a central role in the court-martial process. When a service member commits a violation of the UCMJ, the service member's commander determines the appropriate disposition for the offense. If the commander determines that the offense does not warrant a court-martial, then the commander may impose non-judicial punishment.⁸ However, if the commander determines that the offense warrants a court-martial, then the commander may prefer charges.⁹ Once the commander prefers court-martial charges, the commander forwards the charges through the chain of command, to the commander exercising court-martial convening authority.¹⁰ If the court-martial convening authority agrees that the offense warrants a court-martial, the court-martial convening authority convenes the court-martial and details the members of the court-martial.¹¹ Commanders serving as court-martial convening authorities also have the authority to accept plea bargains and must complete

<http://www.timesunion.com/local/article/Gillibrand-Military-sex-abuse-bill-will-pass-5785655.php>? (last visited Apr. 6, 2015).

⁸ Commanders at all levels, from company commander through commanding general may administer non-judicial punishment. The nature and amount of punishment authorized varies depending on the level of the commander. UCMJ art. 15 (2014).

⁹ Pursuant to Article 30 of the UCMJ, any person that is subject to the UCMJ may sign the charges, but “[u]pon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.” UCMJ art. 30 (2014). In practice, when a commander determines that an offense warrants a court-martial, that commander signs the charges and reads the charges to the accused. This practice is known as the preferral of charges.

¹⁰ UCMJ arts. 30 and 33 (2014). UCMJ arts. 22, 23, and 24 specify which commanders may convene each type of court-martial. UCMJ arts. 22-24 (2014).

¹¹ UCMJ arts. 22, 23, 24, and 25 (2014).

other administrative tasks.¹² After a court-martial, the court-martial convening authority must conduct a post-trial review of the court-martial proceedings and has the authority to set aside certain convictions, and approve, disapprove, commute, or suspend certain court-martial sentences.¹³

Senator Gillibrand's proposal, the Military Justice Improvement Act,¹⁴ and Representative Speier's proposal, the Sexual Assault Training and Prevention (STOP) Act,¹⁵ seek to change this system by removing commanders from the military justice process and establishing an independent office of lawyers responsible for prosecutions. Representative Jackie Speier (D-CA) introduced the Sexual Assault Training Oversight

¹² MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(d)(3) (2012).

¹³ UCMJ art. 60 (2014).

¹⁴ Military Justice Improvement Act of 2014, S. 2992, 113th Cong. (2013). In the Military Justice Improvement Act, Senator Gillibrand proposes to remove the authority of commanders to determine whether to proceed to trial by court-martial for certain non-military offenses. Instead of commanders, judge advocates in the grade of O-6 or higher with significant military justice experience and outside the chain of command of the accused would be responsible for determining the disposition of charges. The proposal also establishes a separate office under each service to convene general and special courts-martial and detail members of the courts-martial for the designated non-military offenses. Under Senator Gillibrand's proposal, commanders retain the authority to determine disposition, convene courts-martial, and detail members for the military offenses listed in Articles 83 through 117, 133, and 134 of the UCMJ, and offenses of conspiracy, solicitation, and attempt to commit such offenses. *Id.*

¹⁵ Sexual Assault Training Oversight and Prevention (STOP) Act, H.R. 1593, 113th Cong. (2013). H.R. 1593 removes commanders from the court-martial process for sex-related offenses only. Under the bill, a "Sexual Assault Oversight and Response Council," composed of "a majority of civilians" appointed by the President and the Secretary of Defense, would appoint a Director of Military Prosecutions and personnel for a Sexual Assault Oversight and Response Office. The Director of Military Prosecutions would oversee the prosecution of sex-related offenses, refer sex-related offenses to courts-martial, and serve as the convening authority for sex-related offenses. *Id.*

and Prevention (STOP) Act in both the 112th and 113th Congresses,¹⁶ and she proposed the changes again as an amendment to the House Armed Services Committee mark-up of the National Defense Authorization Act for Fiscal Year 2016.¹⁷ Senator Kirsten Gillibrand (D-NY) has introduced the Military Justice Improvement Act four times and has stated that she will re-introduce it during the 114th Congress.¹⁸ Either of these proposals, if enacted, impacts the role of commanders in the military justice process. While proponents for the legislation assert that removing commanders from the military justice process will improve the prosecution of major crimes in the military, because the involvement of commanders in the military justice process has been an integral part of the professionalization of the United States military, removing commanders from the military justice process will impact the United States military's status as a profession.

