

ABSTRACT

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. Venghaus.

As military leaders renew their commitment to the military profession, debate over sexual assault and senior leader misconduct has caused several members of Congress to propose legislation that would remove commanders from the military justice process. Since enforcement of an ethical code through self-regulation is one critical characteristic of professions, any change to the military's mechanism for self-regulation could affect the military's status as a profession.

This thesis analyzes the impact that the proposed legislation would have on the United States military's status as a profession. By comparing the history of the United States military as a profession and the history of the military justice system in the United States, this thesis establishes that the evolution of the United States military profession corresponded to the evolution of the military justice system. What started as a system of discipline became a balance between justice and discipline as the system became more fair and equitable for the professional army. To retain the elements of a system of discipline, commanders must remain involved in the process. Maintaining this balance is critical to retaining the trust of American people that is necessary for American society to continue recognizing the military as a profession.

STRIKING THE BALANCE BETWEEN DISCIPLINE AND JUSTICE: THE
COMMANDER'S ROLE IN THE MILITARY JUSTICE SYSTEM AND
ITS IMPACT ON THE MILITARY PROFESSION

A thesis presented to the Faculty of the U.S. Army
Command and General Staff College in partial
fulfillment of the requirements for the
degree

MASTER OF MILITARY ART AND SCIENCE
General Studies

by

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2015

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REPORT DOCUMENTATION PAGE			<i>Form Approved</i> <i>OMB No. 0704-0188</i>		
Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing this collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0188), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS.					
1. REPORT DATE (DD-MM-YYYY) 12-06-2015		2. REPORT TYPE Master's Thesis		3. DATES COVERED (From - To) AUG 2014 – JUN 2015	
4. TITLE AND SUBTITLE Striking the Balance between Discipline and Justice: The Commander's Role in the Military Justice System and its Impact on the Military Profession			5a. CONTRACT NUMBER		
			5b. GRANT NUMBER		
			5c. PROGRAM ELEMENT NUMBER		
			5d. PROJECT NUMBER		
6. AUTHOR(S) Major Jennifer L. Venghaus			5e. TASK NUMBER		
			5f. WORK UNIT NUMBER		
			8. PERFORMING ORG REPORT NUMBER		
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) U.S. Army Command and General Staff College ATTN: ATZL-SWD-GD Fort Leavenworth, KS 66027-2301			10. SPONSOR/MONITOR'S ACRONYM(S)		
9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES)			11. SPONSOR/MONITOR'S REPORT NUMBER(S)		
12. DISTRIBUTION / AVAILABILITY STATEMENT Approved for Public Release; Distribution is Unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT As military leaders renew their commitment to the military profession, debate over sexual assault and senior leader misconduct has caused several members of Congress to propose legislation that would remove commanders from the military justice process. Since enforcement of an ethical code through self-regulation is one critical characteristic of professions, any change to the military's mechanism for self-regulation could affect the military's status as a profession. This thesis analyzes the impact that the proposed legislation would have on the United States military's status as a profession. By comparing the history of the United States military as a profession and the history of the military justice system in the United States, this thesis establishes that the evolution of the United States military profession corresponded to the evolution of the military justice system. What started as a system of discipline became a balance between justice and discipline as the system became more fair and equitable for the professional army. To retain the elements of a system of discipline, commanders must remain involved in the process. Maintaining this balance is critical to retaining the trust of American people that is necessary for American society to continue recognizing the military as a profession.					
15. SUBJECT TERMS military justice; Uniform Code of Military Justice; UCMJ; profession; sexual assault; general officer misconduct; discipline; justice; commander					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES	19a. NAME OF RESPONSIBLE PERSON
a. REPORT	b. ABSTRACT	c. THIS PAGE			19b. PHONE NUMBER (include area code)
(U)	(U)	(U)	(U)	00	

ABSTRACT

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. Venghaus, (total pages).

As military leaders renew their commitment to the military profession, debate over sexual assault and senior leader misconduct has caused several members of Congress to propose legislation that would remove commanders from the military justice process. Since enforcement of an ethical code through self-regulation is one critical characteristic of professions, any change to the military's mechanism for self-regulation could affect the military's status as a profession.

This thesis analyzes the impact that the proposed legislation would have on the United States military's status as a profession. By comparing the history of the United States military as a profession and the history of the military justice system in the United States, this thesis establishes that the evolution of the United States military profession corresponded to the evolution of the military justice system. What started as a system of discipline became a balance between justice and discipline as the system became more fair and equitable for the professional army. To retain the elements of a system of discipline, commanders must remain involved in the process. Maintaining this balance is critical to retaining the trust of American people that is necessary for American society to continue recognizing the military as a profession.

ACKNOWLEDGMENTS

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TABLE OF CONTENTS

	Page
MASTER OF MILITARY ART AND SCIENCE THESIS APPROVAL PAGE	iii
ABSTRACT.....	iv
ACKNOWLEDGMENTS	v
TABLE OF CONTENTS.....	vi
ACRONYMS.....	viii
TABLES	ix
CHAPTER 1 INTRODUCTION	1
The Problem.....	14
Sexual Assault Training Oversight and Prevention (STOP) Act.....	17
Military Justice Improvement Act	18
Current Status.....	20
Research Questions.....	21
Limitations.....	22
Scope and Delimitations	22
Conclusion	23
CHAPTER 2 LITERATURE REVIEW	24
What is a Profession?.....	24
The Military Profession	32
Prior to the French Revolution.....	35
After the French Revolution	38
Arguments Related to Commander’s Involvement in Courts-Martial.....	42
Arguments for Removing Commanders from the Military Justice Process	43
Arguments in Favor of Commander Involvement in the Military Justice Process...	46
Conclusion	49
CHAPTER 3 RESEARCH METHODOLOGY	51
Introduction.....	51
Qualitative Research.....	51
Method.....	53
CHAPTER 4 HISTORICAL CASE STUDIES	55

The Military Profession in the United States.....	55
Military Justice in the United States.....	73
Articles of War.....	74
The UCMJ.....	87
Sexual Assault Scandals and Recent Legislation.....	98
Conclusion.....	110
 CHAPTER 5 CONCLUSIONS AND RECOMMENDATIONS.....	 112
Introduction.....	112
Evolution of the Military Justice System for a Professional Military.....	113
Trust – Self-Policing.....	122
Summary and conclusions.....	122
 GLOSSARY.....	 123
 APPENDIX A PROPOSALS TO AMEND THE UCMJ MADE BY THE 113TH CONGRESS.....	 124
 APPENDIX B SUMMARY OF CHANGES TO THE UCMJ MADE BY THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014.....	 127
 APPENDIX C RECOMMENDATIONS OF THE RESPONSE SYSTEMS PANEL REGARDING THE ROLE OF COMMANDERS IN THE MILITARY JUSTICE SYSTEM.....	 128
 BIBLIOGRAPHY.....	 130
Constitution.....	130
Statutes and Laws.....	130
Cases.....	131
Legislative Materials.....	131
Books.....	133
Scholarly Articles.....	135
Periodical Materials.....	138
Government Documents.....	143
Internet.....	147
Other Sources.....	148

ACRONYMS

CJCS	Chairman of the Joint Chiefs of Staff
DoD	Department of Defense
DODIG	Department of Defense Inspector General
NDAA	National Defense Authorization Act
SASC	Senate Armed Services Committee
UCMJ	Uniform Code of Military Justice

DRAFT

TABLES

	Page
Table 1. Comparison of Definitions of a Profession.....	32
Table 2. Timeline of Events from 1775 to 1925.....	117
Table 3. Timeline of Events from 1925 to 1955.....	118
Table 4. Timeline of Events from 1955 to 1985.....	121
Table 5. Timeline of Events from 1985 to 2015.....	122

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CHAPTER 1

INTRODUCTION

No profession can survive if it loses the trust of its client; and the Army now has much to do to restore its credibility as a self-policing institution.¹

—Dr. Don Snider

Dr. Snider, then serving as a Professor of Military Science at the United States Military Academy and now a Senior Fellow in the Center for Army Profession and Ethic, gave this advice in 2005 as the Army was recovering from crimes committed by Soldiers at Abu Ghraib. However, recent debates and media attention regarding the military's handling of sexual assault and misconduct make his words even more significant today.

On 20 January 2012, *The Invisible War*, a documentary about sexual assault in the military, premiered at the 2012 Sundance Film Festival, where the film won the Documentary Audience Award.² The film's release in the United States on 22 June 2012 drew attention to the military's handling of sexual assault cases.³ Calling for change in the military's process for handling sexual assault, the documentary presents interviews of several veterans who report of being sexually assaulted while in the military, the inadequate response by the military, and the struggles they continue to cope with due to their sexual assaults.⁴ Since its release, the film received an Oscar nomination at the 2012

¹ Don M. Snider, *The U.S. Army as Profession*, in *THE FUTURE OF THE ARMY PROFESSION* 31 (Lloyd J. Matthews ed., 2d ed. 2005).

² *2012 Sundance Film Festival*, SUNDANCE INSTITUTE, <http://history.sundance.org/events/1141> (last visited Apr. 6, 2015).

³ *The Invisible War*, IMDB, http://www.imdb.com/title/tt2120152/?ref_=ttfc_q1 (last visited Apr. 6, 2015).

Academy Awards, has been nominated for and won numerous other film awards, and has received nationwide acclaim.⁵

Just after the release of *The Invisible War*, the media reported on a barrage of senior leader misconduct, putting the military's handling of misconduct in the spotlight. In a five-month period, from June through November 2012, the media reported on numerous incidents of misconduct by officers in grades of lieutenant colonel through general, leading many people to question the discipline of senior military leaders.

On 14 June 2012, a general court-martial found Army Colonel James H. Johnson III, an Army officer who previously served as the commander of the 173d Airborne Brigade Combat Team, guilty of multiple specifications of fraud, conduct unbecoming an officer, and bigamy, and sentenced him to a \$300,000 fine and a reprimand.⁶ The charges stemmed from an affair Colonel Johnson had with a woman he met while deployed to Iraq, his use of government funds to visit her, and his marriage to her in 2011 while he was still married.⁷

⁴ THE INVISIBLE WAR (Cinedigm 2012).

⁵ *The Official Academy Awards Database*, ACADEMY OF MOTION PICTURE ARTS AND SCIENCES, http://awardsdatabase.oscars.org/ampas_awards/BasicSearchInput.jsp (last visited Apr. 6, 2015).

⁶ David Rising, *Colonel found guilty of fraud, fined \$300K*, ARMY TIMES (June 14, 2012), <http://www.armytimes.com/article/20120614/NEWS/206140310/> (last visited Apr. 6, 2015).

⁷ Richard Sandza, *Colonel's sentence in bigamy case draws outrage*, ARMY TIMES (July 1, 2012), <http://www.armytimes.com/article/20120701/NEWS/207010309/Colonel-s-sentence-bigamy-case-draws-outrage> (last visited Apr. 6, 2015).

In July and August 2012, the media reported on two Department of Defense Inspector General (DODIG) reports involving misconduct of general officers.⁸ Reports of general officer misconduct continued when, on 27 September 2012, the case of Army Brigadier General Jeffrey A. Sinclair hit the media.⁹ The Army suspended Brigadier General Sinclair from his duties as the Deputy Commander of the 82d Airborne Division and initiated an investigation into numerous offenses including forcible sodomy, wrongful sexual contact, disobeying orders, engaging in and attempting to engage in an inappropriate relationship, and wrongful use of his government travel card.¹⁰ For the next eighteen months, through March 2014, national news outlets around the country reported on Brigadier General Sinclair's investigation and court-martial proceedings.¹¹

⁸ Al Kamen, *IG report blasts missile defense chief*, WASH. POST (July 10, 2012), http://www.washingtonpost.com/blogs/in-the-loop/post/ig-report-blasts-missile-defense-chief/2012/07/10/gJQA9TCyaW_blog.html (last visited Apr. 6, 2015); Joe Gould, *DoD details 4-star's lavish spending*, ARMY TIMES (Aug. 17, 2012), <http://www.armytimes.com/article/20120817/NEWS/208170311/> (last visited Apr. 6, 2015); Inspector Gen., U.S. Dep't of Def., No. H10116727365, Report of Investigation: Lieutenant General Patrick J. O'Reilly, U.S. Army, Director, Missile Defense Agency (May 2, 2012), available at <http://www.dodig.mil/foia/ERR/O'ReillyROI.pdf> (last visited Apr. 6, 2015); Inspector Gen., U.S. Dep't of Def., No. 11-1119226-153, Report of Investigation: General William E. Ward, U.S. Army, Commander, U.S. AFRICOM (26 June 2012), available at http://www.dodig.mil/foia/ERR/WardROI_Redacted.pdf (last visited Apr. 6, 2015).

⁹ Timothy Williams, *General Charged With Sexual Misconduct*, N.Y. TIMES (Sept. 27, 2012), http://www.nytimes.com/2012/09/28/us/decorated-general-charged-with-violations-of-military-law.html?_r=1& (last visited Apr. 6, 2015).

¹⁰ Henry Cunningham, *Brig. Gen. Jeffrey Sinclair's case referred to general court-martial*, FAYETTEVILLE OBSERVER (Dec. 19, 2012), http://www.fayobserver.com/military/brig-gen-jeffrey-sinclair-s-case-referred-to-general-court/article_7709fa54-1901-5429-86da-a92284988263.html (last visited Apr. 6, 2015).

¹¹ In March 2014, Brigadier General Sinclair pled guilty to several offenses including adultery, conduct unbecoming an officer, and obstruction of justice, and was sentenced to a reprimand, forfeiture of \$20,000, and restitution of \$4,157. Greg Botelho

To make matters worse, on 9 November 2012, Army General (Retired) David H. Petraeus, one of the most renowned general officers of this era, submitted his resignation as Director of the Central Intelligence Agency after admitting to having an extramarital affair with his biographer while on active duty in the United States Army.¹² On 3 March 2015, General (Retired) Petraeus pled guilty to removing and retaining classified information after the Federal Bureau of Investigation found notebooks containing classified information in his home.¹³

While the focus was on the Army up to this point, an Air Force case appears to have been the “straw that broke the camel’s back.” What could have been a news story about the successful prosecution of a senior leader sparked Congressional action when the convening authority reversed the court-martial conviction. On 3 November 2012, a court-martial found Lieutenant Colonel James H. Wilkerson III, an United States Air Force F-16 pilot serving as the Inspector General for Aviano Airbase in Italy, guilty of aggravated sexual assault, abusive sexual contact, and conduct unbecoming an officer, in

& Marlena Baldacci, *Brigadier general accused of sexual assault must pay over \$20,000; no jail time*, CNN (Mar. 20, 2014), <http://www.cnn.com/2014/03/20/justice/jeffrey-sinclair-court-martial/> (last visited Apr. 6, 2015). In June 2014, the Secretary of the Army directed that Brigadier General Sinclair retire as a lieutenant colonel. Dan Lamothe, *Here’s how disgraced Brig. Gen. Jeffrey Sinclair’s affair will hit him in the wallet*, WASH. POST (Jun. 20, 2014), <http://www.washingtonpost.com/news/checkpoint/wp/2014/06/20/heres-how-disgraced-brig-gen-jeffrey-sinclair-got-demoted-two-ranks> (last visited Apr. 6, 2015).

¹² *Message from General David H. Petraeus (US Army Retired)*, CENTRAL INTELLIGENCE AGENCY (Nov. 9, 2012), <https://www.cia.gov/news-information/press-releases-statements/2012-press-releases-statements/statement-to-employees-from-petraeus.html> (last visited Apr. 6, 2015).

¹³ Evan Perez, *Gen. Petraeus pleads guilty to federal charge*, CNN (Mar. 3, 2015), <http://www.cnn.com/2015/03/03/politics/general-david-petraeus-guilty-charges/> (last visited Apr. 6, 2015).

violation of Articles 120 and 133 of the Uniform Code of Military Justice (UCMJ).¹⁴ A general court-martial consisting of five officers sentenced him to one year of confinement and dismissal from the service.¹⁵ However, on 26 February 2013, the convening authority, Air Force Lieutenant General Craig Franklin, disapproved the findings and sentence and dismissed the charges against Lieutenant Colonel Wilkerson.¹⁶ In a six-page memorandum to the Secretary of the Air Force, Lieutenant General Franklin explained that he disapproved the findings and sentence because he “concluded there was insufficient evidence to support a finding of guilt beyond a reasonable doubt.”¹⁷

Within two weeks of the reversal of Lieutenant Colonel Wilkerson’s conviction, Representative Jackie Speier (D-CA) and Senator Claire McCaskill (D-MO) proposed bills to amend the UCMJ, and other legislative proposals followed.¹⁸ As Congress began investigating the issue of sexual assault in the military, allegations of sexual assault and misconduct by senior leaders continued to saturate the news media. Between April and June 2013, fourteen separate allegations of misconduct received significant attention by the media.

¹⁴ *Wilkerson Record of Trial*, AIR FORCE FREEDOM OF INFORMATION ACT ELECTRONIC READING ROOM, <http://www.foia.af.mil/reading/thewilkersonfoiacase.asp> (last visited Apr. 6, 2015).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Memorandum from Lieutenant General Craig Franklin, to Secretary of the Air Force Michael Donley (12 March 2013), *available at* <http://www.foia.af.mil/shared/media/document/AFD-130403-022.pdf> (last visited Apr. 6, 2015).

¹⁸ On 12 March 2013, Representative Speier introduced H.R. 1079, the Military Judicial Reform Act. Military Judicial Reform Act, H.R. 1079, 113th Cong. (2013). On the same day, Senator McCaskill introduced S. 538. S. 538, 113th Cong. (2013).

On 5 April 2013, the media reported that the Army had relieved Major General Ralph Baker, Commander of Combined Joint Task Force – Horn of Africa, of command due to allegations related to alcohol and sexual misconduct offenses.¹⁹ Major General Baker’s civilian policy advisor alleged that while on a business trip to Djibouti with Major General Baker, he “drank wine heavily, and pushed his hand between her legs afterward while they were sitting in the back seat of a sport utility vehicle.”²⁰

On 24 April 2013, a court-martial sentenced Air Force Technical Sergeant Bobby Bass to six months confinement and reduction to Staff Sergeant for his treatment of trainees, which included cruelty, assault, and wrongful sexual contact.²¹ An investigation into a sexual misconduct scandal at Joint Base San Antonio-Lackland led to the charges

¹⁹ Lolita C. Baldor, *Officials: General Fired Over Alcohol, Sex Charges*, MILITARY TIMES (Apr. 5, 2013), <http://www.military.com/daily-news/2013/04/05/officials-general-fired-over-alcohol-sex-charges.html> (last visited Apr. 6, 2015). Major General Baker received a letter of reprimand and was retired as a brigadier general in September 2013. Dan Lamothe, *Army general, accused of sexual assault by senior advisor, retired quietly with demotion*, WASH. POST (Oct. 1, 2014), <http://www.washingtonpost.com/news/checkpoint/wp/2014/10/01/army-general-accused-of-sexual-assault-by-senior-adviser-retired-quietly-with-demotion> (last visited Apr. 6, 2015).

²⁰ Lamothe, *supra* note 19. Major General Baker received administrative punishment, including a fine and a reprimand, and retired as a brigadier general in September 2013. *Id.*

²¹ One news article reported that Technical Sergeant Bass “order[ed] trainees to strip naked and enter a shower with dozens of fellow recruits,” “order[ed] trainees to apply Icy Hot to their genitals as punishment,” “ordered [trainees] to do physical training in a steamy bathroom with toilets filled with feces and urine,” “forced [trainees] to PT in their underwear while other trainees looked on and mocked them,” and “called [one trainee] into his office and ordered him to do push-ups, kicking him in the sternum with the toe of his steel-toed boot each time he reached the rest position.” Kristin Davis, *Former MTI gets 6 months; is 17th court-martialed in Lackland sex scandal*, A.F. TIMES (Apr. 24, 2013), <http://www.airforcetimes.com/article/20130424/NEWS/304240021/Former-MTI-gets-6-months-17th-court-martialed-Lackland-sex-scandal> (last visited Apr. 6, 2015).

against Technical Sergeant Bass and 17 other Air Force instructors.²² The next week, on 3 May 2013, a court-martial convicted a Marine Corps recruiter in Alaska of sexual assault. The media was shocked when his sentence only included a reduction in rank and a dishonorable discharge from the Marine Corps – with no adjudged sentence to confinement.²³

Three days later, on 6 May 2013, the Air Force removed Lieutenant Colonel Jeffrey Krusinki from his position after police in Virginia arrested him for an alleged sexual battery. This report was particularly shocking because Lieutenant Colonel Krusinki was in charge of the Air Force Sexual Assault Prevention and Response Program.²⁴ On the same day, the media reported that Congress blocked the promotion nomination of Air Force Lieutenant General Susan J. Helms because she granted clemency in a sexual assault case in 2012. A court-martial found Captain Matthew S. Herrera guilty of sexually assaulting a lieutenant in 2009. After reviewing the transcript of the court-martial, Lieutenant General Helms granted clemency to Captain Herrera, finding him guilty of indecent acts rather than sexual assault.²⁵ Congress continued its

²² *Id.*

²³ Michelle Theriault Boots, *Anchorage Marine rapists walks without prison time*, ALASKA DISPATCH NEWS (May 7, 2013), <http://www.adn.com/article/20130507/anchorage-marine-rapist-walks-without-prison-time> (last visited Apr. 6, 2015).

²⁴ Morgan Whitaker, *Head of Air Force sexual assault prevention charged with sexual battery*, MSNBC (May 6, 2013), <http://www.msnbc.com/politicsnation/head-air-force-sexual-assault-prevention-c> (last visited Apr. 6, 2015).

²⁵ 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 (last visited Apr. 6, 2015).

scrutiny of the military when, on 9 May 2013, Representative Jackie Speier (D-CA) brought a Facebook page to the attention of Marine Corps leadership. The page, maintained by several active duty Marines, included “photos of women, one of them naked and bound, with lewd captions.”²⁶

Less than a week later, the media reported that the Army had begun an investigation into allegations that Sergeant First Class Gregory McQueen, an Army Sexual Harassment/Assault Response and Prevention Coordinator at Fort Hood, Texas “persuaded a female private first class to become a prostitute who sold sex to other servicemembers.”²⁷ The next day, Fort Campbell suspended their Sexual Harassment/Assault Response and Prevention program manager, Army Lieutenant Colonel Darin Haas, after civilian police arrested him for stalking his ex-wife and violating a protective order.²⁸ Although the civilian court dismissed the charges three

²⁶ Tom Vanden Brook, *Facebook pulls page that denigrates female Marines*, USA TODAY (May 9, 2013), <http://www.usatoday.com/story/news/politics/2013/05/08/offensive-marine-corps-facebook-page-for-women/2144247/> (last visited Apr. 6, 2015).

²⁷ Tom Vanden Brook, *Suspect in Fort Hood prostitution ring identified*, ARMY TIMES (May 15, 2013), <http://www.armytimes.com/article/20130515/NEWS/305150027/Suspect-Fort-Hood-prostitution-ring-identified> (last visited Apr. 6, 2015). On 12 March 2015, a military judge found Sergeant First Class McQueen guilty of multiple specifications of attempting to pander conspiracy to patronize or solicit a prostitute, failure to obey a lawful order and dereliction of duty, cruelty and maltreatment, adultery, pandering and prostitution, and assault consummated by a battery. The judge sentenced him to twenty-four months confinement, reduction to E-1, and a dishonorable discharge. *SFC sentenced for organizing Fort Hood prostitution ring*, ARMY TIMES (Mar. 12, 2015), <http://www.armytimes.com/story/military/crime/2015/03/11/fort-hood-ncos-prostitution-ring-court-martial-begins-today/70137580/> (last visited Apr. 6, 2015).

²⁸ Chris Smith, *Fort Campbell sexual harassment manager arrested*, USA TODAY (May 16, 2013), <http://www.usatoday.com/story/news/nation/2013/05/16/fort-campbell-sexual-harassment-manager-arrested/2182437/> (last visited Apr. 6, 2015).

months later, the charges and arrest of Lieutenant Colonel Haas added negative attention to the military's sexual assault response program.²⁹

Between 21 and 24 May 2013, three new reports emerged which drew more negative attention on the military's handling of misconduct. On 21 May 2013, the Army suspended Brigadier General Bryan T. Roberts from his position as Commander of the Army Training Center and Fort Jackson due to an investigation into allegations of adultery and assault.³⁰ On 2 August 2013, a criminal investigation found that Brigadier General Roberts physically assaulted a woman on three occasions. On 16 September 2013, a separate Department of the Army Inspector General investigation determined that Brigadier General Roberts "engaged in two inappropriate relationships" and "improperly used government resources."³¹

²⁹ Tony Gonzalez, *Ex-Fort Campbell officer cleared of stalking charge*, ARMY TIMES (Aug. 24, 2013), <http://archive.armytimes.com/article/20130824/NEWS/308240006/Ex-Fort-Campbell-officer-cleared-stalking-charge> (last visited Apr. 6, 2015).

³⁰ Joe Gould, *Fort Jackson 1-star suspended amid misconduct allegations*, ARMY TIMES (May 21, 2013), <http://www.armytimes.com/article/20130521/NEWS/305210049/Fort-Jackson-1-star-suspended-amid-misconduct-allegations> (last visited Apr. 6, 2015). Brigadier General Roberts was relieved from command on July 11, 2013. Susanne M. Shafer, *Army relieves Fort Jackson general of command*, AUGUSTA CHRONICLE (Jul. 12, 2013), <http://chronicle.augusta.com/news/metro/2013-07-12/army-relieves-fort-jackson-general-command> (last visited Apr. 6, 2015). In August 2013, Brigadier General Roberts received a reprimand and was fined \$5,000 for assault and adultery. He retired in April 2014 in the grade of colonel. Craig Whitlock, *Army general disciplined over mishandling of sexual-assault case in Japan*, WASH. POST (Apr. 22, 2014), http://www.washingtonpost.com/world/national-security/army-general-disciplined-over-mishandling-of-sexual-assault-case-in-japan/2014/04/22/6339f268-ca2b-11e3-a75e-463587891b57_story.html (last visited Apr. 6, 2015).

³¹ Inspector Gen., U.S. Dep't of Army, U.S. Army Inspector General Agency Report of Investigation, Case 13-034 (16 Sep. 2013), *available at* <http://apps.washingtonpost.com/g/page/world/brig-gen-bryan-t-roberts-investigation/768/> (last visited Apr. 6, 2015). He received non-judicial punishment for the assaults, adultery, and conduct unbecoming an officer. As a result, he received a reprimand and forfeited \$2,500 per

On 22 May 2013, the media began reporting on a scandal at the United States Military Academy in which a non-commissioned officer secretly videotaped female cadets while they were in the bathroom or shower.³² On 24 May 2013, the media commented on an “[o]pen season’ for sex,” referring to the Army suspension of Lieutenant Colonel Joseph L. Miley from his position as the Commander of the 49th Air Defense Artillery Battalion, Fort Greeley, Alaska, for condoning adultery and fraternization.³³

The next week, the media reported on yet another misconduct scandal when the United States Military Academy announced that they had “temporarily disbanded the men’s rugby team over an ‘inappropriate’ email chain that ‘would suggest a hostile team environment or a culture of disrespect towards women.’”³⁴ An investigation into the

month for two months. *Id.* Brigadier General Roberts retired as a colonel in April 2014. Whitlock, *Army general*, *supra* note 30.

³² Thom Shanker, *Women Were Secretly Filmed at West Point, the Army Says*, N.Y. TIMES (May 22, 2013), http://www.nytimes.com/2013/05/23/us/sergeant-accused-of-secretly-filming-female-cadets.html?_r=1& (last visited Apr. 6, 2015). Sergeant First Class McClendon eventually pled guilty to eight specifications of indecent acts and a general court-martial sentenced him to thirty-three months of confinement, reduction to Private, and a bad-conduct discharge. Thom Shanker, *West Point Sergeant Pleads Guilty to Videotaping Female Cadets*, N.Y. TIMES (Mar. 6, 2014), <http://www.nytimes.com/2014/03/07/us/west-point-sergeant-pleads-guilty-to-secretly-videotaping-female-cadets.html> (last visited Apr. 6, 2015).

³³ Mark Farmer, *‘Open Season’ for sex at Alaskan base, military officials say*, NBC NEWS (May 24, 2013), http://usnews.nbcnews.com/_news/2013/05/24/18477490-open-season-for-sex-at-alaskan-base-military-officials-say?lite (last visited Apr. 6, 2015); Joe Gould, *Greely commander suspended amid probe*, ARMY TIMES (June 11, 2013), <http://www.armytimes.com/article/20130611/NEWS/306110039/Greely-commander-suspended-amid-probe> (last visited Apr. 6, 2015).

³⁴ Joe Gould, *West Point rugby team disbanded over ‘inappropriate’ emails*, ARMY TIMES (June 2, 2013), <http://www.armytimes.com/article/20130602/NEWS/>

matter found that “emails that circulated among the 60 team members contained material that . . . was, among other things, lewd, inappropriate and mocking both of team members and nonmembers.”³⁵

On 4 June 2013, after receiving numerous Congressional proposals to amend the UCMJ, the Senate Armed Services Committee (SASC) held a hearing on the topic of sexual assault in the military. Senator Carl Levin (D-MI), Chairman of the SASC explained that legislative action was necessary because “[t]he problem of sexual assault is of such scope and magnitude that it has become a stain on our military.”³⁶ The hearing included testimony from the Chairman of the Joint Chiefs of Staff (CJCS), all of the services and service judge advocates, spokespersons for victims of sexual assault, and two retired judge advocates.³⁷

Media reports on misconduct in the military did not stop after the SASC hearing. In fact, the hearing seemed to draw even more attention to the issue of misconduct in the military, resulting in media outlets filing requests under the Freedom of Information Act

306020005/West-Point-rugby-team-disbanded-over-inappropriate-emails (last visited Apr. 6, 2015).

³⁵ Chris Carroll, *West Point rugby team benched over improper emails*, STARS AND STRIPES (June 3, 2013), <http://www.stripes.com/news/west-point-rugby-team-benched-over-improper-emails-1.224123> (last visited Apr. 6, 2015).

³⁶ *Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military*, 113th Cong. 2 (2013) (opening statement of Sen. Carl Levin, Chairman, S. Comm on Armed Forces), available at <http://www.armed-services.senate.gov/imo/media/doc/13-44%20-%206-4-13.pdf> (last visited Apr. 6, 2015).

³⁷ *Pending Legislation Regarding Sexual Assaults in the Military*, UNITED STATES SENATE COMMITTEE ON ARMED SERVICES, <http://www.armed-services.senate.gov/hearings/oversight-pending-legislation-regarding-sexual-assaults-in-the-military> (last visited Apr. 6, 2015).

(FOIA)³⁸ for additional information on misconduct allegations.³⁹ In the two weeks following the hearing, the media reported on a sexual assault case in which a general officer was relieved for failing to take action,⁴⁰ an investigation finding that a general officer misused his position,⁴¹ and Navy charges against three United States Naval Academy football players for sexually assaulting another student.⁴²

³⁸ 5 U.S.C. § 552 (2014).

³⁹ Craig Whitlock, *Military brass, behaving badly: Files detail a spate of misconduct dogging armed forces*, WASH. POST (Jan. 26, 2014), http://www.washingtonpost.com/world/national-security/military-brass-behaving-badly-files-detail-a-spate-of-misconduct-dogging-armed-forces/2014/01/26/4d06c770-843d-11e3-bbe5-6a2a3141e3a9_story.html (last visited Apr. 6, 2015).

⁴⁰ On 7 June 2013, the Army suspended Major General Michael Harrison from his duties as Commander, United States Army – Japan, for failing to take action on a report that a subordinate had sexually harassed and assaulted a female Japanese civilian employee. Kirk Spitzer, *Army Suspends Top Commander in Japan*, TIME (June 10, 2013), <http://nation.time.com/2013/06/10/army-suspends-top-commander-in-japan/> (last visited Apr. 6, 2015). In August 2014, the Secretary of the Army directed that Major General Harrison be retired as a brigadier general. Chris Carroll, *Army general forced out, forfeits star for mishandling sex assault claim*, STARS AND STRIPES (Aug. 27, 2014), <http://www.stripes.com/news/army/army-general-forced-out-forfeits-star-for-mishandling-sex-assault-claim-1.300199> (last visited Apr. 6, 2015).

⁴¹ In June 2013, media obtained and reported on a DODIG report regarding Army Lieutenant General David Huntoon, Superintendent of the United States Military Academy. The report found that Lieutenant General Huntoon “improperly used Government personnel for other than official purposes, improperly accepted gifts of services from subordinates, and misused his position to induce a benefit to a friend.” Michael Hill, *Report criticizes West Point superintendent*, ARMY TIMES (June 14, 2013), <http://www.armytimes.com/article/20130614/CAREERS03/306140017/Report-criticizes-West-Point-superintendent> (last visited Apr. 6, 2015); Inspector Gen., U.S. Dep’t of Def., No. H11L120171242, Report of Investigation: Lieutenant General David H. Huntoon, U.S. Army, Superintendent, United States Military Academy, West Point, NY, (May 1, 2012), available at <http://www.dodig.mil/FOIA/ERR/H11L120171242.pdf> (last visited Apr. 6, 2015).

⁴² On 17 June 2013, the Navy announced that they had filed charges against three football players at the United States Naval Academy for sexually assaulting another student. Anny Shin, *U.S. Naval Academy football players to face charges over alleged*

By August 2013, it became clear that the media was unhappy with the military's release of information on senior leader misconduct. A USA Today report by Ray Locker on 8 August 2013 attacked the military for "covering up the problems of its senior officers," citing an investigation report on Army Major General Joseph Fil, Jr. that was completed in 2012 but was not released until a Freedom of Information Act (FOIA) request was filed.⁴³ Additional reports continued to surface over the next few months, including reports that the Navy removed a flag officer from his position for using counterfeit poker chips,⁴⁴ the Air Force relieved a general officer from command for

2012 rape, WASH. POST (June 17, 2013), http://www.washingtonpost.com/local/naval-academy-football-players-face-charges-over-alleged-2012-rape/2013/06/17/146be01e-d770-11e2-a9f2-42ee3912ae0e_story.html (last visited Apr. 6, 2015). The Navy dismissed the charges against two of the students and a court-martial found the third student not guilty of sexual assault in March 2014. Helene Cooper, *Former Naval Academy Football Player Is Acquitted of Sexual Assault*, N.Y. TIMES (Mar. 20, 2014), http://www.nytimes.com/2014/03/21/us/former-naval-academy-football-player-is-acquitted-of-sexual-assault-charges.html?_r=0 (last visited Apr. 6, 2015).