¹⁶ Sexual Assault Training Oversight and Prevention (STOP) Act, H.R. 3435, 112th Cong. (2011); Sexual Assault Training Oversight and Prevention (STOP) Act, H.R. 1593, 113th Cong. (2013).

¹⁷ *Markup of H.R. 1735 – National Defense Authorization Act for Fiscal Year 2016*, U.S. HOUSE OF REPRESENTATIVES COMMITTEE REPOSITORY, <http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=103288> (last visited May 5, 2015).

¹⁸ Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013); Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2013); Military Justice Improvement Act of 2014, S. 2970, 113th Cong. (2014); Military Justice Improvement Act of 2014, S. 2992, 113th Cong. (2014); Dennis Yusko, *Gillibrand vows to keep fight for sex abuse bill*, TIMES UNION, Sept. 27, 2014, <http://www.timesunion.com/local/article/Gillibrand-Military-sex-abuse-bill-will-pass-5785655.php>? (last visited Apr. 6, 2015); Anna Palmer & Darren Samuelsohn, *Kirsten Gillibrand gears up for another round*, POLITICO, Jan. 7, 2015, <http://www.politico.com/story/2015/01/kirsten-gillibrand-military-sexual-assault-114018.html> (last visited Apr. 6, 2015).

Evolution of the Military Justice System for a Professional Military

Rules have existed to govern the conduct and discipline of soldiers for centuries, even before the emergence of the military as a profession.¹⁹ The Continental Congress appointed a committee to draft Articles of War for the Continental Army on the same day they established the Continental Army, and they enacted the Articles of War sixteen days later.²⁰ Since the Articles of War existed prior to the professionalization of the United States Army, some might argue that the military justice system had no impact on the military becoming a profession. However, as the United States military professionalized, the military justice system evolved to correspond with the professionalization of the military.

When Congress adopted the Articles of War in 1775, Congress created the military justice system to be a system of discipline. At that time, military leaders such as George Washington considered discipline to be “the soul of the Army.”²¹ Because of the importance of discipline, the Articles of War provided rules and punishments for disciplinary infractions, “with very slight attention given to creating a fair legal

¹⁹ HARRY M. WARD, *GEORGE WASHINGTON’S ENFORCERS: POLICING THE CONTINENTAL ARMY* 31 (2006); *THE JUDGE ADVOCATE GENERAL’S SCHOOL, THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE 2* (1959) [hereinafter *BACKGROUND OF THE UCMJ*]; H. COMM. ON MILITARY AFFAIRS, 79TH CONG., *INVESTIGATIONS OF THE NATIONAL WAR EFFORT* (Comm. Print 1946), available at http://www.loc.gov/rr/frd/Military_Law/pdf/investigations.pdf (last visited Apr. 6, 2015).

²⁰ WARD, *supra* note 19, at 32; *BACKGROUND OF THE UCMJ*, *supra* note 19, at 2.

²¹ Robert D. Heinl, Jr., *The Collapse of the Armed Forces*, *ARMED FORCES JOURNAL*, June 1971, at 30-38 (reprinted in *H300: ROOTS OF TODAY’S OPERATIONAL ENVIRONMENT* 262-263 (U.S. Army Command and General Staff College ed., 2014).

process.”²² In fact, discipline was so important that the Articles of War denied Soldiers the basic civil liberties for which they were fighting.²³

The importance of discipline remained after the American Revolutionary War and therefore, Congress made only minor changes to the Articles of War until after the American Civil War.²⁴ Coincidentally, the first major changes Congress made to the Articles of War occurred as the military began to professionalize.

While the United States military began to professionalize after the War of 1812, most military historians consider the late nineteenth century, after the American Civil War, as the age of military professionalization in the United States.²⁵ Serving as the Commanding General of the Army from 1869 to 1883, General William T. Sherman led the efforts to professionalize the military with the advances he made to professional military education.²⁶ It was during General Sherman’s tenure as Commanding General that Congress completely revised the Articles of War in 1874, the first major revision of the Articles of War since 1775.²⁷ While this major revision to the Articles of War did not

²² WARD, *supra* note 19, at 30.

²³ *Id.* at 30, 35.

²⁴ BACKGROUND OF THE UCMJ, *supra* note 19, at 3.

²⁵ Matthew Moten, *Who Is a Member of the Military Profession?* JOINT FORCES QUARTERLY, 3d Quarter 2011, 16.