⁴³ Ray Locker, *Pentagon keeps covering up officers' dirty laundry*, USA TODAY (Aug. 8, 2013), <http://www.usatoday.com/story/nation/2013/08/08/general-fil-inspector-general-report-delayed/2631527/> (last visited Apr. 6, 2015). According to the DODIG report, while serving as the Commanding General, Eighth United States Army/United States Army - Korea, Major General Fil improperly accepted gifts of a value of approximately \$6,500 and failed to report the gifts, in violation of the Joint Ethics Regulation. Inspector Gen., U.S. Dep't of Def., No. H11-120936321, *Alleged Misconduct: Major General Joseph F. Fil, Jr., United States Army, Former Commanding General, Eighth United States Army and Chief of Staff, United Nations Command/Combined Forces Command/United States Forces Korea*, available at <http://www.dodig.mil/FOIA/ERR/H11-120936321.pdf> (last visited Apr. 6, 2015).

⁴⁴ On 10 October 2013, the media reported that the Navy removed Vice Admiral Tim Giardina from his position after a criminal investigation found that he used counterfeit poker chips at a casino. *U.S. Navy Vice Admiral fired from nuclear post amid gambling probe*, CBS NEWS (Oct. 10, 2013), <http://www.cbsnews.com/news/us-navy-vice-admiral-fired-from-nuclear-post-amid-gambling-probe/> (last visited Apr. 6, 2015).

“personal misbehavior,”⁴⁵ an Army officer sent e-mails that contained inappropriate sexual innuendos about a Congresswoman,⁴⁶ and an Air Force general officer engaged in an inappropriate relationship and consumed alcohol while on duty.⁴⁷

The Problem

It is no surprise these high-profile allegations of sexual assault and general officer misconduct prompted congressional action. In the twenty-four month period between January 2013 and December 2014, members of Congress introduced over forty bills to amend the UCMJ.⁴⁸ Some of the proposals specifically related to sexual assault cases. For example, part of the Better Enforcement for Sexual Assault Free Environments (BE

⁴⁵ On 11 October 2013, the Air Force relieved Major General Michael J. Carey from his command of the 20th Air Force for “personal misbehavior.” *Justin Fishel, Air Force general in charge of nuclear weapons fired over ‘conduct’, FOX NEWS (Oct. 11, 2013), <http://www.foxnews.com/politics/2013/10/11/air-force-general-in-charge-nuclear-missiles-to-be-fired-officials-say/> (last visited Apr. 6, 2015).*

⁴⁶ An August 2013 Department of the Army Inspector General investigation determined that Brigadier General Martin P. Schweitzer, Deputy Commanding General (Operations) for the 82d Airborne Division, “failed to demonstrate exemplary conduct” and “used an Army communication system for an unauthorized purpose.” The investigation disclosed that Brigadier General Schweitzer sent two e-mails from his government e-mail account that contained inappropriate sexual innuendos about a Congresswoman. Inspector Gen., U.S. Dep’t of Army, U.S. Army Inspector General Agency Report of Investigation, Case 13-024 (23 Aug. 2013), *available at* <http://apps.washingtonpost.com/g/page/world/martin-p-schweitzer-investigation/770/> (last visited Apr. 6, 2015).

⁴⁷ An inspector general report on Air Force Brigadier General David C. Uhrich found that he “engaged in an inappropriate relationship” and “consumed alcohol in a manner that was of a nature to bring discredit upon the armed forces.” The investigation detailed that Brigadier General Uhrich kept alcohol in his desk and frequently drank while on duty. Inspector Gen., U.S. Dep’t of Air Force, Report of Investigation (S7077P) Brig Gen David C. Uhrich (September 2013), *available at* <http://apps.washingtonpost.com/g/page/world/report-on-gen-david-c-uhrich/769/> (last visited Apr. 6, 2015).

⁴⁸ See Appendix A, *infra*.

SAFE) Act, introduced by Representative Michael Turner (R-OH) and Senator Claire McCaskill (D-MO) proposed to provide legal counsel to victims and require discharge from the service of anyone found guilty of rape or sexual assault.⁴⁹ However, several of the proposals sought to make significant changes to not only sexual assault cases, but to the military justice system as a whole.

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.⁵⁰ However, if the commander determines that the offense warrants a court-martial, then the commander may prefer charges.⁵¹ Once the commander prefers court-martial charges, the commander forwards the charges through the chain of command, to the commander exercising court-martial

⁴⁹ Better Enforcement for Sexual Assault Free Environments (BE SAFE) Act of 2013, H.R. 1867, 113th Cong. (2013); H.R. 2207, 113th Cong. (2013); S. 1032, 113th Cong. (2013).

⁵⁰ 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).

⁵¹ 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.

convening authority.⁵² 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.⁵³ Commanders serving as court-martial convening authorities also have the authority to accept plea bargains and must complete other administrative tasks.⁵⁴ 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.⁵⁵

Several of the proposals made between 2013 and 2014 sought to completely change this system by removing commanders from the military justice process and establishing an independent office of lawyers responsible for prosecutions. The two most significant of these proposals are the Sexual Assault Training and Prevention (STOP) Act⁵⁶ and the Military Justice Improvement Act.⁵⁷ These proposals sparked significant debate in Congress over whether commanders or lawyers should be responsible for making decisions regarding courts-martial. Thus, the proposals bring back the long-

⁵² 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).

⁵³ UCMJ arts. 22, 23, 24, and 25 (2014).

⁵⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(d)(3) (2012).

⁵⁵ UCMJ art. 60 (2014).

⁵⁶ Sexual Assault Training Oversight and Prevention (STOP) Act, H.R. 1593, 113th Cong. (2013).

⁵⁷ Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2013).

standing debate over whether the military justice system is a system of discipline, or a system of justice.

Sexual Assault Training Oversight and Prevention (STOP) Act

On 16 November 2011, Representative Jackie Speier (D-CA)⁵⁸ introduced H.R. 3435, the Sexual Assault Training Oversight and Prevention (STOP) Act to the House of Representatives, but no action was taken on it during the 112th Congress.⁵⁹ In the midst of the vigorous debates in Congress in 2013 over the issue of sexual assault in the military, Representative Jackie Speier (D-CA) reintroduced the bill on 6 May 2013 as H.R. 1593. However, the House Armed Services Committee took no action on it during the 113th Congress.⁶⁰

Representative Speier's bill would remove commanders from the court-martial process for sex-related offenses only. The bill would create a "Sexual Assault Oversight and Response Council," composed of civilians appointed by the President and the Secretary of Defense. The Sexual Assault Oversight and Response Council would appoint a Director of Military Prosecutions and personnel for a Sexual Assault Oversight

⁵⁸ Elected in 2008, Rep. Speier serves as ranking member of the House Armed Services Committee, Subcommittee on Investigations and Oversight, and the House of Representatives Democratic Senior Whip. In 1978, while serving as a Congressional staff member, Rep. Speier was shot five times. As a result of this incident and her "passionate and compelling speeches on the House floor," Rep. Speier is known as a "fighter" and is a leader in the debate over sexual assault in the military. CONGRESSWOMAN JACKIE SPEIER, http://speier.house.gov/index.php?option=com_content&view=article&id=13&Itemid=2 (last visited Apr. 6, 2015).

⁵⁹ Sexual Assault Training Oversight and Prevention (STOP) Act, H.R. 3435, 112th Cong. (2011).

⁶⁰ Sexual Assault Training Oversight and Prevention (STOP) Act, H.R. 1593, 113th Cong. (2013).

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.⁶¹

Military Justice Improvement Act

On 13 March 2013, with Senator Kirsten Gillibrand (D-NY) presiding, the SASC, Subcommittee on Personnel held a hearing on sexual assaults in the military.⁶² Two months later, on 16 May 2013, Senator Gillibrand first introduced the Military Justice Improvement Act of 2013, S. 967, to the Senate.⁶³ On the same day, Representative Dan Benishek, (R-MI) introduced the same bill in the House of Representatives as H.R. 2016.⁶⁴ The SASC held hearings on Senator Gillibrand's bill on 4 June 2013.⁶⁵

On 20 November 2013, Senator Gillibrand revised her bill and re-introduced it as S. 1752.⁶⁶ The bill reached the Senate floor for debate on 6 March 2014. However,

⁶¹ *Id.*

⁶² *Testimony on Sexual Assaults in the Military: Hearing Before the Subcomm. on Personnel of the S. Comm. on Armed Services, 113th Cong. (2013), available at http://www.armed-services.senate.gov/download/official-transcript_-testimony-on-sexual-assaults-in-the-military---personnel-subcommittee---march-13-201313 (last visited Apr. 6, 2015) [hereinafter *13 March 2013 Hearing*].*

⁶³ Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013).

⁶⁴ Military Justice Improvement Act of 2013, H.R. 2016, 113th Cong. (2013).

⁶⁵ *Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before the S. Comm. on Armed Services, 113th Cong. (2013) [hereinafter *4 June 2013 Hearing*], available at http://www.armed-services.senate.gov/download/official-transcript_-pending-legislation-regarding-sexual-assaults-in-the-military---june-4-2013 (last visited Apr. 6, 2015).*

⁶⁶ S. 1752, 113th Cong. (2013).

shortly after debate began, several Senators made a motion to close debate on the bill.⁶⁷ If three-fifths of the Senate approves a cloture motion, debate ends and the Senate votes on the bill.⁶⁸ In this case, the cloture vote received only fifty-five of the sixty votes required to close the debate. Therefore, the Senate did not vote on the bill and the bill returned to the Senate calendar for further debate.⁶⁹

Senator Gillibrand re-introduced the bill as S. 2970, Military Justice Improvement Act of 2014, on 2 December 2014.⁷⁰ A week later, she expanded the bill and re-introduced it as S. 2992 on 9 December 2014, but the Senate did not act on the re-introduced bill before the 113th Congress recessed.⁷¹

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

⁶⁷ 160 CONG. REC. S1335-38 (daily ed. Mar. 6, 2014). The following Senators made the cloture motion: Harry Reid (D-NV), Kirsten E. Gillibrand (D-NY), Barbara Boxer (D-CA), John D. Rockefeller IV (D-WV), Tammy Baldwin (D-WI), Benjamin L. Cardin (D-MD), Patrick J. Leahy (D-VT), Debbie Stabenow (D-MI), Richard Blumenthal (D-CT), Christopher A. Coons (D-DE), Claire McCaskill (D-MO), Jon Tester (D-MT), Mark Begich (D-AK), Barbara Mikulski (D-MD), Maria Cantwell (D-WA), Charles E. Schumer (D-NY), Dianne Feinstein (D-CA). *Id.*

⁶⁸ WALTER J. OLESZEK, CONG. RESEARCH SERV., RL 98-780, CLOTURE: ITS EFFECT ON SENATE PROCEEDINGS (2008), *available at* <http://www.senate.gov/CRS/Reports/crs-publish.cfm?pid=%26%2A2%3C4Q%3C%3B%3B%0A> (last visited Apr. 6, 2015).

⁶⁹ 160 CONG. REC. S1349-38 (daily ed. Mar. 6, 2014).

⁷⁰ Military Justice Improvement Act of 2014, S. 2970, 113th Cong. (2013).

⁷¹ Military Justice Improvement Act of 2014, S. 2992, 113th Cong. (2013).

of the accused would be responsible for determining the disposition of charges.⁷² The proposal would also establish 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.⁷³ Under Senator Gillibrand's proposal, commanders would 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.⁷⁴

Current Status

As proposals to amend the UCMJ were pending in Congress, debate began over the National Defense Authorization Act (NDAA) for Fiscal Year 2014 (FY14). Rather than enacting separate legislation to amend the UCMJ, the Armed Services Committees decided to include the legislation in the FY14 NDAA. After months of debate in Congress, the FY14 NDAA passed both the Senate and the House of Representatives and President Obama signed it into law on 26 December 2013.⁷⁵ Although it included several major changes to the way the military handles misconduct, the legislation did not incorporate any of the proposals to remove commanders from the court-martial process.

⁷² *Id.* at § 2.

⁷³ *Id.* at § 3.

⁷⁴ *Id.* at §§ 2-3.

⁷⁵ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013) [hereinafter 2014 NDAA]. See *infra* chapter 2.

However, some members of Congress have vowed to continue pursuing the issue.⁷⁶ Representative Jackie Speier (D-CA) has introduced the Sexual Assault Training Oversight and Prevention (STOP) Act twice and will likely re-introduce the bill again during the current Congress. 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.⁷⁷ Either of these proposals, if enacted, would impact 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, it is unclear what impact, if any, the change would have on the United States military's status as a profession.

Research Questions

Primary Research Question: Will removing commanders from the court-martial process affect the United States military's status as a profession?

Secondary Research Question 1: What is a profession?

Secondary Research Question 2: Is the military a profession?

⁷⁶ 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), <http://www.timesunion.com/local/article/Gillibrand-Military-sex-abuse-bill-will-pass-5785655.php> (last visited Apr. 6, 2015).

⁷⁷ Dennis Yusko, *supra* note 76; 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).

Secondary Research Question 3: How are commanders currently involved in the court-martial process?

Limitations

Due to the researcher's location at Fort Leavenworth, Kansas, research will be limited to the Combined Arms Research Library, The Judge Advocate General's Legal Center and School Library, and online sources.

Scope and Delimitations

Several other countries, such as the United Kingdom, Australia, Canada, and Israel have removed commanders from their military justice processes. While an analysis of the military justice systems of these countries may be useful in determining whether the removal of commanders from their military justice systems affected their military's status as a profession, such analysis is beyond the scope of this thesis.

The Response Systems to Adult Sexual Assault Crimes Panel, Role of the Commander Subcommittee conducted an analysis of the military justice systems of allied nations and determined that “[n]one of the military justice systems employed by our Allies was changed or set up to deal with the problem of sexual assault, and the evidence does not indicate that the removal of the commander from the decision making process in non-U.S. military justice systems has affected the reporting of sexual assaults.”⁷⁸

Additionally, because the society for which a profession serves determines whether a

⁷⁸ REPORT OF THE ROLE OF THE COMMANDER SUBCOMM. TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 113 (2014) [hereinafter REPORT OF THE ROC SUBCOMM.], *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/02_RoC/ROC_Report_Final.pdf (last visited Apr. 6, 2015).

particular occupation is a profession, American society will determine whether the United States military remains a profession if Congress removes commanders from the military justice process. As noted by the Legal Counsel to the CJCS,

the move by our allies to more civilianized systems mirrors a general global trend towards demilitarization, especially among countries that no longer require or maintain truly expeditionary militaries. The role of the United States military is different, and it will continue to be different. While many countries can afford for the center of the[ir] military justice systems to be located . . . far from the arenas of international armed conflict, we require a more flexible capability that can travel with the unit as it operates in any part of the world.⁷⁹

Therefore, while analysis of the military justice systems of other countries might be interesting, it is not relevant to the determination of whether American society will continue to recognize the United States military as a profession if Congress removes commanders from the military justice process.

Conclusion

This study will examine whether removing commanders from the military justice process will affect the United States military's status as a profession. Chapter 2 will survey existing literature on the elements of a profession, the military's status as a profession, and the arguments for and against commander involvement in the military justice process. Chapter 3 will present the methodology for this study. Chapter 4 will provide historical case studies of the military as a profession in the United States and military justice in the United States. Chapter 5 will conclude the study with an analysis of the case studies to determine whether removing commanders from the military justice process will impact the military's status as a profession.

⁷⁹ *Id.* at 108.

CHAPTER 2

LITERATURE REVIEW

In order to determine whether removing commanders from the military justice process will affect the military's status as a profession, one must first understand the definition and characteristics of a profession. Then, using the definition of a profession, one must be able to conclude that the military is currently a profession. This chapter will review sociological literature in order to define the elements of a profession. Next, this chapter will survey existing literature on whether the military is a profession. Finally, this chapter will summarize the arguments for and against commander involvement in the military justice process.

What is a Profession?

Although professions have existed for centuries, the modern concept of a profession did not exist until the nineteenth century, and sociologists did not begin to study professions until the twentieth century.⁸⁰ Sociology, the study of social behavior, includes a significant body of research and literature on the study of professions. However, a review of sociologic literature indicates that there is no clear definition of the concept of a "profession."

Sir A. M. Carr-Saunders and Paul Alexander Wilson were among the first sociologists to define the concept of a profession when they published *The*

⁸⁰ ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 3 (1988). *See also* Talcott Parsons, *The Professions and Social Structure*, 17 *SOCIAL FORCES* 457 (1939) ("Perhaps the closest parallel is the society of the Roman Empire where, notably, the Law was highly developed as a profession indeed.").

Professions in 1933.⁸¹ These two English sociologists defined professions as “organized bodies of experts who applied esoteric knowledge to particular cases. They had elaborate systems of instruction and training, together with entry by examination and other formal prerequisites. They normally possessed and enforced a code of ethics or behavior.”⁸²

Other sociologists in this era attempted not to define professions, but to delineate their role in society. In 1939, Talcott Parsons explained that the profession “is the institutional framework in which many of our most important social functions are carried on.”⁸³ Although Parsons recognized many elements of a profession, he distinguished professions from occupations by their interest and professional authority. Businessmen, he noted, pursue their own self-interest, whereas professionals serve the interests of others.⁸⁴ Parsons also distinguished professionals based on the professional authority they wield resulting from the technical competence they hold in a particular field.⁸⁵

In 1957, Samuel P. Huntington adopted a similar trait-based definition of professions when he described the military officer corps as a profession in his seminal book, *The Soldier and the State*.⁸⁶ Huntington wrote that professions have three

⁸¹ ABBOTT, *supra* note 80, at 4 (citing A. M. SAUNDERS & PAUL A. WILSON, *THE PROFESSIONS* (1933)).

⁸² *Id.*

⁸³ Parsons, *supra* note 80, at 467.

⁸⁴ *Id.* at 458.

⁸⁵ *Id.* at 460.

⁸⁶ SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* (1957).

characteristics: expertise, responsibility, and corporateness.⁸⁷ He explained that a professional “is an expert with specialized knowledge and skill in a significant field of human endeavor [sic]” and that a professional acquires expertise through education and experience.⁸⁸ The expertise of a professional is “essential to the functioning of society,” and as such, professionals have a responsibility to society rather than their own wealth and well-being.⁸⁹ Due to their responsibility to society, professions have values and ideals that are generally “codified into written canons of professional ethics.”⁹⁰ Finally, Huntington asserted that “members of a profession share a sense of organic unity and consciousness of themselves as a group apart from laymen.”⁹¹ This unity is usually evident through professional associations with rules or standards for professional responsibility.⁹²

After World War II, “white-collar service occupations grew at an unprecedented rate, and this fuelled demand for professional recognition.”⁹³ For this reason, for over thirty years sociologists continued to use definitions, such as Huntington’s definition, to distinguish between occupations and “professions.” These definitions generally focused on the expertise of professions, trust between the client and professional, and the existence of formal associations and licensing bodies with

⁸⁷ *Id.* at 8.

⁸⁸ *Id.*

⁸⁹ *Id.* at 9.

⁹⁰ *Id.* at 10.

⁹¹ HUNTINGTON, *supra* note 86, at 10.

⁹² *Id.*

⁹³ Alan Aldridge, *Series Editor’s Preface* to ROBERT DINGWALL, *ESSAYS ON PROFESSIONS*, at vii (2008).

codes of ethics.⁹⁴ However, the 1960s brought about additional research and change in the study of professions.⁹⁵

In 1964, Geoffrey Millerson identified that any definition of professions based on a set of characteristics could be “moulded [sic] to fit arguments.”⁹⁶ Thus, by defining a profession based on traits alone, one can easily include or exclude a particular occupation from the category of professions by adding or excluding traits from the definition of profession. To avoid this problem, Millerson attempted to define professions without any specific characteristics. He defined professions as “a type of higher-grade, non-manual occupation, with both subjectively and objectively recognized status, possessing a well-defined area of study or concern and providing a definite service, after advanced training and education.”⁹⁷

Around the same time, Harold Wilensky, another well-known sociologist, argued that although occupations were becoming more “professionalized,” there are only thirty to forty professions.⁹⁸ Wilensky stated that “any occupation wishing to exercise professional authority must find a technical basis for it, assert an exclusive jurisdiction, link both skill and jurisdiction to standards of training, and convince the public that its services are uniquely trustworthy.”⁹⁹ However, he found that the distinction between an occupation and a profession lies in the fact that “[t]he job of

⁹⁴ ABBOTT, *supra* note 80, at 5.

⁹⁵ *Id.*

⁹⁶ GEOFFREY MILLERSON, *THE QUALIFYING ASSOCIATIONS* 3 (1964).

⁹⁷ *Id.* at 10.

⁹⁸ Harold L. Wilensky, *The Professionalization of Everyone?*, 70 *AM. J. SOCIOLOGY* 137, 141 (1964).

⁹⁹ *Id.* at 138.

the professional is technical-based on systematic knowledge or doctrine acquired only through long prescribed training” and “[t]he professional man adheres to a set of professional norms.”¹⁰⁰

The study of professions continued to evolve after the 1960s and sociologists published a majority of the literature regarding the study of professions between the 1960s and the 1980s. During this period, most literature focused on one profession, usually law or medicine. Sociologists then derived general theories about professions as a whole from their analysis of that one profession.¹⁰¹ For example, Eliot Freidson, a prominent sociologist in the study of professions, focused most of his work on the profession of medicine. In his book *Profession of Medicine*, Freidson centered his analysis of the profession of medicine on two characteristics, autonomy and preeminence.¹⁰²

Beginning in 1975, another theory developed regarding the relation of professions to society. Jeffrey Berlant, writing in 1975, and Magali Larson, writing in 1977, both adopted a monopoly theory in their analysis of the medical profession.¹⁰³ These two sociologists hypothesized that the medical profession developed in an attempt to dominate the medical field, thus establishing a monopoly.¹⁰⁴ While her book focused on her monopoly theory of professions, Larson began her book by articulating that professions are distinct from other occupations based on several

¹⁰⁰ *Id.*

¹⁰¹ Sida Liu, *Forward to THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* (Robert Dingwall & Philip Lewis, eds., 2014).

¹⁰² ELIOT FREIDSON, *PROFESSION OF MEDICINE* xv and 5 (1970).

¹⁰³ JEFFREY L. BERLANT, *PROFESSION AND MONOPOLY* (1975); MAGALI LARSON, *THE RISE OF PROFESSIONALISM* (1977).

¹⁰⁴ ABBOTT, *supra* note 80, at 6.

“general dimensions.”¹⁰⁵ She posited that professions have a “body of knowledge and techniques which the professionals apply in their work,” required training to obtain the knowledge, a service orientation, ethics “which justify the privilege of self-regulation granted them by society,” autonomy, and prestige.¹⁰⁶

The study of the military as a profession increased in the 1970s and 1980s with scholars such as Sam C. Sarkesian,¹⁰⁷ Allan R. Millett,¹⁰⁸ General Sir John Hackett,¹⁰⁹ and Anthony E. Hartle.¹¹⁰ While these authors offered new ideas in the study of the military as a profession, they derived their trait-based definitions of a profession from existing sociology literature. These authors included the following characteristics in their definitions: organizational structure, special knowledge, education, ethical codes and self-regulation, a calling or commitment, service to society, autonomy, group identity, and authority.¹¹¹

¹⁰⁵ LARSON, *supra* note 103, at x.

¹⁰⁶ *Id.*

¹⁰⁷ See SAM C. SARKESIAN, *THE PROFESSIONAL ARMY OFFICER IN A CHANGING SOCIETY* (1975).

¹⁰⁸ See ANTHONY E. HARTLE, *MORAL ISSUES IN MILITARY DECISION MAKING* 21 (1989) (citing ALLAN R. MILLETT, *MILITARY PROFESSIONALISM AND OFFICERSHIP IN AMERICA* (1977)).

¹⁰⁹ See GENERAL SIR JOHN HACKETT, *THE PROFESSION OF ARMS* (1983).

¹¹⁰ See HARTLE, *supra* note 108.

¹¹¹ Sam Sarkesian’s definition includes four characteristics: “(1) organizational structure; (2) special knowledge and education; (3) self-regulation; and (4) calling and commitment.” SARKESIAN, *supra* note 107, at 9. Allan Millett notes that six attributes are generally included when analyzing professions: “1. The occupation is a full-time and stable job, serving continuing social needs. 2. The occupation is considered a lifelong calling by the practitioners, who identify themselves personally with their job subculture. 3. The occupation is organized to control performance standards and recruitment. 4. The occupation requires formal, theoretical education. 5. The occupation has a service orientation in which loyalty to standards of competence and loyalty to clients’ needs are paramount. 6. The occupation is granted a great deal of

Most sociologists in the last century focused their research on defining professions and determining what makes an occupation a profession. In 1988, Andrew Abbott approached the study of profession in a different manner. Although Abbott loosely defined professions as “exclusive occupational groups applying somewhat abstract knowledge to particular cases,” his book, *The System of Professions*, presents a theory that professions are part of a larger system and that a profession’s role in that system depends on the other professions in the system.¹¹² Thus, rather than focusing on defining which occupations are professions, Abbott centered his theory on explaining how professions interact within the system of professions.¹¹³

Within the last few decades, scholars studying the military as a profession have adopted Abbott’s systems theory.¹¹⁴ However, Army doctrine uses a trait-based definition and defines a profession as “a trusted self-policing and relatively autonomous vocation whose members develop and apply expert knowledge as human

collective autonomy by the society it serves, presumably because the practitioners have proven their high ethical standards and trustworthiness.” HARTLE, *supra* note 108, at 21 (citing MILLETT, *supra* note 108, at 18). General Sir John Hackett defines a profession as “an occupation with a distinguishable corpus of specific technical knowledge and doctrine, a more or less exclusive group coherence, a complex of institutions peculiar to itself, an educational pattern adapted to its own specific needs, a career structure of its own and a distinct place in the society which has brought it forth.” HACKETT, *supra* note 109, at 9. Rather than adopting his own definition, Anthony Hartle cites other definitions and concludes that “[m]ost authorities would accept the following five elements as ones constituting the distinguishing attributes of a profession. 1. Systematic theory; 2. Authority; 3. Community sanction; 4. Ethical codes; 5. A culture.” HARTLE, *supra* note 108, at 19 (citing Ernest Greenwood, *Attributes of a Profession*, in *MAN, WORK, AND SOCIETY* 207 (Sigmund Nosow and William H. Form, eds., 1962)).

¹¹² ABBOTT, *supra* note 80, at 33.

¹¹³ *Id.* at 315.

¹¹⁴ *See generally* THE FUTURE OF THE ARMY PROFESSION (Lloyd J. Matthews ed., 2d ed. 2005).

expertise to render an essential service to society in a particular field.”¹¹⁵ The Army definition further explains that a profession has five characteristics: “[p]rofessions provide a unique and vital service to the society served,” professions “apply[] expert knowledge and practice,” “[p]rofessions earn the trust of the society because of effective and ethical application of their expertise,” “[p]rofessions self-regulate,” and professions are “granted significant autonomy and discretion in their practice of expertise on behalf of the society.”¹¹⁶

Despite the varied analysis of professions in the last century, most definitions of a profession share common characteristics. As depicted in Table 1, below, a majority of the scholars evaluated include some form of knowledge or expertise, training or education, ethical code or self-regulation, and service-orientation, calling or commitment in their definition of a profession. After approximately 1970, authors also generally include organizational structure or group identity, and some form of autonomy, preeminence, dominance, prestige, or authority in their definitions.

¹¹⁵ U.S. DEP’T OF ARMY, DOCTRINE REFERENCE PUB. 1, THE ARMY PROFESSION para. 1-3 (Jun. 2013) [hereinafter ADRP 1].

¹¹⁶ *Id.*

Table 1. Comparison of Definitions of a Profession

	Knowledge / Expertise	Training / Education	Ethical Code / Self-Regulation	Service-Oriented / Calling or Commitment	Org. Structure / Group Identity	Autonomy	Preeminence/ Dominance / Prestige / Authority
Carr-Saunders	✓	✓	✓				
Parsons	✓			✓			
Huntington	✓	✓	✓	✓	✓		
Millerson	✓	✓		✓			
Wilensky	✓	✓	✓				
Freidson						✓	✓
Larson	✓	✓	✓	✓		✓	✓
Millet		✓	✓	✓	✓	✓	
Sarkesian	✓	✓	✓	✓	✓		
Hackett	✓	✓			✓		✓
Hartle	✓		✓	✓	✓		✓
ADRP 1	✓		✓	✓		✓	✓

Source: Created by author. Data derived from 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))

The Military Profession

Despite the extensive research and literature on the study of professions, the military is notably absent from traditional sociologic studies of professions and it is only within the last 60 years that scholars began to recognize the military as a profession. However, by applying the characteristics of a profession described above to the military, it is clear that the modern military is a profession.

Morris Janowitz, a sociologist, and Samuel P. Huntington, a political scientist, led the movement of studying the military as a profession in the late 1950s. In 1957, Samuel P. Huntington published his book, *The Soldier and the State*, which is now considered a preeminent text on civil-military relations.¹¹⁷ Huntington began his book by stating that “[t]he modern officer corps is a professional body and the modern military officer a professional man.”¹¹⁸ While this proclamation was considered novel and even controversial at the time, the idea of the military as a profession has since become commonplace.

At the same time Huntington was conducting research into civil-military relations from a political science perspective, Morris Janowitz began studying the military profession from a sociology perspective. In 1960, Janowitz published *The Professional Soldier: A Social and Political Portrait*, the first literature in the field of military sociology.¹¹⁹ That same year, Janowitz founded the Inter-University Seminar on Armed Forces and Society, “a forum for the interchange and assessment of research and scholarship in the social and behavioral sciences dealing with the military establishment and civil-military relations.”¹²⁰ Throughout his career, Janowitz published numerous works on the military profession, and sociologists consider Janowitz as the founder of the study of the military and society as a subfield of sociology.¹²¹

¹¹⁷ HUNTINGTON, *supra* note 86.

¹¹⁸ *Id.* at 7.

¹¹⁹ MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT* (1960).

¹²⁰ <http://www.iusafs.org/about/AboutUs.asp>

¹²¹ <http://www.iusafs.org/JanowitzBio.asp>

After Janowitz developed the study of the military as a subfield of sociology, a few other sociologists began including the military in their analysis of professions. For example, in 1964, Harold Wilensky studied the process of professionalization and identified that the military became a professional career after the Renaissance period.¹²²

From the 1960s to the 1980s, sociologists, historians, and political scientists began studying and writing extensively about military professionalism. In 1975, military sociologist Sam C. Sarkesian published *The Professional Army Officer in a Changing Society*.¹²³ Historian Allan Millet followed in 1977 with *Military Professionalism and Officership in America*.¹²⁴

Military leaders after 1960 also embraced the concept of the military as a profession. In his farewell speech at West Point in 1962, General Douglas MacArthur proclaimed, “[y]ours is the profession of arms, the will to win, the sure knowledge that in war there is no substitute for victory, that if you lose, the Nation will be destroyed, that the very obsession of your public service must be Duty, Honor, Country.”¹²⁵ In 1983, General Sir John Hackett, a retired British officer, wrote *The Profession of Arms*, outlining the profession of arms through history.¹²⁶

Although scholars agree that the modern military is a profession, historians debate the date when the military became a profession. The military has possessed

¹²² Wilensky, *supra* note 98, at 141.

¹²³ SARKESIAN, *supra* note 107.

¹²⁴ MILLETT, *supra* note 108.

¹²⁵ <http://www.nationalcenter.org/MacArthurFarewell.html>

¹²⁶ HACKETT, *supra* note 109.

some characteristics of a profession for centuries, but most scholars identify the nineteenth century as the period of military professionalization.

Prior to the French Revolution

“From the beginning of man’s recorded history physical force, or the threat of it, has always been freely applied to the resolution of social problems.”¹²⁷ Historians believe that as far back as the 7th century B.C., societies organized militaries to defend their states.¹²⁸ In the 7th century B.C., a body of elders selected Spartan children for service as infantryman. These children began military education and training at age seven and served the state in the military from age twenty-one to age sixty.¹²⁹ While these early soldiers were “professional” in the sense that the military was their occupation and they were in the service of the state, the military did not become a “profession” in the modern sense of the word until sometime after the nineteenth century.¹³⁰

In Europe prior to the nineteenth century, nobility had the right to a military commission, or they could buy a commission for the right price.¹³¹ France and Prussia prohibited commoners from serving as military officers based on a belief “that only

¹²⁷ *Id.* at 9.

¹²⁸ Victor Davis Hanson, *Genesis of the Infantry*, in *THE CAMBRIDGE HISTORY OF WARFARE* 25 (Geoffrey Parker ed., 2005); HACKETT, *supra* note 109, at 10; SARKESIAN, *supra* note 107, at 8.

¹²⁹ HACKETT, *supra* note 109, at 10-13.

¹³⁰ HUNTINGTON, *supra* note 86, at 19; SARKESIAN, *supra* note 107, at 8; HACKETT, *supra* note 109, at 99.

¹³¹ HACKETT, *supra* note 109, at 104; R.R. Palmer, *Frederick the Great, Guibert, Bülow: From Dynastic to National War*, in *MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE* 92 (Peter Paret ed., 1986).

aristocrats possessed honor, loyalty, and courage.”¹³² England required officers to purchase their commission in order to ensure officers had a financial interest in the government, thereby restricting officer commissions to wealthy individuals who could afford it.¹³³ Due to these commissioning practices, 85 percent of European military officers were aristocrats.¹³⁴ Mercenaries and technical experts generally made up the remaining part of the officer corps prior to the nineteenth century.¹³⁵

Because men of noble birth were entitled to military commissions, they received military training and education from an early age, but very few military schools or academies existed.¹³⁶ For example, King Frederick II of Prussia, also known as Frederick the Great, began his military training at the age of six, when his father assigned him a drill instructor and a company of six-year old cadets to train.¹³⁷

Beginning in the late seventeenth century, nations began establishing military schools for training in technical fields such as artillery and engineering. The establishment of military academies followed in the early eighteenth century when England, France, and Prussia established academies to train noble children for military service. However, these academies were rudimentary and only provided

¹³² HUNTINGTON, *supra* note 86, at 22.

¹³³ *Id.* at 22-23.

¹³⁴ John A. Lynn, *Nations in Arms*, in *THE CAMBRIDGE HISTORY OF WARFARE 196-197* (Geoffrey Parker ed. 2005).