²⁶ HUNTINGTON, *supra* note 2, at 230; Jerry M. Cooper, *The Army’s Search for a Mission, 1865-1890*, in AGAINST ALL ENEMIES: INTERPRETATIONS OF AMERICAN MILITARY HISTORY FROM COLONIAL TIMES TO THE PRESENT 184-185 (Kenneth J. Hagan & William R. Roberts eds., 1986).

²⁷ 18 Stat. 229 (1878), available at <http://www.loc.gov/law/help/statutes-at-large/43rd-congress.php> (last visited Apr. 6, 2011); BACKGROUND OF THE UCMJ, *supra* note 19, at 3.

change the nature of the military justice system as a system of discipline, the revision was the first revision in which Congress began adding elements of fairness to the military justice system by removing harsh punishments such as flogging and branding.²⁸

Between the end of the American Civil War in 1865 and the end of World War I in 1918, the military continued to professionalize, and by the end of World War I, the military was a profession. It is no coincidence that the next major revision to the Articles of War occurred in 1916, almost simultaneously with the United States military becoming a profession.²⁹ Still considered a system of discipline, commanders retained their authority and responsibility for the military justice system under the 1916 Articles of War. However, for the first time, the 1916 Articles of War increased the role of lawyers in the military justice process.³⁰ While The Judge Advocate General had always been responsible for “prosecut[ing] in the name of the United States of America,” the 1916 Articles of War authorized The Judge Advocate General to detail judge advocates to act for him in general courts-martial, thus increasing the number of courts-martial for which judge advocates would be present.³¹

As the role of lawyers in the military justice system increased, the first debates over the authority of commanders began and these debates directly corresponded with the

²⁸ BACKGROUND OF THE UCMJ, *supra* note 19, at 3.

²⁹ Act of 29 Aug. 1916, ch. 418, 39 Stat. 650-70 (1916).

³⁰ *Id.*

³¹ WARD, *supra* note 19, at 41; *Journals of the Continental Congress – Articles of War; September 20, 1776*, Yale Law School, The Avalon Project, at Section XIV, articles 1 and 11, http://avalon.law.yale.edu/18th_century/contcong_09-20-76.asp (last visited Apr. 6, 2015); BACKGROUND OF THE UCMJ, *supra* note 19, at 3.

military's professionalization at the end of World War I. In 1917, Brigadier General Samuel T. Ansell, the Acting Judge Advocate General for the Army, got into a disagreement with Major General Enoch H. Crowder, The Judge Advocate General, over the authority of The Judge Advocate General.³² The disagreement led to intense debates between 1917 and 1920 over the fairness of the military justice system.³³ While Major General Crowder believed that the Articles of War needed some minor changes, Brigadier General Ansell wanted a complete revision of the Articles of War to transform it into a more civilian-like system of justice.³⁴ This debate between Brigadier General Ansell and Major General Crowder marked the beginning of a long history of debates regarding the authority of commanders in the military justice system, the fairness of the military justice system, and whether the military justice system should be a system of discipline or a system of justice.

As a result of the Ansell-Crowder debate, Congress revised the Articles of War in 1920.³⁵ Although the 1920 Articles of War included some of Brigadier General Ansell's

³² See generally Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1-3 (1967); JOHNATHAN LURIE, *MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980* 43-75 (1998).

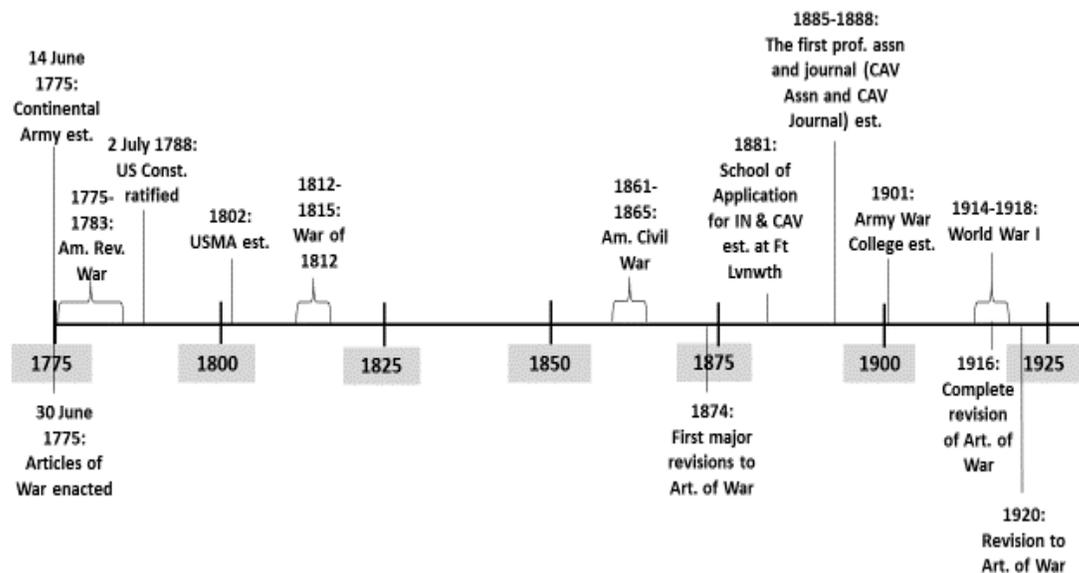
³³ Brown, *supra* note 32; LURIE, *supra* note 32.