¹³⁵ Palmer, *supra* note 131, at 92; Geoffrey Parker, *Dynastic War*, in *THE CAMBRIDGE HISTORY OF WARFARE 150* (Geoffrey Parker ed., 2005); HUNTINGTON, *supra* note 86, at 20-23.

¹³⁶ HUNTINGTON, *supra* note 86, at 24-25; WILLIAM B. SKELTON, *AN AMERICAN PROFESSION OF ARMS 1784-1861* 88 (1992).

¹³⁷ Jay Luvaas, *Frederick the Great: The Education of a Great Captain*, in *H100: RISE OF THE WESTERN WAY OF WAR* (U.S. Army Command and General Staff College ed., 2014).

noble children with limited training before they took command of military units at around age twelve.¹³⁸ After assuming command, officers received no additional training or education.¹³⁹

Once commissioned, military officers received promotions based on their status, wealth, and noble birth. In England, officers could purchase a higher rank, and in other nations, the highest nobility served in the highest command positions.¹⁴⁰ Frederick the Great was a captain by age fourteen, a colonel by age eighteen, and a major general by age twenty-two.¹⁴¹

While military officers came from the highest classes of society, enlisted soldiers during this period came from the lowest classes. Forced into service, these soldiers had no commitment to the military or the nation they served. They lacked morale, expertise, and loyalty. Societies considered these soldiers the lowest class and treated them as social outcasts rather than experts in warfare.¹⁴²

The aristocratic influence on the military resulted in the military not being a profession prior to the nineteenth century. Officers lacked specialized knowledge or expertise of warfare and received limited military training or education. The military lacked discipline and the only ethical code was that of the aristocracy.¹⁴³ Officers

¹³⁸ HUNTINGTON, *supra* note 86, at 24-25.

¹³⁹ *Id.* at 25.

¹⁴⁰ *Id.* at 23-24.

¹⁴¹ Luvaas, *supra* note 137.

¹⁴² Palmer, *supra* note 135, at 92-93; Macgregor Knox, *Mass politics and nationalism as military revolution: The French Revolution and after*, in *THE DYNAMICS OF MILITARY REVOLUTION 1300-2050* 60 (Macgregor Knox and Williamson Murray ed., 2001).

¹⁴³ HUNTINGTON, *supra* note 86, at 26-28.

were committed to their own honor and class status rather than to the military or the service of their country.¹⁴⁴ They abandoned their units when military service was inconvenient to them, or when they wanted to engage in the lavish lifestyle of an aristocrat.¹⁴⁵ The wealthy aristocrats who made up the officer corps viewed officership not as a profession, but an “incidental attribute of his station in society.”¹⁴⁶

After the French Revolution

The nineteenth century brought about changes to militaries around the world and by the end of the nineteenth century, nearly all militaries possessed characteristics of a profession by modern standards.¹⁴⁷ In France, financial crisis in the late eighteenth century led to the social and political turmoil of the French Revolution. In 1789, the National Constituent Assembly abolished feudalism in France, thereby removing special privileges from nobility and making all citizens equal under the law. In 1792, the Legislative Assembly abolished the monarchy and France became a republic.¹⁴⁸ The changes in France triggered major social and political changes throughout Europe, but also served as a catalyst for change to the professionalism of the European militaries. After the French Revolution, characteristics of a profession began to emerge in militaries around the world.

¹⁴⁴ Palmer, *supra* note 135, at 92.

¹⁴⁵ John A. Lynn, *States in Conflict*, in THE CAMBRIDGE HISTORY OF WARFARE 180-181 (Geoffrey Parker ed., 2005); HUNTINGTON, *supra* note 86, at 27.

¹⁴⁶ HUNTINGTON, *supra* note 86, at 27. *See also* SKELTON, *supra* note 136, at 88.

¹⁴⁷ HACKETT, *supra* note 109, at 99; HUNTINGTON, *supra* note 86, at 19.

¹⁴⁸

The end of feudalism in France removed the privilege of military commissions from nobility, making all citizens eligible to serve in the military in any rank.¹⁴⁹ Prussia followed France with a decree in 1808 removing class restrictions for officers.¹⁵⁰ England established the Royal Military College in 1802 and graduates received a military commission without the traditional requirement to purchase a commission. However, with the exception of commissions granted by the Royal Military College, the practice of purchasing a military commission continued in England until 1871.¹⁵¹ While service as a military officer was previously just one aspect of being a nobleman, opening the officer ranks to members of all classes of society allowed officers to develop specialized knowledge and expertise in the art and science of warfare.

Officers' knowledge and expertise in warfare also increased as the systems for advancement and promotion changed. With the decline of feudalism, class status became irrelevant. Previously promoted based on class status or wealth, officers now received promotions based on performance.¹⁵² Performance-based promotions gave officers the incentive to develop specialized knowledge and expertise.

The eradication of military commissions based on status or wealth also led to the improvement of military training and education. Under the old system, military training and education was not necessary because nobility were believed to be born

¹⁴⁹ Thomas M. Huber, *The Rise of Napoleon*, in *H100: Rise of the Western Way of War* (U.S. Army Command and General Staff College ed., 2014); HUNTINGTON, *supra* note 86, at 42.

¹⁵⁰ HUNTINGTON, *supra* note 86, at 39.

¹⁵¹ *Id.* at 43.

¹⁵² Lynn, *Nations in Arms*, *supra* note 134, at 196.

with the honor and courage that was necessary for military command.¹⁵³ However, with all citizens now eligible for military commissions, military leaders recognized the need to develop standards or prerequisites for granting military commissions, and they developed formal military training and education to prepare officers for command. For example, in France, legislation after the French Revolution required one-third to two-thirds of officers to be graduates of military schools. Beginning in 1806, Prussia required officer candidates to graduate from the gymnasia or pass an entrance examination.¹⁵⁴

Although nations established some military academies and schools in the eighteenth century, military schools and academies took root in the nineteenth century. France established École Polytechnique, an engineering school, in 1794.¹⁵⁵ In 1804, Napoleon Bonaparte transformed the school into a military school for artillery and engineer officers and the school remains part of the Ministry of Defense to this day.¹⁵⁶ France established their military academy, the Special Military School (École Spéciale Militaire de Saint-Cyr), in 1803.¹⁵⁷ In 1741, England established a military academy for the technical training of artillery and engineer officers, the Royal Military Academy at Woolwich.¹⁵⁸ England later established the Royal Military

¹⁵³ HUNTINGTON, *supra* note 86, at 24.

¹⁵⁴ HACKETT, *supra* note 109, at 103.

¹⁵⁵ HUNTINGTON, *supra* note 86, at 42; *1794-1804: Revolution and Napoleonic Period*, ÉCOLE POLYTECHNIC UNIVERSITÉ PARIS-SACLAY, <http://www.polytechnique.edu/en/revolutionnapoleonicperiod> (last visited Apr. 6, 2015).

¹⁵⁶ *19th century: thrust into the upheaval of the times*, ÉCOLE POLYTECHNIC UNIVERSITÉ PARIS-SACLAY, <http://www.polytechnique.edu/en/19thcentury> (last visited Apr. 6, 2015).

¹⁵⁷ HUNTINGTON, *supra* note 86, at 42.

¹⁵⁸ *Id.* at 25.

College in 1800 in order to train officers to be staff officers, to train cadets to be officers, and to train non-commissioned officers.¹⁵⁹ England reorganized and expanded the Royal Military Academy in 1806, and it remained open until its closure in 1939.¹⁶⁰ The Royal Military College has been closed and reorganized several times since it opened, but it remains open today as the Royal Military Academy Sandhurst.¹⁶¹ Prussia founded their military academy in 1801 and General Sharnhorst re-established the Kriegsakademie in Berlin in 1810.¹⁶²

The end of the monarchy in France transformed the French military from a king's army to a citizen's army.¹⁶³ The new form of government gave citizens motivation to serve in the military because it was now their nation rather than the king's nation. Therefore, military officers now served in the military due to a calling or commitment to serve their country and identified themselves as members of the profession of arms. Because the military now served society as a whole rather than the king, the military gained more respect from the society they served. As the military education of officers increased and officers had more specialized knowledge and expertise in warfare, societies began to accept military officers as experts in the field of warfare, and granted the military profession more autonomy.

¹⁵⁹ HACKETT, *supra* note 109, at 104; *The History of RMA Sandhurst*, THE BRITISH ARMY, http://www.army.mod.uk/documents/general/history_of_rmas.pdf (last visited Apr. 6, 2015).

¹⁶⁰ *The History of RMA Sandhurst*, THE BRITISH ARMY, http://www.army.mod.uk/documents/general/history_of_rmas.pdf (last visited Apr. 6, 2015).

¹⁶¹ *Id.*

¹⁶² HACKETT, *supra* note 109, at 103.

¹⁶³

Based on these changes after the French Revolution, most scholars would agree that modern militaries around the world possess the characteristics of being a profession.¹⁶⁴ After the French Revolution, military officers began to possess specialized knowledge or expertise in the art and science of warfare. Militaries developed extensive training and education programs. Rather than serving for the monarchy, after the French Revolution, military officers served based on a calling or commitment to serve the people. Military structure changed and officers began to identify themselves as military officers rather than nobles. As a result of these changes, the military obtained more prestige and received more autonomy and authority from the society they served. Chapter 4 will discuss the final characteristic, self-regulation of an ethical code, in detail as it relates to the involvement of commanders in the military justice process.

Although most scholars agree that the military as a whole became a profession after the French Revolution, individual militaries developed and professionalized at different rates. In most countries, the process of professionalization continues to this day. Chapter 4 will review the history of professionalization in the United States in order to determine the effect that removing commanders from the military justice process will have on the military profession in the United States.

Arguments Related to Commander's Involvement in Courts-Martial

Now that it has been determined that the military is a profession, this research can move on to the issue of removing commanders from the military justice process and how it would affect the military's status as a profession. With Congress calling

¹⁶⁴ According to Samuel P. Huntington, “[p]rior to 1800 there was no such thing as a professional officer corps. In 1900 such bodies existed in virtually all major countries.” HUNTINGTON, *supra* note 86, at 19.

for change to the UCMJ to address the problem of sexual assault in the military, academic scholars, members of Congress, judge advocates, and military leaders have all expressed their opinions on whether commanders should be involved in the military justice process. The SASC received testimony from the service chiefs, judge advocate generals, commanders, victims, and other individuals. The Response Systems to Adult Sexual Assault Crimes Panel, established by the Secretary of Defense at the direction of Congress, studied the issue for a year. As part of their study, the panel received testimony from “military leaders, both officer and enlisted, active duty and retired; foreign military leaders; sexual assault survivors; sexual assault advocacy groups; [Department of Defense (DoD)] and civilian victim services personnel; military and civilian prosecutors and defense counsel; military and civilian victim counsel; academics and subject matter experts; Senators; and private citizens.”¹⁶⁵ As a result, there is no shortage of literature and testimony available highlighting the arguments for and against removing commanders from the military justice process.

Arguments for Removing Commanders from the Military Justice Process

Advocates for removing commanders from the military justice process cite five primary arguments. First, they argue that commander involvement in the military justice process discourages victims from reporting sexual assaults due to fears of retaliation, retribution, damage to reputation, and disciplinary action for collateral misconduct.¹⁶⁶ According to Ms. Anu Bhagwati, Executive Director of Service

¹⁶⁵ RSP REPORT, *supra* note 169, cover letter.

¹⁶⁶ Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 144 (2014); REPORT OF THE ROC SUBCOMM., *supra* note 78, at 93-95.

Women’s Action Network, service members “do not report [sexual assault] for two reasons primarily. They fear retaliation, and they are convinced that nothing will happen to their perpetrator.”¹⁶⁷ Others expand on the argument by stating that “[i]n the military justice system, victims might suspect that their superiors will not take their complaints seriously, and ultimately, the concern might be that the commander of the accused would not only take no action against the assailant, but would take action against the victim herself.”¹⁶⁸

The argument that the involvement of commanders in the military justice process decreases reporting leads directly into the next argument, that commanders have conflicting duties between the accused and the victim, and that this conflict impedes the commander ability to respond to sexual assault in their units.¹⁶⁹ Commanders are “required to balance servicemembers’ due process rights with serving military justice and maintaining good order and discipline in their units.”¹⁷⁰ Thus, when both the accused and the victim are members of the commander’s unit, the commander has a duty to protect the due process rights of the accused, but must also consider the well-being of the victim. This conflict may affect decisions whether to transfer the accused or the victim to another unit and may result in re-victimization.

¹⁶⁷ Transcript of SASC hearing, pg. 181.

¹⁶⁸ Murphy, *supra* note 166, at 144; REPORT OF THE ROC SUBCOMM., *supra* note 78, at 93-95.

¹⁶⁹ Murphy, *supra* note 166, at 141-143; REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 171-172 (2014) (statement of Hillman and Bryant) [hereinafter RSP REPORT], *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf (last visited Apr. 6, 2015); REPORT OF THE ROC SUBCOMM., *supra* note 78, at 98.

¹⁷⁰ Murphy, *supra* note 166, at 142.

Third, advocates argue that the involvement of commander in the military justice process “undermines the rights of both victims and accused service members, all of whom deserve an independent and impartial tribunal.”¹⁷¹ When considering the appropriate disposition of a particular case, proponents argue that commanders factor in their knowledge of the accused and/or victim, and that this results in unfair decisions. They argue that “the decisions to prosecute or not should be based on evidence, independent of preexisting command relationships.”¹⁷²

Fourth, many argue that “[b]y establishing such a dominant role for the convening authority, the military justice system presents the potential problem of a commander using his power and influence in such a way as to thwart the fairness, impartiality, and integrity of disciplinary proceedings.”¹⁷³ This argument alludes to the issue of unlawful command influence. Unlawful command influence would occur when a commander attempts to deter sexual assault through messaging and the messaging has the effect of influencing the opinion of the court-martial panel members or witnesses. Article 37 of the UCMJ prohibits unlawful command influence.¹⁷⁴ Thus, a commander’s role as the court-martial convening authority

¹⁷¹ RSP REPORT, *supra* note 169, at 171-172 (statement of Hillman and Bryant).

¹⁷² Transcript of Response Systems to Adult Sexual Assault Crimes Panel: The Role of the Commander in the Military Justice System: Perspectives of Retired Senior Commanders and Former Officers 11-12 (Jan. 30, 2014) (testimony of Major General (Retired) Martha Rainville) [hereinafter Jan 30, 2014 Transcript], *available at* <http://responsesystemspanel.whs.mil/> (last visited Apr. 6, 2015). *See also* Murphy, *supra* note 166, at 167.

¹⁷³ Lindsay N. Alleman, Who is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems, 16 DUKE J. COMP. & INT’L L. 169, 171 (2006).

¹⁷⁴ UCMJ art. 37 (2014).

precludes the commander from deterring sexual assault in their units through messaging.¹⁷⁵

Finally, advocates for removing commanders from the military justice process argue that commanders lack the legal training that is necessary to make prosecutorial decisions. Therefore, they argue that “lawyers are better suited to make charging decisions and determine which cases should go to trial because they have the necessary legal training and background.”¹⁷⁶

Arguments in Favor of Commander Involvement in the Military Justice Process

Proponents for commander involvement in the military justice process focus their arguments around the idea that commanders must be involved in the military justice process because they are responsible for the good order and discipline of their unit. Although most proponents for keeping commanders involved in the military justice process agree that changes to the UCMJ are necessary, they are adamant that commanders must remain involved in the military justice process.

At the SASC hearing on sexual assault in the military in June 2013, the CJCS and all of the service chiefs fervently argued that commanders must be involved in the military justice process in order to maintain good order and discipline in their units.

General Martin E. Dempsey, CJCS commented that

[t]he commander’s responsibility to preserve order and discipline is essential to effecting change. They punish criminals, and they protect victims when and where no other jurisdiction is capable of doing so or lawfully able to do so. Commanders are accountable for all that goes on in a unit, and

¹⁷⁵ Murphy, *supra* note 166, at 144-152.

¹⁷⁶ *Id.* at 168-169. See also *Law Professors’ Statement on Reform of Military Justice*, COMPREHENSIVE RESOURCE CENTER FOR THE MILITARY JUSTICE IMPROVEMENT ACT, <http://www.gillibrand.senate.gov/mjia> (last visited Apr. 6, 2015); RSP REPORT, *supra* note 169, at 43 (statement of Colonel McHale).

ultimately, they are responsible for the success of the missions assigned to them.¹⁷⁷

In his prepared statement to the SASC, General Raymond T. Odierno, Chief of Staff of the Army argued that

[d]iscipline is built, shaped and reinforced over a Soldier's career by commanders with authority. The commander is necessarily vested with ultimate authority because he or she is responsible for all that goes on in a unit – health, welfare, safety, morale, discipline, training, and readiness to execute a mission in wartime and in times of peace. The commander's ability to punish quickly, visibly, and locally is essential to maintaining discipline in all its forms within a unit. The [UCMJ] is the vehicle by which commanders can maintain good order and discipline in the force.¹⁷⁸

Noting that commanders are “responsible and accountable for everything that happens in his or her ship, squadron, or unit,” Admiral Jonathan Greenert, Chief of Naval Operations, recommended that “the unit commander's authority and role as the singular individual accountable for the welfare of his or her sailors should be preserved such that the commander is able to carry out his or her mission.”¹⁷⁹

Similarly, General James F. Amos, Commandant of the Marine Corps, commented on the responsibility of commanders when he testified that “[c]ommanding officers are charged with establishing and training to standards and uniformly enforcing those standards. A unit will rise or fall as a direct result of the leadership of its commanding officer. Commanding officers never delegate responsibility. They should never be forced to delegate their authority.”¹⁸⁰

General Mark A. Welsh, III, Chief of Staff of the Air Force, mirrored the sentiments of his peers with his testimony,

¹⁷⁷ SASC Hearing transcript at 11.

¹⁷⁸ SASC Hearing transcript at 16.

¹⁷⁹ SASC Hearing transcript at 25.

¹⁸⁰ SASC Hearing Transcript at 32.

Airmen should have no doubt about who will hold them accountable for mission performance and adherence to standards. Airmen expect their commander to define the mission, ensure readiness, and hold accountable other Airmen who fail to meet their responsibilities or live up to our standards of conduct. The commander must have both the responsibility and the authority to address issues that affect the good order and discipline of their unit.¹⁸¹

Finally, Admiral Robert J. Rapp, Jr., Commandant of the Coast Guard, stated that he has “serious concerns about legislation that would fundamentally alter the role of commanders without full consideration of the second- and third-order effects on command authority and the ability to maintain unit discipline.”¹⁸²

A panel of commanders from all of the services shared similar sentiments with the SASC. For example, Colonel Donna W. Wright, an Army commander testified

The commander is responsible for all that happens or fails to happen in his or her unit. They set the standard, and we enforce them. The UCMJ provides me with all the tools I need to deal with misconduct in my unit from low-level offenses to the most serious, including murder and rape. I cannot and should not relegate my responsibility to maintain discipline to a staff officer or someone else outside of the chain of command.¹⁸³

In addition to the argument that UCMJ authority is necessary for commanders to maintain good order and discipline, Senator Carl Levin (D-MI) and Senator Claire McCaskill (D-MO) argue that commanders must retain authority so they can be held responsible if the military culture does not change.¹⁸⁴ According to some,

¹⁸¹ SASC Hearing Transcript at 47-48.

¹⁸² SASC Hearing Transcript at 50.

¹⁸³

¹⁸⁴ According to Senator Levin, “[i]t is the chain of command that can and must be held accountable if it fails to change an unacceptable military culture. It is harder to hold someone accountable for their failure to act if you reduce their power to act.” Bill Briggs, *Gillibrand loses bid to strip military sex assault cases from chain of command*, NBC NEWS (Jun. 12, 2013), http://usnews.nbcnews.com/_news/2013/06/12/18920746-gillibrand-loses-bid-to-strip-military-sex-assault-cases-from-chain-of-command?lite (last visited Apr. 6, 2015). Senator McCaskill argues that “keeping commanders involved in the prosecution of sexual assaults would ensure

commanders will feel less responsibility to change the culture regarding sexual assault if they do not have authority in the military justice process.¹⁸⁵

Lastly, proponents for retaining the authority of commanders in the military justice process point to the differences between the military and civilian systems of justice and the necessity for the military to have an effective system of justice while deployed. Quoting the Defense Legal Policy Board's report, Senator James M. Inhofe (R-IA) argued that "[w]hile good order and discipline is important and essential in any military environment, it is especially vital in the deployed environment. The military justice system is the definitive commanders' tool to preserve good order and discipline, and nowhere is this more important than in a combat zone."¹⁸⁶

Conclusion

A review of existing literature shows that sociologists, historians, political scientists, and military leaders all agree that the modern military is a profession. Military leaders and advocates for the involvement of commanders in the military justice process claim that "[r]educing command responsibility [in the military justice process] could adversely affect the ability of the commander to enforce professional standards and ultimately, to accomplish the mission."¹⁸⁷ However, research and literature does not address the impact that such a change would have on the military's status as a profession. This study will fill that gap by analyzing whether proposals to

command emphasis and command responsibility are the causes behind a reduction in sexual assaults." Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60*, UCMJ, ARMY LAW., Jul. 2014.

¹⁸⁵ REPORT OF THE ROC SUBCOMM., *supra* note 78, at 105.

¹⁸⁶ SASC Hearing transcript pg. 9.

¹⁸⁷ General Dempsey statement to the SASC – 4 June 2013.

remove commanders from the military justice process will affect the United States military's status as a profession.

DRAFT

CHAPTER 3

RESEARCH METHODOLOGY

Introduction

The issue of whether commanders should be involved in the military justice process has been a topic of discussion and debate since before Congress enacted the UCMJ in 1951.¹⁸⁸ The issue re-emerged in 2012 in response to the problem of sexual assault in the military and continues to be hotly debated nationwide – by military leadership, Congress, bar associations and legal organizations, academic scholars, and the American people in general.¹⁸⁹ Although scholars have written many articles on the topic, arguments for and against commander’s involvement in the military justice process generally focus on whether the military justice system is a system of justice or a system of discipline and thus, whether lawyers or commanders should be responsible for the system. While scholars present valid arguments for and against the involvement of commanders in the military justice system, the arguments ignore the fact that the military justice system is the means to enforce the military’s ethical code, and enforcement of the code through self-regulation is one characteristic that contributes to the military’s status as a profession. Thus, it is unclear whether removing commanders from the military justice process affect the military’s status as a profession.

Qualitative Research

This study will use qualitative research to determine whether removing commanders from the military justice process will affect the military’s status as a

¹⁸⁸ See *infra* chapter 4.

¹⁸⁹ See *infra* chapter 4.

profession. Although, as discussed in chapter 2, many sociologists define a profession using specific traits or characteristics, one important aspect of a profession is that in order to be a profession, it must be recognized as a profession by society.¹⁹⁰

Therefore, in order to determine whether the military's status as a profession will change if Congress removes commanders from the military justice system, one must determine how society would view such change.

Qualitative research is a way of “understanding the meaning people have constructed, that is, how people make sense of their world and the experiences they have in the world.”¹⁹¹ Some writers compare qualitative research to a quilter who “stitches, edits, and puts slices of reality together.”¹⁹² Since studies already exist regarding the military as a profession and regarding command authority in the military justice process, this study will use qualitative research to piece together both concepts.

Qualitative research has four major characteristics. First, qualitative research focuses on “understanding the phenomenon of interest from the participants’ perspectives, not the researcher’s.”¹⁹³ Thus, in this study, research will focus on understanding the military's status as a profession from society's perspective rather than from the perspective of a military officer. Second, in qualitative research the researcher is responsible for collecting and analyzing the data.¹⁹⁴ For this study, the

¹⁹⁰ Snider, *supra* note 1, at 4.

¹⁹¹ SHARAN B. MERRIAM, *QUALITATIVE RESEARCH* 13 (2009).

¹⁹² NORMAN K. DENZIN AND YVONNA S. LINCOLN, *THE SAGE HANDBOOK OF QUALITATIVE RESEARCH* 5 (4th ed. 2011).

¹⁹³ MERRIAM, *supra* note 190, at 14.

¹⁹⁴ *Id.* at 15.

researcher will not conduct any interviews or surveys, because congressionally mandated and Department of Defense directed boards have already conducted extensive interviews and surveys as part of their reviews of the military justice system. However, the researcher will review all literature and draw from previously conducted interviews and testimony in order to analyze the data related to this study. Third, because adequate theories do not exist or fail to explain the particular phenomenon, qualitative research is inductive in that “researchers gather data to build concepts, hypotheses, or theories rather than deductively testing hypotheses.”¹⁹⁵ This study will derive data from concepts regarding the military justice system and the military as a profession in order to form a hypothesis regarding the impact that removing commanders from the military justice process will have on the military’s status as a profession. Finally, qualitative research is “richly descriptive,” describing the issue using words rather than numbers.¹⁹⁶

Method

This study will use a historical case study methodology to determine whether removing commanders from the military justice process will impact the military’s status as a profession. A historical case study “is a study of the development of a particular organization over time.”¹⁹⁷ Using a historical case study approach, the researcher “presents a holistic description and analysis of a specific phenomenon (the case) but presents it from a historical perspective.”¹⁹⁸

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 16.

¹⁹⁷ *Id.* at 47.

¹⁹⁸ MERRIAM, *supra* note 190, at 47.

For this study, the researcher will begin by studying the history of the military as a profession in the United States. The researcher will look at when and why the United States military developed characteristics of a profession and the relationship between the different characteristics of a profession.

The researcher will then present a study of the history of the military justice system in the United States. In this part of the study, the researcher will focus on the role of commanders in the military justice process over time and the debates over whether the military justice system is a system of discipline or a system of justice.

After studying both the history of the military profession in the United States and the history of military justice in the United States, the researcher will compare the two in order to determine whether the evolution of the military profession coincided with the development of the military justice system. Finally, the researcher will analyze the historical case studies to ascertain whether removing commanders from the military justice system will impact the military's status as a profession.

CHAPTER 4

HISTORICAL CASE STUDIES

As discussed in chapter 2, most scholars agree that the military as a whole became a profession after the French Revolution and that modern militaries possess the characteristics of a profession. However, in order to understand whether removing commanders from the military justice process in the United States will affect the United States military's status as a profession, one must first understand the relationship between the United States military profession and the military justice system in the United States. A review the history of the military profession in the United States and the history of the military justice system in the United States will help determine the relationship between the two in order to ascertain whether removing commanders from the military justice process will affect the military's status as a profession.

The Military Profession in the United States

As European militaries transitioned to become more professional in the nineteenth century, the newly established military in the United States was also going through changes that would result in a professional military. The Continental Congress established the Continental Army on 14 June 1775 and structured it like the British military.¹⁹⁹ Since the British military had not yet transformed into a professional military, the Continental Army also lacked the traits of a profession.

After the American Revolutionary War, the American people were apprehensive about the existence of a permanent military because the British military

¹⁹⁹ SKELTON, *supra* note 136, at 4.

had been a threat to their political freedom.²⁰⁰ As a result, the Confederation Congress disbanded the Continental Army shortly after the Treaty of Paris went into effect on 12 May 1784.²⁰¹ However, on 3 June 1784, the Confederation Congress ordered the establishment of an army of 700 men, and the United States Army has been in existence as a permanent army since that day.²⁰² Although the Confederation Congress established the permanent military on 3 June 1784, debate over its existence, size, and organization continued for several decades.²⁰³

On 17 September 1787, the delegates to the Constitutional Convention signed the United States Constitution.²⁰⁴ On 2 July 1788, the United States Constitution went into effect after nine of the original thirteen colonies ratified the document.²⁰⁵ The newly adopted Constitution gave Congress the power “[t]o raise and support Armies” and “[t]o provide and maintain a Navy.”²⁰⁶ However, as a concession to the people’s distrust of a permanent army, the Constitution restricted the appropriation of money for the army to two years, thereby giving Congress the ability not to fund the army if necessary.²⁰⁷

²⁰⁰ *Id.* at 3-4.

²⁰¹ *Id.* at 4; Treaty of Paris.

²⁰² SKELTON, *supra* note 136, at 4.

²⁰³ *Id.* at 4-5.

²⁰⁴ *A More Perfect Union: The Creation of the U.S. Constitution*, THE U.S. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, http://www.archives.gov/exhibits/charters/constitution_history.html (last visited Apr. 6, 2015).

²⁰⁵ *Id.*

²⁰⁶ U.S. CONST. art. I, § 8.

²⁰⁷ *Id.*

After adoption of the Constitution in 1788, Congress expanded the army and established the War Department. The expansion did not last long, because in 1796, Congress reduced the size of the army. In fact, during the period between 1784 and 1812, the size of the army increased and decreased frequently as political leaders changed and disputes arose in the United States.²⁰⁸ Due to the instability, “[r]elatively few officers made a long-term commitment to military service, and military leaders failed to develop effective procedures to instill group values, build internal cohesion, or develop and transmit professional knowledge.”²⁰⁹ Thus, while the aristocratic influence on the militaries in Europe held those militaries back from professionalization until the nineteenth century, instability in the United States was the primary cause of the lack of professionalism in the United States military.²¹⁰

Scholars disagree as to the date the United States Army became a “profession.”²¹¹ However, it is clear that the War of 1812 resulted in major changes to the professionalization of the United States Army. In the fifty years between the War of 1812 and the American Civil War, the United States Army began to develop officers with distinct knowledge and expertise, military training and education evolved, and the army established rules to restrict entrance into the officer corps.

²⁰⁸ SKELTON, *supra* note 136, at xv, 4-9.

²⁰⁹ *Id.* at xv.

²¹⁰ *Id.* at 89.

²¹¹ 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 86, at 254. William B. Skelton believes that the change occurred between the end of the War of 1812 and the Civil War. *See generally* SKELTON, *supra* note 136, 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 109, at 129.

At the beginning of the War of 1812, a majority of the army general officers had previously served in the American Revolutionary War, but only two of those fourteen general officers had served in the military in the period between the American Revolutionary War and the War of 1812. Rather, most general officers in the War of 1812 had served in the American Revolutionary War, left the service to pursue other occupations after the war ended, and subsequently received political appointments to their general officer positions during the War of 1812. Much like the aristocrat officers in Europe, these general officers viewed their military service as an extension of their political role in the country rather than a profession in itself.²¹²

By the last year of the War of 1812, a group of new, younger officers had taken leadership positions in the army. After the war ended, seven general officers remained in the service. Of those seven general officers, none had served in the American Revolutionary War and four had risen from the officer ranks rather than receiving a direct appointment as a general officer.²¹³ Because these officers rose through the ranks rather than receiving a direct appointment, they developed knowledge and expertise specific to military warfare and saw the military as their occupation rather than a temporary duty.

After the War of 1812, the officer corps began to transform like the general officer corps. Once composed of political figures and men who viewed the military as a temporary job, the officer corps after the War of 1812 began to resemble a more permanent, professional group of officers. By 1815, officers with other civilian careers had left the service to return to their civilian careers, leaving only those

²¹² SKELTON, *supra* note 136, at 110.

²¹³ *Id.*

officers who desired a military career.²¹⁴ Most of these officers had entered military service during the war. While a few graduated from the United States Military Academy, most had been educated through their war experiences.²¹⁵ These officers were unique in that they experienced the military failures at the beginning of the war, but they also saw the changes that led to success at the end of the war. As a result, these officers were proud of their accomplishments during the war and understood the benefits of discipline, experience, and organization.²¹⁶

Military training and education, and officer accessions also began to change after the War of 1812. Established in 1802 by Thomas Jefferson, the United States Military Academy did not produce very many officers in its first decade of existence.²¹⁷ Between 1802 and 1813, the average number of graduates from the United States Military Academy per year was only 7.5.²¹⁸ However, after the War of 1812 ended, “more professors, assistant professors, and young officer instructors were authorized; a maximum of 250 cadets was fixed, and age and mental requirements for admission were prescribed.”²¹⁹ By 1850, the average number of graduates per year rose to thirty-eight.²²⁰ Although this number was still only a small percentage of the

²¹⁴ *Id.* at 115.

²¹⁵ *Id.* at 114.

²¹⁶ *Id.* at 114-115.

²¹⁷ HACKETT, *supra* note 109, at 128; HUNTINGTON, *supra* note 86, at 198.

²¹⁸ The number of graduates per year from 1802 through 1813 was: 2 (1802), 3 (1803), 2 (1804), 3 (1805), 15 (1806), 7 (1807), 5 (1808), 15 (1809), 0 (1810), 19 (1811), 18 (1812), 1 (1813). Charles W. Larned, *The Genius of West Point, in THE CENTENNIAL OF THE UNITED STATES MILITARY ACADEMY AT WEST POINT, NEW YORK 1802-1902* 505-506 (1904).

²¹⁹ LESTER A. WEBB, *CAPTAIN ALDEN PARTRIDGE AND THE UNITED STATES MILITARY ACADEMY 1806-1833* 22 (1965).

total number of army officers, the increase represents the increasing importance that military leadership placed on military education.²²¹

As military leadership placed more emphasis on military education, the leadership also made major changes to the United States Military Academy to improve the quality of military education. In 1813, Captain Alden Partridge became the Acting Superintendent of the United States Military Academy.²²² During his tenure, Captain Partridge wrote the first set of regulations for the academy, “specified the course of studies to be completed before a cadet could be considered for a commission,” and “announced a method for handling infractions of the rules.”²²³

In 1817, President Monroe appointed Captain Sylvanus Thayer as the superintendent and gave him the authority to change the curriculum. Thayer had studied at the United States Military Academy in 1807 prior to entering the Corps of Engineers. However, his inspiration for change came from the two years he spent after the War of 1812 studying the French engineering academy, École Polytechnique. During the sixteen years that Thayer served as the superintendent, he instituted major changes that made the United States Military Academy into what it is today.²²⁴

In 1818, Thayer drafted new regulations to govern academy procedures. Under the new rules, the academy administered an entrance examination at the same time

²²⁰ Larned, *supra* note 217, at 505-506.

²²¹ Between 1815 and 1830, the army had between 500 and 600 officers. SKELTON, *supra* note 136, at 136. In 1821, Congress reduced the officer strength from 680 to 540. AMERICAN MILITARY HISTORY VOLUME 1 164 (Richard W. Stewart ed., 2009), available at http://www.history.army.mil/html/books/030/30-21/CMH_Pub_30-21.pdf (last visited Apr. 6, 2015).

²²² WEBB, *supra* note 218, at 23.