³⁴ Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 19-24 (1970), available at <https://ww.law.upenn.edu/live/files/2846-shermanthe-civilianization-of-military-law> (last visited Apr. 6, 2015); Brown, *supra* note 32, at 15-36; *Hearings Before a Subcommittee of the Committee on Military Affairs, United States Senate, on S. 64., A Bill to Establish Military Justice*, 66th Cong. (1st Sess. 1919) 5-23, available at http://books.google.com/books?id=Ixgn148aq6sC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (last visited Apr. 6, 2015).

³⁵ Act of June 4, 1920, ch. 2, 41 Stat. 759, 287 (1920).

proposals to make the system fairer, the revised Articles of War did not include the most drastic changes and commanders retained their authority over the military justice system.³⁶ Thus, as the military became more professional, Congress gradually revised the Articles of War to become more fair and the military justice system became more of a balance between a system of discipline and a system of justice.

Table 1. Timeline of Events from 1775 to 1925



Source: Created by author.

By the end of World War I in 1918, the United States military had become a profession.³⁷ However, throughout the twentieth century, military professionalism in the

³⁶ *Revision of the Articles of War 1912-1920, volume 2*, LIBRARY OF CONGRESS, http://www.loc.gov/rr/frd/Military_Law/pdf/RAW/vol2.pdf (last visited Apr. 6, 2015); Brown, *supra* note 32, at 15-36; BACKGROUND OF THE UCMJ, *supra* note 19, at 4-6.

³⁷ Samuel P. Huntington believes that “[t]he American professional military ethic is peculiarly a product of the years between the Civil War and the First World War. HUNTINGTON, *supra* note 2, at 254. William B. Skelton believes that the change occurred between the end of the War of 1912 and the Civil War. See generally SKELTON, *supra*

United States continued to evolve as the military adapted to changing circumstances both in the United States and internationally. As the military profession continued to evolve, Congress also made changes to the military justice system throughout the twentieth century. However, what is interesting is that every major change to the military justice system since 1918 corresponds with a significant change in the professionalism of the military.

In 1950 when Congress enacted the UCMJ, the military was in a period of major reorganization and transformation following the end of World War II and the beginning of the Cold War. Although the military drew down forces for a few years immediately following World War II, the emergence of the Cold War and the changing international security environment necessitated a large, permanently established professional military force capable of engaging in simultaneous small-scale operations around the world.³⁸ World War II also demonstrated the need for reorganization of the United States military. As a result, the National Security Act of 1947 consolidated the War and Navy Departments into the DoD and created the United States Air Force.³⁹

Under the newly unified DoD, it was no longer feasible for the services to operate under two separate military justice systems, the Articles of War and the Articles for the