²²³ *Id.* at 25.

²²⁴ SKELTON, *supra* note 136, at 123.

every year and established one unified class per year, beginning every fall.²²⁵

Thayer's rules required cadets to take two examinations per year as an evaluation for advancement, and cadets could not receive a commission unless they completed all four years of instruction at the academy.²²⁶ The academy also established disciplinary standards, instituted strict inspection procedures, and dismissed any cadet who failed to meet the standards.²²⁷

By the 1830s, the Army instituted stricter policies for accession into the officer corps. Recognizing the quality of instruction at the United States Military Academy, the Army preferred officers to graduate from the academy and offered commissions to all graduates of the academy. Officers not commissioned through the academy had to go through military training and pass a competency examination.²²⁸ Thus, by 1830, 63.8 percent of officers received their commission from the United States Military Academy and by 1860, the number had risen to 75.8 percent.²²⁹

The process for selecting cadets to attend the United States Military Academy also changed in the 1830s. Prior to 1812, the Secretary of War selected cadets for attendance at the United States Military Academy, which led to favoring of applicants from the northeast.²³⁰ In the 1830s, Congress began to control appointments to the United States Military Academy, with each congressional districted allocated one

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 123-125.

²²⁸ *Id.* at 137.

²²⁹ SKELTON, *supra* note 136, at 138.

²³⁰ *Id.* at 139.

appointment.²³¹ As appointments to the United States Military Academy became more representative of all states, the officer corps became a “cross-section of middle-class America.”²³²

As military training, education, and accessions improved in the early nineteenth century, the American Civil War had a negative effect on society’s view of the military.²³³ The Civil War left American society hostile toward the military and “[t]he blanket hostility of American society isolated the armed forces politically, intellectually, socially, and even physically from the community which they served.”²³⁴ However, according to Samuel Huntington, this period of isolation “made these same years the most fertile, creative, and formative in the history of the American armed forces” such that the military was able “to develop a distinctive military character.”²³⁵

During this period in the late nineteenth century, military leaders began to understand the complexity of war and the need for “a lifetime of study, practice, and application.”²³⁶ As a result, the idea emerged that “[w]ar must be waged not simply by career soldiers but by professionals.”²³⁷ One officer, General William T. Sherman, strongly believed in this principle and greatly contributed to the professionalization of

²³¹ *Id.*

²³² HUNTINGTON, *supra* note 86, at 227.

²³³ HACKETT, *supra* note 109, at 128.

²³⁴ HUNTINGTON, *supra* note 86, at 226-27.

²³⁵ *Id.* at 227.

²³⁶ 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* (Kenneth J. Hagan & William R. Roberts eds., 1986).

²³⁷ *Id.*

the Army after the Civil War. Although most Americans know General Sherman for his involvement in the Civil War, he also served as Commanding General of the Army from 1869 to 1883.²³⁸

During his fourteen years as Commanding General, General Sherman was an advocate for professional military education, founding the School of Application for Infantry and Cavalry at Fort Leavenworth in 1881.²³⁹ After 1881, the military created additional schools for professional military education, such as the Naval War College, established in 1884, and the Army War College, established in 1901.²⁴⁰ By 1915, the United States had a comprehensive system of professional military education, much like what exists today.²⁴¹ Professional military education provides officers with advanced military education that contributes to the development of specialized knowledge and expertise that is required of a profession.

The advance of professional military education in the United States also led to the formation of professional associations and journals, such as the United States Naval Institute in 1873, the Cavalry Association in 1885, and the *Cavalry Journal* in 1888.²⁴² General Sherman supported these professional associations and journals and encouraged officers to participate in intellectually stimulating activities.²⁴³ Other

²³⁸ *Id.* at 230.

²³⁹ Captain Jonathan M. House, *The Fort and the New School, 1881-1916*, in *A BRIEF HISTORY OF FORT LEAVENWORTH 1827-1983* 34 (John W. Partin ed., 1983). The School of Application for Infantry and Cavalry later became the Command and General Staff College. *Id.*

²⁴⁰ HUNTINGTON, *supra* note 86, at 241.

²⁴¹ *Id.* at 237.

²⁴² HUNTINGTON, *supra* note 86, at 243.

²⁴³ Cooper, *supra* note 235, at 184.

branches followed suit with *The Journal of the United States Artillery* in 1892, the Infantry Society in 1893, and the *Infantry Journal* in 1904.²⁴⁴ The emergence of these professional associations and journals provides further evidence of the professionalization of the United States military after the Civil War.

In addition to his contribution to professional military education, General Sherman was also one of the first general officers who truly personified a professional officer. From his motto of “[i]t is enough for the world to know that I am a soldier” to his dedication to “maintaining the honor and dignity of the nation,” General Sherman considered himself a professional soldier and his attitude eventually filtered down throughout the Army.²⁴⁵

While some scholars such as William B. Skelton believe that the United States military became a profession as early as the Civil War,²⁴⁶ it is clear that by World War I, the United States military, particularly the officer corps, was a profession under the modern definition of a profession. Strict policies existed for accession into the officer corps and cadets attended military academies based on a calling or commitment to public service. Upon accession into the officer corps, officers received specialized knowledge and education in warfare at advanced military schools. Professional associations emerged and officers began to identify themselves with the profession of arms. Although American society had a hostile attitude toward the military after the Civil War, by the end of World War I, civil-military relations had

²⁴⁴ HUNTINGTON, *supra* note 86, at 243.

²⁴⁵ *Id.* at 231.

²⁴⁶ *See generally* SKELTON, *supra* note 136, at 107.

improved and society accepted the military as experts in their field, worthy of respect and prestige.

Even though the military possessed the characteristics of a profession after World War I, the United States military continued to evolve as a profession throughout the twentieth century. The end of World War II brought about a period of major change for the United States military profession as it adapted to a changing security environment. During World War II, the United States military had expanded in order to fight a large-scale conventional war on two fronts.²⁴⁷ In 1945, the United States used atomic bombs on Hiroshima and Nagasaki, thus ending the war and introducing nuclear weapons to warfare.²⁴⁸

The end of World War II triggered a period of major military reorganization. Because the United States military had grown to over twelve million personnel during World War II, a period of personnel drawdown followed the end of the war.²⁴⁹ More significant, however, were the reorganization of the war department and the creation of the United States Air Force.²⁵⁰ On 19 December 1945, just four months after Japan surrendered, President Truman wrote a letter to Congress “recommend[ing] that the Congress adopt legislation combining the War and Navy Departments into one single Department of National Defense.”²⁵¹ The reorganization took eighteen months to

247

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²⁵¹ 218. SPECIAL MESSAGE TO THE CONGRESS RECOMMENDING THE ESTABLISHMENT OF A DEPARTMENT OF NATIONAL DEFENSE, HARRY S. TRUMAN LIBRARY AND MUSEUM, <http://trumanlibrary.org/publicpapers/index.php?pid=508&st=&st1=> (last visited Apr. 6, 2015).

enact, but in July 1947, the National Security Act of 1947 created the “National Military Establishment” and a few months later, Congress confirmed James V. Forrestal as the first Secretary of Defense.²⁵² In addition to reorganizing the War Department, the National Security Act of 1947 created the United States Air Force and eliminated the Army Air Corps.²⁵³ In August 1949, the National Military Establishment was renamed the Department of Defense.²⁵⁴

In this period after the war, the United States and the Soviet Union emerged as the two world superpowers.²⁵⁵ Although the formation of international organizations such as the United Nations and the North Atlantic Treaty Organization sought to settle disputes without having to resort to warfare, tensions between the United States and the Soviet Union were high.²⁵⁶ Tensions between the two superpowers, combined with the existence of nuclear capability by the United States and eventually the Soviet Union characterized the forty-five year period after World War II commonly known as the Cold War.²⁵⁷

As the international security environment changed, the United States saw the need for a large, permanently established professional military force.²⁵⁸ For more than

²⁵² National Security Act of 1947, Pub. L. 80-253, 61 Stat. 495 (1947); JAMES V. FORRESTAL, 1ST SECRETARY OF DEFENSE, U.S. DEPARTMENT OF DEFENSE, http://www.defense.gov/specials/secdef_histories/SecDef_01.aspx (last visited Apr. 6, 2015).

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²⁵⁴ National Security Act Amendments of 1949, Pub. L. 81-216, § 4, 63 Stat. 578, 579 (1949).

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ten years, the United States demonstrated the need for a large force as United States forces conducted operations in Korea, Formosa, Vietnam, Lebanon, Cuba, Thailand, Laos, Congo, Dominican Republic, and Cambodia.²⁵⁹

Within a few years, however, the Vietnam War changed the political and social environment in the United States and affected the professionalism of the military. By the 1960s, public support for the Vietnam War declined and most Americans did not support sending troops to Vietnam.²⁶⁰ The draft, which had support from a majority of Americans for prior conflicts, was strongly opposed during the Vietnam War.²⁶¹ Therefore, Soldiers drafted during the Vietnam War lacked desire to serve in the military and military professionalism suffered. The quality of Soldiers, combined with apathy of the American public resulted in increased discipline problems in the Army. Drug use in the Army increased, which led to more crime in general.²⁶² The lack of popular support for the Vietnam War empowered Soldiers to be insubordinate, disobey orders, and desert the Army.²⁶³ Racial tension was also high and racial violence wreaked havoc at many Army installations.²⁶⁴ These increased disciplinary problems and war crimes such as the My Lai massacre showed clear evidence of the lack of military professionalism during the Vietnam War.²⁶⁵

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²⁶² H306RA at 262-263

²⁶³ H306RA at 263-265

²⁶⁴ H306RA at 260-262

265

Seeing the decline in professionalism, in 1970, General William C. Westmoreland, the Chief of Staff of the Army, directed a study on military professionalism.²⁶⁶ Reporting on the results of the study Major General G.S. Eckhardt, Commandant of the Army War College wrote that “[m]easures can and must be found to ensure that a climate of professionalism exists in the Army. The attainment of such a climate is the essential prerequisite for genuine effectiveness.”²⁶⁷ This study is particularly important because it is the first study conducted by the Army that recognizes the importance of military professionalism.

Three years later, recognizing the lack of support for the draft, Congress eliminated the draft on 1 July 1973.²⁶⁸ This change signifies a major change in the Army profession, as the Army became the all-volunteer Army that it is today.

However, despite the elimination of the draft, the Army continued to struggle with professionalism in the period following the Vietnam War. Because public support for the military was low after the Vietnam War, no one wanted to join the military voluntarily, which made personnel recruiting difficult. As a result, the Army lowered its standards to meet recruiting goals and thus, new recruits were of a lower quality.²⁶⁹ Drug use was rampant, crime was at an all-time high, and racial tension continued.²⁷⁰

Despite the severity of problems following the Vietnam War, military senior leaders remained committed to the profession. General Creighton Abrams, Chief of

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²⁶⁹ H306RB at 270

²⁷⁰ H306RB at 270

Staff of the Army from 1972 to 1974 “constantly reminded dispirited leaders of the ideals that had brought them into the Army: patriotism, integrity, honesty, and devotion to duty.”²⁷¹ Army Commanders took a hard-stance on discipline and began to restore order throughout the 1970s.²⁷² In 1973, the Army established Training and Doctrine Command (TRADOC) and General William DuPuy, the first TRADOC Commander “began a fundamental reformation of Army training.”²⁷³

While the Army made changes to regain professionalism, funding cuts in the late 1970s limited training, resources, and Soldier pay and entitlements.²⁷⁴ As a result, the quality of Soldiers continued to decrease. In the late 1970s, the problem was so bad that the Army separated forty percent of Soldiers for discipline problems or unsuitability during their first enlistment.²⁷⁵

The downward spiral of unprofessionalism began to turn around in the 1980s. After the military failed to rescue American hostages in Iran in 1980, the American people began to realize the plight of the Army. Recruiting efforts increased under the direction of Major General Maxwell Thurman and the “Be All You Can Be” advertising campaign improved the Army’s image. Congress increased military salaries by twenty-five percent and reinstated the college benefits of the GI Bill.²⁷⁶ Slowly, the quality of Soldiers increased and military professionalism returned.

²⁷¹ H306RB at 271

²⁷² H306RB at 271

²⁷³ H306RB at 273-274

²⁷⁴ H306RB at 276

²⁷⁵ H306RB at 276

²⁷⁶ H306RB at 277

As the quality of Soldiers increased, the Army made other changes throughout the 1980s to solidify the professionalism of the military. The Army established the National Training Center at Fort Irwin, California so units could train for combat in a simulated combat environment.²⁷⁷ A few years later, the Army established the Battle Command Training Program at Fort Leavenworth to train division and corps level commanders and staffs for combat.²⁷⁸ Recognizing the importance of education, the Army also instituted the non-commissioned officer education system to mirror the officer education system established decades prior.²⁷⁹ TRADOC continued to develop and revise doctrine to adapt to the changing environment.²⁸⁰ The creation of the School of Advanced Military Studies (SAMS) offered select officers the opportunity for advanced study of military history and the art of war.²⁸¹

Through all of these changes, the Army demonstrated its commitment to regaining status as a profession. As the Army regained professionalism, they also experienced success in numerous operations including Operation Urgent Fury in Grenada in 1983, Operation Just Cause in Panama in 1989, and Operation Desert Storm in Kuwait in 1990-1991.²⁸²

However, with its success came new challenges. The fall of the Berlin Wall in 1989 and the dissolution of the Soviet Union in 1991 signified the end of the Cold

²⁷⁷ H306RB at 279-280

²⁷⁸ H306RB at 280-281

²⁷⁹ H306RB at 281-282

²⁸⁰ H306RB at 282-283

²⁸¹ H306RB at 284

²⁸² H306RB at 285-289

War.²⁸³ As the Cold War ended, the United States no longer needed a military of the magnitude previously needed. Therefore, in the 1990s, the Army began to draw down forces at an unprecedented rate.²⁸⁴ As the military began to transform for the twenty-first century, the topic of the military as a profession re-emerged. As General (Retired) Frederick M. Franks, Jr. noted in 2002, “we are at the end of one period of professionalism begun in the U.S. Army late in the 19th century, and are now, in the first decade of the 21st century, beginning another period.”²⁸⁵ Dr. Don Snider and Dr. Gayle Watkins, both serving as faculty members at the United States Military Academy, recognized that “the most critical challenge the Army now faces in its planned transition is to reinforce the professional nature of the institution and to provide the opportunity for its soldiers to be members of a profession – the Army profession.”²⁸⁶ Throughout the 2000s, Dr. Snider, Dr. Watkins, and a number of other scholars began studying the Army profession in depth.²⁸⁷ Meanwhile, after the terrorist attacks in the United States on 11 September 2001, the Army went to war in both Iraq and Afghanistan and discussion of the Army profession faded except in academic circles.

In 2010, after nine years at war in Iraq and Afghanistan, Army leadership recognized the need to look at the Army profession and to adapt to the twenty-first century. On 8 December 2010, while serving as the Commander of U.S. Army

283

284

²⁸⁵ THE FUTURE OF THE ARMY PROFESSION xviii (Lloyd J. Matthews ed., 2d ed. 2005).

²⁸⁶ Snider, *supra* note 1, at 3.

287

Training and Doctrine Command, General Martin E. Dempsey approved an Army White Paper on “The Profession of Arms.”²⁸⁸ In that White Paper, General Dempsey defined the United States Army as “an American Profession of Arms, a vocation comprised of experts certified in the ethical application of land combat power, serving under civilian authority, entrusted to defend the Constitution and the rights and interests of the American people.”²⁸⁹ In April 2011, General Dempsey became the Army Chief of Staff and shortly thereafter, on 1 October 2011, he became the CJCS. In 2012, General Dempsey published a CJCS White Paper on the profession of arms, thereby extending his ideas on the profession of arms to all of the military services.²⁹⁰ According to General Dempsey, “[w]e must renew our commitment to the Profession of Arms. We’re not a profession simply because we say we’re a profession. We must continue to learn, to understand, and to promote the knowledge, skills, attributes, and behaviors that define us as a profession.”²⁹¹

What is interesting, however, is that while military leadership recognizes the need to “renew our commitment to the Profession of Arms,” members of Congress have proposed legislation to amend the military justice process that could impact the military’s status as a profession. Although military leadership has fervently argued against the proposed legislation, military leaders have not raised the issue of how the proposed legislation might affect the military’s status as a profession. A review of the

²⁸⁸ Martin E. Dempsey, *An Army White Paper: The Profession of Arms* (2010), available at <http://www.benning.army.mil/armor/content/PDF/Profession%20of%20Arms%20White%20Paper%208%20Dec%2010.pdf> (last visited Apr. 6, 2015).

²⁸⁹ *Id.*

²⁹⁰ Martin E. Dempsey, *America’s Military – A Profession of Arms White Paper*, available at http://www.dtic.mil/doctrine/concepts/white_papers/cjcs_wp_profession.pdf (last visited Apr. 6, 2015).

²⁹¹ *Id.*

history of the military justice system in the United States will provide insight into how the military justice system evolved as the United States military professionalized and thus, whether the involvement of commanders in the military justice system is a necessary aspect of the United States military's status as a profession.

Military Justice in the United States

One critical characteristic of professions is the existence of an ethical code and enforcement of that code through self-regulation. According to Army Doctrine Reference Publication (ADRP) 1, “[t]he [UCMJ], Army regulations, and policies set the minimum standard for behavior.”²⁹² The military justice system further provides the mechanism for self-regulation.