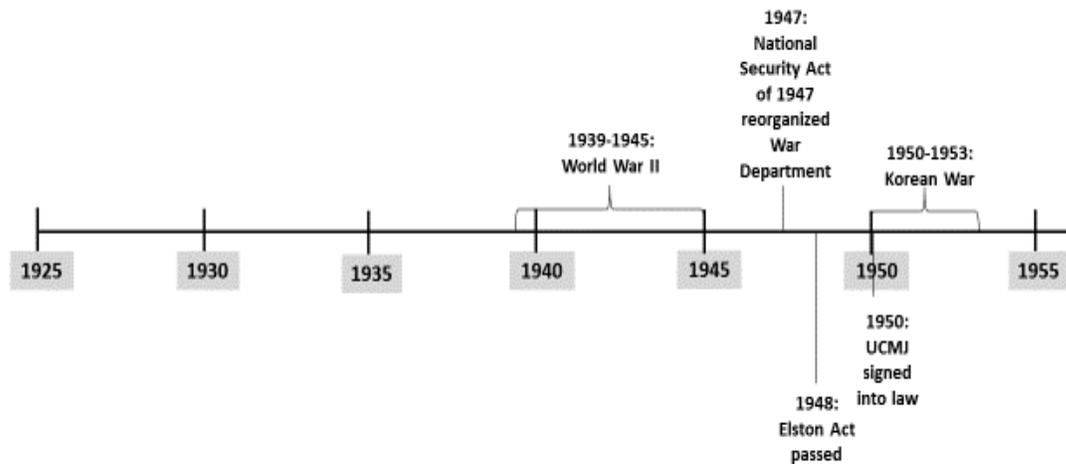
note 3, at 107. General Sir John Hackett agrees with Huntington and says that “[t]he years between 1860 and the First World War saw the emergence of a distinctive American professional military ethic” HACKETT, *supra* note 3, at 129.

³⁸ Williamson A. Murray & Geoffrey Parker, *The Post-War World*, in THE CAMBRIDGE HISTORY OF WARFARE 362, 364 (Geoffrey Parker ed., 2005); Leonard Wong & Douglas V. Johnson II, *Serving the American People: A Historical View of the Army Profession*, in THE FUTURE OF THE ARMY PROFESSION 93, 101 (Lloyd J. Matthews ed, 2005).

³⁹ National Security Act of 1947, Pub. L. 80-253, 61 Stat. 495 (1947).

Government of the Navy. Therefore, the reorganization of the military in 1947 directly led to the creation of the UCMJ in 1950.⁴⁰

Table 2. Timeline of Events from 1925 to 1955



Source: Created by author.

After it became effective in 1951, the first major change to the UCMJ was in 1968.⁴¹ The year 1968 was also a significant year for military operations and the military profession. On 30 January 1968, the Viet Cong and North Vietnamese People’s Army launched the largest military campaign in the Vietnam War, a series of attacks known as the Tet Offensive. Initially caught off guard by the attacks, the South Vietnamese and the United States eventually defeated the North Vietnamese People’s Army. However, the battles of the Tet Offensive resulted in heavy casualties and loss of credibility from the American public.⁴²

⁴⁰ Uniform Code of Military Justice, Pub. L. 81-506, 64 Stat. 107 (1950).

⁴¹ Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

⁴² *Milestones*, U.S. Department of State Office of the Historian, <https://history.state.gov/milestones> (last visited Apr. 9, 2015).

Just one month after the Tet Offensive, on 16 March 1968, American Soldiers raped and massacred hundreds of unarmed civilians in My Lai, a village in South Vietnam.⁴³ This one widely known incident is a representation of the lack of professionalism that some American Soldiers displayed throughout the Vietnam War.

As the operational environment in Vietnam changed due to the Tet Offensive, and incidents such as the My Lai massacre showed the lack of professionalism of the United States military, Congress worked on major changes to the UCMJ. Although the changes had been percolating for several years, Congress did not come to an agreement on the changes until 1968, the same year that the Vietnam War began to spark debate and consternation in the United States.⁴⁴ The 1968 revisions, combined with the increased non-judicial punishment authority granted in 1962 gave commanders additional options for handling the lack of professionalism that became so apparent during the Vietnam War.⁴⁵

The Vietnam War left the military in shambles. In 1970, the Army began to study military professionalism and in 1973, Congress eliminated the draft, creating an all-volunteer Army.⁴⁶ Throughout the 1970s, the military attempted to recover from the

⁴³ William G. Eckhardt, *My Lai: An American Tragedy* (2000), available at <http://law2.umkc.edu/faculty/projects/ftrials/mylai/ecktragedy.html> (last visited Apr. 9, 2015).

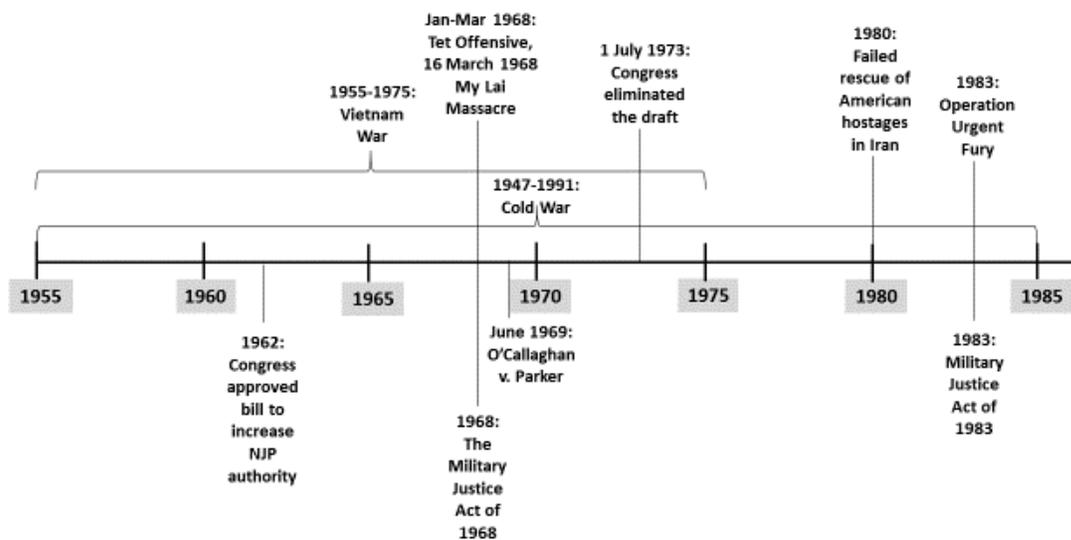
⁴⁴ WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 197 (1973); Military Justice Act of 1968, Pub. L. 90-632, 82 Stat. 1335 (1968).

⁴⁵ Generous, *supra* note 44, at 149; Act of Sept. 7, 1962, Pub. L. 87-648, 76 Stat. 447 (1962).

⁴⁶ On September 28, 1971, President Richard Nixon signed H.R. 6531 into law, thus authorizing personnel to be inducted into military service via the draft through June

Vietnam War, but continued to struggle with discipline and professionalism. By 1983, professionalism had returned to the military and the renewed professionalism and effectiveness of the military necessitated a review of the military justice system. After a yearlong study evaluating the effectiveness of the UCMJ in wartime, Congress made the next major revisions to the UCMJ in 1983.⁴⁷ By reducing the commander’s burden of administering military justice during combat, the 1983 revisions increased the responsibility and authority of judge advocates.⁴⁸ Thus, the military justice system became more of a balance between a system of justice and a system of discipline.

Table 3. Timeline of Events from 1955 to 1985



Source: Created by author.

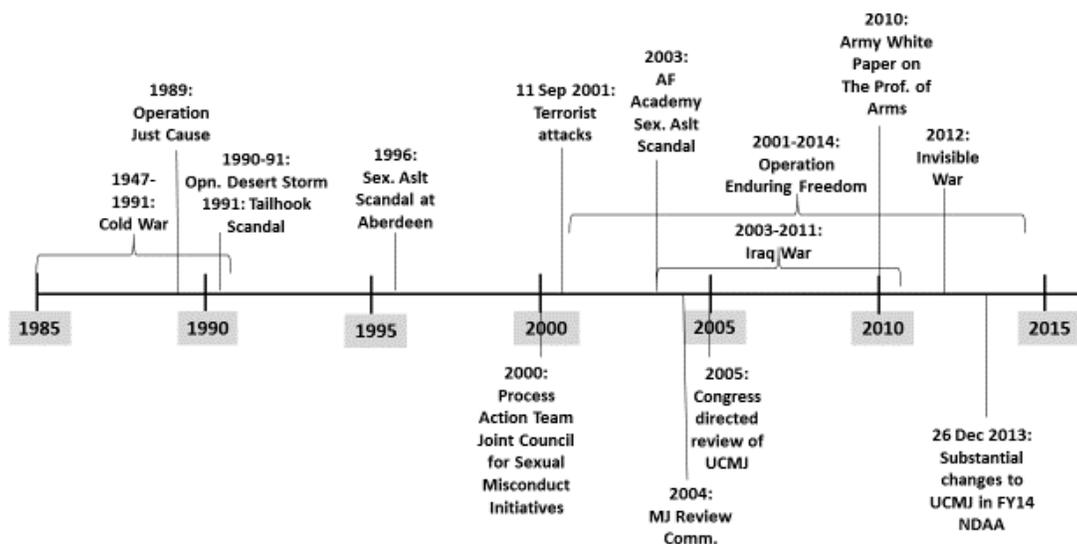
30, 1973. Amendments to the Military Selective Service Act of 1967, Pub. L. 92-129, 85 Stat. 348 (1971). Congress did not extend the Act and therefore, the draft expired on July 1, 1973.

⁴⁷ Lieutenant Colonel E.A. Gates & Major Gary V. Casida, *Report to the Judge Advocate General by the Wartime Legislation Team*, 104 MIL L. REV. 139, 141 (1984); Military Justice Act of 1983, Pub. L. 98-209, 97 Stat. 1393 (1983).

⁴⁸ Military Justice Act of 1983, Pub. L. 98-209, 97 Stat. 1393 (1983).

For the next thirty years, the military continued to progress as a profession, but with no major changes. Likewise, Congress made only minor changes to the UCMJ from 1984 to 2013. However, after fourteen years of combat operations in Iraq and Afghanistan, the military is now facing another crisis in military professionalism. Incidents of sexual assault and general officer misconduct are receiving attention from Congress and the American public. As a result, Congress made significant changes to the UCMJ in 2013 and 2014 and is considering additional changes.⁴⁹

Table 4. Timeline of Events from 1985 to 2015



Source: Created by author.

As Congress considers additional changes to the UCMJ, it is important to consider the effect that such changes could have on the military’s status as a profession.

⁴⁹ National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 576, 126 Stat. 1632, 1758 (2013); National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, 127 Stat. 672 (2013).

As history shows, the military justice system and the professionalization of the United States military are inextricably linked. As the military became more professional, Congress revised the military justice system to make it fairer to those under its jurisdiction. Therefore, what started as a system of discipline evolved to become a delicate balance between a system of discipline and a system of justice as the military became more professional.

The military justice system is a dynamic system that is constantly evolving. The significant changes made to the UCMJ in 2014 are an example of such evolution. However, it takes time for changes to take effect and to determine the effect that such changes have on the system and on the military profession. Therefore, before making additional changes to the military justice system, Congress must give the military time to implement and adjust to the Fiscal Year 2014 changes in order to determine their effect on the military justice system and on the military profession. Further changes to the military justice system without consideration of the other recent changes will affect the balance between discipline and justice, which will affect society's opinion on the professionalism of the military.

Society's Recognition of the Military Profession

To be a profession, American society must regard the military as a profession. Society must trust that members of the military have specialized knowledge or expertise separate from other members of society and that members of the military go through education or training programs to obtain the specialized knowledge or expertise. They must further believe that the military serves the interests of society rather than their own interests, that there is an organizational structure to the military, and that military

members are committed to the integrity of the profession. Finally, society must trust that the military upholds high ethical standards and has an ethical code that the military enforces through self-regulation. If all of these factors are in place, then society accepts members of the military as the authority in their field, treats them with the respect and prestige of a profession, and grants the military profession a certain degree of autonomy.⁵⁰

As the mechanism for enforcing ethical standards, the military justice system is an integral part of society's recognition of the military as a profession. As a result, society expects the military justice system to reflect the values of American society.

The United States was founded on the three democratic values of liberty, justice, and equality and those concepts form the basis for American values. From a very young age, the Pledge of Allegiance to the United States flag teaches United States citizens the democratic values: "I pledge allegiance to the Flag of the United States of America, and

⁵⁰ See generally ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 4 (1988) (citing A. M. SAUNDERS & PAUL A. WILSON, *THE PROFESSIONS* (1933)); Talcott Parsons, *The Professions and Social Structure*, 17 *SOCIAL FORCES* 457, 467 (1939); SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* (1957); GEOFFREY MILLERSON, *THE QUALIFYING ASSOCIATIONS* 10 (1964); Harold L. Wilensky, *The Professionalization of Everyone?*, 70 *AM. J. SOCIOLOGY* 137, 138 (1964); ELIOT FREIDSON, *PROFESSION OF MEDICINE* xv and 5 (1970); MAGALI LARSON, *THE RISE OF PROFESSIONALISM* x (1977); ANTHONY E. HARTLE, *MORAL ISSUES IN MILITARY DECISION MAKING* 21 (1989) (citing ALLAN R. MILLETT, *MILITARY PROFESSIONALISM AND OFFICERSHIP IN AMERICA* (1977)); SAM C. SARKESIAN, *THE PROFESSIONAL ARMY OFFICER IN A CHANGING SOCIETY* 9 (1975); GENERAL SIR JOHN HACKETT, *THE PROFESSION OF ARMS* 9 (1983); ANTHONY E. HARTLE, *MORAL ISSUES IN MILITARY DECISION MAKING* 19 (1989) (citing Ernest Greenwood, *Attributes of a Profession, in MAN, WORK, AND SOCIETY* 207 (Sigmund Nosow and William H. Form, eds., 1962)); U.S. DEP'T OF ARMY, *DOCTRINE REFERENCE PUB. 1, THE ARMY PROFESSION* para. 1-3 (June 2013).

to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.”⁵¹

Before the United States military became a profession, the military justice system was merely a system of discipline. However, as the United States military became more professional, many Americans found it preposterous to have a military justice system based merely on discipline, denying Soldiers many of the common elements of justice upon which the United States was founded. Therefore, as the military became more professional, Congress added elements of justice into the military justice system.

While society demands that the military justice system include elements of justice, the military justice system must also maintain its character as a system of discipline because “[t]he very nature of armies requires a strict military code for submission and obedience.”⁵² Commanders must retain authority to administer discipline under the UCMJ in order to exercise their authority and maintain good order and discipline in their units. Without the ability of commanders to exercise their authority and maintain good order and discipline in their units, the military risks losing the trust of society in the ability to carry out military mission. As stated by General James F. Amos, former Commandant of the Marine Corps, “[w]e cannot ask our Marines to follow their Commanding Officer into combat if we create a system that tells Marines to not trust their Commanding Officer on an issue as important as sexual assault.”⁵³ Similarly, we

⁵¹ 4 U.S.C. § 4 (2014).

⁵² WARD, *supra* note 19, at 15.

⁵³ *Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before the S. Comm. on Armed Services*, 113th Cong. 34 (2013), available at [18](http://www.armed-</p></div><div data-bbox=)

cannot ask American society to trust military commanders in combat if we cannot trust commanders to administer discipline in their units.

Therefore, in order to retain the trust of society, both trust in executing the military mission of fighting and winning the nation's wars, and trust in the military as a profession, the military justice system must maintain the delicate balance between a system of discipline and a system of justice. The Preamble to the *Manual for Courts-Martial* acknowledges this balance when it states that “[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”⁵⁴

In order for the military justice system to maintain balance between discipline and justice, commanders and judge advocates must work together to form the necessary link between discipline and justice. While judge advocates must continue to play an active role in the military justice process to ensure that it serves justice, commanders must remain responsible for the military justice system in order to retain the authority over good order and discipline in their units. As explained by General Raymond T. Odierno, the Chief of Staff of the Army,

The relationship between the judge advocate legal advisor and the commander is unique. The commander has the authority, but that commander relies on his or her judge advocate for advice and recommendation. Commander do not make disposition decisions without judge advocate advice, and Article 34, UCMJ, requires that the judge advocate provide written advice before charges may be

services.senate.gov/download/official-transcript-pendng-legislation-regarding-sexual-assaults-in-the-military---june-4-2013 (last visited Apr. 6, 2015) [hereinafter *4 June 2013 Hearing*] (prepared statement by General James F. Amos, USMC).

⁵⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt I, para. 3 (2012).

referred to a court-martial. In the event that a judge advocate encounters a commander unwilling to follow advice to take an allegation to trial, the judge advocate may take the same allegation to the superior commander, who can essentially pull the case up to the next level.⁵⁵

Removing commanders from the military justice system, as Senator Gillibrand and Representative Speier have proposed in the Military Justice Improvement Act⁵⁶ and the Sexual Assault Training Oversight and Prevention Act,⁵⁷ even if only removed for sexual assault cases, damages the balance of the military justice system that has taken 240 years to achieve. Any major change to the balance between discipline and justice creates the risk that society will no longer trust the military as a profession. Therefore, as Congress considers further revisions to the UCMJ to address the sexual assault and general officer misconduct problems of the last decade, military senior leaders and Congress must remain vigilant to the repercussions that such changes would have on the balance between discipline and justice, and thus, on society's recognition of the military as a profession.

⁵⁵ *4 June 2013 Hearing, supra* note 53, at 19 (prepared statement by General Raymond T Odierno, USA).

⁵⁶ Military Justice Improvement Act of 2014, S. 2992, 113th Cong. (2014).

⁵⁷ Sexual Assault Training Oversight and Prevention (STOP) Act, H.R. 1593, 113th Cong. (2013).