Rules have existed to govern the conduct and discipline of soldiers for centuries, even before the emergence of the military as a profession. The earliest known rules date back to the Roman Empire.²⁹³ In England, King Richard I used the rules of the Roman Empire to issue ordinances to his armies during his rule from 1189-1199.²⁹⁴ Four hundred years later, in 1621, Gustavus Adolphus issued rules to govern the conduct of his army in Sweden.²⁹⁵ British soldiers who had served in

²⁹² ADRP 1, *supra* note 115, at para. 1-14.

²⁹³ 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*]; *Investigations of the National War Effort: Report of the Committee on Military Affairs House of Representatives, Seventy-Ninth Congress*, LIBRARY OF CONGRESS, http://www.loc.gov/rr/frd/Military_Law/pdf/investigations.pdf (last visited Apr. 6, 2015) [hereinafter *Investigations of the National War Effort*].

²⁹⁴ Timothy C. Dunwoody, *Articles of War*, in *HISTORICAL DICTIONARY OF THE U.S. ARMY* 45-46 (Jerold E. Brown ed., 2001); WARD, *supra* note 292, at 31; *BACKGROUND OF THE UCMJ*, *supra* note 292, at 2.

²⁹⁵ *Investigations of the National War Effort*, *supra* note 292, at 4.

Sweden brought the rules back to Britain with them, which led to the issuance of the British Articles of War by James I in 1686.²⁹⁶ These Articles of War formed the basis for military law in England for nearly 200 years.²⁹⁷ In the eighteenth century, the British adapted the Articles of War for use in the American colonies and these Articles of War served as the foundation for the original Articles of War in the United States. Over the years, the Articles of War evolved into the UCMJ, which continues to govern the conduct and discipline of service members in the United States to this day.

Articles of War

Prior to the American Revolutionary War, the British Articles of War governed the discipline of militia in the American colonies.²⁹⁸ However, as the colonies rebelled against Britain and declared themselves independent, the British Articles of War no longer applied to the state militias. On 5 April 1775, Massachusetts established the “Rules and Regulations for the Massachusetts Army,” which was very similar to the British Articles of War of 1765.²⁹⁹ In the next few months, the other twelve colonies followed the lead of Massachusetts, establishing military codes similar to the British Articles of War.³⁰⁰

On 14 June 1775, the Second Continental Congress formed the Continental Army and simultaneously appointed a committee to draft articles of war for the

²⁹⁶ *Id.* at 4; Dunwoody, *supra* note 293, at 45-46.

²⁹⁷ Dunwoody, *supra* note 293, at 45-46.

²⁹⁸ WARD, *supra* note 292, at 31.

²⁹⁹ *Id.*; BACKGROUND OF THE UCMJ, *supra* note 292, at 2.

³⁰⁰ WARD, *supra* note 292, at 31.

Continental Army.³⁰¹ The Articles of War, enacted on 30 June 1775 by the Second Continental Congress, were nearly identical to the “Rules and Regulations for the Massachusetts Army” and included sixty-nine provisions.³⁰² Believing that “discipline is the soul of an Army,” George Washington was a strong advocate of disciplinary rules to govern the military.³⁰³ Although George Washington served on the committee that drafted the Articles of War, he believed that the punishments prescribed in the Articles of War were not harsh enough. As a result, by November 1775, Congress amended the Articles of War to add certain capital offenses.³⁰⁴

After only a year, the Second Continental Congress decided to re-draft the Articles of War. The new Articles of War, drafted by John Adams and Thomas Jefferson and approved on 20 September 1776, contained one hundred and two provisions and were more similar to the British Articles of War than the previous version.³⁰⁵ Following this revision, the Continental Congress made no additional changes to the Articles of War until after the end of the war.³⁰⁶

Since their issuance in the United States, the Articles of War gave commanders the authority and responsibility to control good order and discipline. The phrase “good order and discipline” is not defined. However, Section IX, article 1 of the 1776 Articles of War provided that “[e]very officer, commanding in quarters, garrisons, or on a march, shall keep good order, and, to the utmost of his power,

³⁰¹ *Id.* at 32.

³⁰² *Id.*; BACKGROUND OF THE UCMJ, *supra* note 292, at 2.

³⁰³ H306RA

³⁰⁴ WARD, *supra* note 292, at 33.

³⁰⁵ *Id.* at 35; BACKGROUND OF THE UCMJ, *supra* note 292, at 2.

³⁰⁶ WARD, *supra* note 292, at 36.

redress all abuses or disorders which may be committed by any officer or soldier under his command.”³⁰⁷ Under these early Articles of War, forty-nine of the articles defined the offenses unique to the military for which a court-martial could adjudge punishment. These offenses included desertion, absence without leave, use of profanity, traitorous or disrespectful words, contempt or disrespect, mutiny, fighting a duel, refusing to obey an order, being drunk on duty, and misbehavior before the enemy.³⁰⁸ The remaining articles outlined the authority and procedures of courts-martial.³⁰⁹ Commanders convened courts-martial, appointed officers to serve on the court-martial, reviewed court-martial verdicts, and had the authority to grant pardons to convicted persons.³¹⁰ Thirteen general or field grade officers appointed by the convening authority served on a general court-martial and five officers served on a regimental court-martial.³¹¹ At this time, the only lawyer involved in the court-martial process was the judge advocate general, whose role was to “prosecute in the name of the United States of America.”³¹²

³⁰⁷ *Journals of the Continental Congress – Articles of War; September 20, 1776*, YALE LAW SCHOOL, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/contcong_09-20-76.asp (last visited Apr. 6, 2015) [hereinafter *1776 Articles of War*].

³⁰⁸ *See generally id.* at Sections I, II, IV, V, VI, VII, VIII, XII, and XIII.

³⁰⁹ *Id.*

³¹⁰ *Id.*; WARD, *supra* note 292, at 32, 39.

³¹¹ WARD, *supra* note 292, at 40; *1776 Articles of War*, *supra* note 306, at Section XIV, articles 1 and 11.

³¹² WARD, *supra* note 292, at 41; *1776 Articles of War*, *supra* note 306, at Section XIV, article 3.

After the war ended in 1783, the Continental Congress did not change the Articles of War until they made minor changes in May 1786.³¹³ The United States Constitution, drafted in 1787, gave Congress the power “[t]o make Rules for the Government and Regulation of the land and naval Forces” and “[t]o provide for organizing, arming, and disciplining, the Militia.”³¹⁴ Pursuant to its new authority under the Constitution, Congress confirmed the 1786 Articles of War in 1789.³¹⁵

After confirming the Articles of War in 1789, Congress did not revise the Articles of War until 1806. In this revision, Congress made mostly administrative changes, such as renumbering the articles. The substance of the 1806 Articles of War remained nearly identical to the 1786 Articles of War.³¹⁶

The 1806 Articles of War remained in effect unchanged for nearly sixty years.³¹⁷ Minor changes were made during the Civil War and, in 1874, Congress made the first major revisions to the Articles of War.³¹⁸ The 1874 changes included the removal of certain punishments, such as flogging and branding, and authorized the

³¹³ WARD, *supra* note 292, at 43.

³¹⁴ US. CONST. art. I, § 8.

³¹⁵ Act of Sept. 29, 1789, ch. 25, 1 Stat. 95 (1789); BACKGROUND OF THE UCMJ, *supra* note 292, at 2.

³¹⁶ ADJUTANT AND INSPECTOR GENERAL’S OFFICE, ARTICLES OF WAR, MILITARY LAWS, AND RULES AND REGULATIONS FOR THE ARMY OF THE UNITED STATES (1816), *available at* <https://ia701203.us.archive.org/5/items/articlesofwarmil00adam/articlesofwarmil00adam.pdf> (last visited Apr. 6, 2015) [hereinafter 1806 Articles of War].

³¹⁷ BACKGROUND OF THE UCMJ, *supra* note 292, at 3.

³¹⁸ 18 Stat. 229 (1878), *available at* <http://www.loc.gov/law/help/statutes-at-large/43rd-congress.php> (last visited Apr. 6, 2015) [hereinafter 1874 Articles of War]; BACKGROUND OF THE UCMJ, *supra* note 292, at 3.

President to establish maximum punishments for offenses during times of peace.³¹⁹

Although Congress completely revised the Articles of War, Congress did not make any changes with respect to the authority and responsibility of commanders over the discipline of soldiers.³²⁰

World War I brought about the next major revisions to the Articles of War. In 1916, Congress completely revised the 1874 Articles of War when they enacted the 1916 Articles of War.³²¹ These new Articles of War re-arranged the articles, eliminated outdated provisions, provided for one or more judge advocates to be detailed to each general court-martial, gave authority to the President to determine court-martial procedures, changed the statute of limitations, and gave convening authorities the authority to approve lesser included offenses, but did not affect the authority or responsibility of commanders.³²²

Several courts-martial in 1917 under the 1916 Articles of War triggered a great deal of debate over the military justice system and eventually led to changes to the Articles of War in 1920.³²³ During the summer of 1917, a group of African-American soldiers from Fort Sam Houston, Texas caused a riot that resulted in the

³¹⁹ BACKGROUND OF THE UCMJ, *supra* note 292, at 3.

³²⁰ 1874 Articles of War, *supra* note 317.

³²¹ Act of 29 Aug. 1916, ch. 418, 39 Stat. 650-70 (1916) [hereinafter 1916 Articles of War].

³²² BACKGROUND OF THE UCMJ, *supra* note 292, at 3-4.

³²³ Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 15 (1970), available at <https://www.law.upenn.edu/live/files/2846-sherman-the-civilianization-of-military-law> (last visited Apr. 6, 2015); Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1-3 (1967).

death of several people.³²⁴ General courts-martial convicted fifty-five soldiers of murder, mutiny, and riot, and sentenced thirteen of the soldiers to death.³²⁵ At the conclusion of the trial, the convening authority reviewed the trial proceedings and ordered the sentences executed. Southern Command executed the thirteen soldiers within two days of the end of the trial, without any appellate or other review.³²⁶

A few months later, in September 1917, a general court-martial convened for fourteen soldiers charged with mutiny at Fort Bliss, Texas for refusing to attend a drill formation. The general court-martial found ten of the soldiers guilty of mutiny and sentenced them to three to seven years confinement and dishonorable discharges.³²⁷ In accordance with the 1916 Articles of War, after approving the sentences, the convening authority forwarded the records of trial to the Judge Advocate General for review.³²⁸ Upon review of the records of trial in November 1917, Brigadier General

³²⁴ Sherman, *supra* note 322, at 15; Brown, *supra* note 322, at 3; Hearings Before the Committee on Military Affairs, United States Senate, on S. 5320, A Bill to Promote the Administration of Military Justice by Amending Existing Laws Regulating Trial by Courts-Martial, and for Other Purposes, 65th Cong. 3d Session 39 (1919) (statement of Brig. Gen. Samuel T. Ansell), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/RAW-vol1.pdf (last visited Apr. 6, 2015) [hereinafter Hearings on S. 5320].

³²⁵ Sherman, *supra* note 322, at 15; Brown, *supra* note 322, at 3; Hearings on S. 5320, *supra* note 323, at 39.

³²⁶ Sherman, *supra* note 322, at 15; Brown, *supra* note 322, at 3; Hearings on S. 5320, *supra* note 323, at 39.

³²⁷ 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 Session (1919) 772-73 (reprinting General Court-Martial Order No. 1174), *available at* http://books.google.com/books?id=Ixgnl48aq6sC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (last visited Apr. 6, 2015) [hereinafter Hearings on S. 64].

³²⁸ Brown, *supra* note 322, at 1.

Samuel T. Ansell, the Acting Judge Advocate General, directed that the findings be set aside.³²⁹

Brigadier General Ansell's direction to set aside the findings resulted in a disagreement between Brigadier General Ansell and Major General Enoch H. Crowder, The Judge Advocate General, over the authority to set aside findings.³³⁰ Eventually, this disagreement sparked additional debate, led by Brigadier General Ansell, over the fairness of the military justice system. By December 1918, the debate reached Congress and within a few days, the American Bar Association and the War Department appointed a committee to review the military justice system.³³¹

On 13 January 1919, Senator George E. Chamberlain (D-OR) introduced a bill to revise the Articles of War in order to improve the administration of military justice.³³² The bill did not pass the Senate. However, if approved, the bill would have increased the authority of judge advocates to change or set aside findings of courts-martial.³³³

As Senator Chamberlain's bill was pending, Brigadier General Ansell continued to provoke debate about the military justice system. Through numerous written articles and speeches, Brigadier General Ansell argued "that the existing

³²⁹ *Id.* at 2.

³³⁰ Brown, *supra* note 322, at 2. For a more detailed discussion of the disagreement between Brigadier General Ansell and Major General Crowder, *see generally*, Brown, *supra* note 322, and JOHNATHAN LURIE, *MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980* 43-75 (1998).

³³¹ Brown, *supra* note 322, at 9; *BACKGROUND OF THE UCMJ*, *supra* note 292, at 4.

³³² Hearings on S. 5320, *supra* note 323, at 3; Brown, *supra* note 322, at 9.

³³³ Hearings on S. 5320, *supra* note 323, at 3-4; Brown, *supra* note 322, at 9.

system of Military Justice is un-American” and that the Articles of War needed to undergo a complete revision.³³⁴ Although Major General Crowder acknowledged that the Articles of War did need some changes, he argued against Brigadier General Ansell and defended the Articles of War.³³⁵

After Senator Chamberlain’s original bill, S. 5320, failed, Brigadier General Ansell proposed new legislation to overhaul the military justice system. In November 1919, Senator Chamberlain sponsored Brigadier General Ansell’s legislation and a subcommittee of the Senate Committee on Military Affairs held hearings on the new bill, S. 64.³³⁶ Brigadier General Ansell’s proposal sought to make major changes to the system of military justice, transforming it into a more civilian-like legal system.³³⁷ As Major (Retired) J.E. Runcie summarized in his testimony before the Senate Subcommittee of the Committee on Military Affairs during the hearings on Brigadier Ansell’s proposal, “the real underlying question which the bill raises is a question as to whether military discipline shall be enforced by law or by the exercise of arbitrary and often capricious authority of military commanders.”³³⁸ Thus, Brigadier Ansell’s

³³⁴ Brown, *supra* note 322, at 11; Sherman, *supra* note 322, at 5 (citing Samuel T. Ansell, *Military Justice*, 5 Cornell L.Q. 1 (1919)).

³³⁵ Brown, *supra* note 322, at 11.

³³⁶ Brown, *supra* note 322, at 14; Hearings on S. 64, *supra* note 326.

³³⁷ For example, Brigadier Ansell’s proposal included provisions to delineate the elements of each punitive crime; establish maximum punishments for each crime; assimilate the civilian criminal statutes; require a preliminary investigation and legal sufficiency determination before referral of charges; limit the authority of commanders to convene courts-martial and appoint members; require counsel to be lawyers, allow accused to choose their military counsel, and require a military judge to preside over courts-martial; add enlisted members, change the court membership requirements, and add peremptory challenges; apply the rules of evidence; announce acquittals in open court; and create a military appeals court. Sherman, *supra* note 322, at 19-24; Brown, *supra* note 322, at 15-36; Hearings on S. 64, *supra* note 326, at 5-23.

³³⁸ Hearings on S. 64 (statement of Major J. E. Runcie), *supra* note 326, at 23.

proposals to limit the authority of commanders and make the military justice system more like the civilian legal system marks the beginning of nearly a century of debate over the authority of commanders in the military justice process.

After holding hearings on the bill, the Subcommittee failed to report on Brigadier General Ansell's bill. Instead, the Army Reorganization Act of 1920 included revisions to the Articles of War for which the War Department and Major General Crowder had previously agreed.³³⁹ The 1920 Articles of War included some of Brigadier General Ansell's proposals, but the most drastic changes were not included and the authority of commanders in the military justice system remained intact.³⁴⁰

The 1920 Articles of War remained in place until after World War II, with only minor changes made in 1937, 1942, and 1947.³⁴¹ However, the end of World War II brought about another period of major reform in the military justice system. During the war, over 1,700,000 courts-martial had been conducted, and over 45,000

³³⁹ Brown, *supra* note 322, at 14; Act of 4 June 1920, ch. 2, 41 Stat. 759, 787.

³⁴⁰ Significant changes that were included in the 1920 Articles of War included: authorization for the President to prescribe maximum punishments during times of war and peace, authorization for enlisted men to prefer charges, expansion of the preliminary investigation, the right for the accused to cross-examine witnesses, a requirement for the convening authority to receive pretrial advice from his judge advocate, a requirement for the appointment of defense counsel, a requirement for the appointment of a law member for every general court-martial, authorization for challenges for cause and peremptory challenges of court members, authorization for the President to establish rules of evidence, a requirement for findings and sentences to be announced in open court, a requirement for a post-trial review of every general court-martial prior to action by the convening authority, prohibition of the reconsideration of an acquittal or finding of not guilty, and a requirement for the establishment of a board of review. *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) [hereinafter 1920 Articles of War]; Brown, *supra* note 322, at 15-36; BACKGROUND OF THE UCMJ, *supra* note 292, at 4-6.

³⁴¹ BACKGROUND OF THE UCMJ, *supra* note 292, at 6.

servicemen were still imprisoned when the war ended in 1945.³⁴² Service members coming home from World War II complained that the military justice system was not fair or impartial.³⁴³ As a result, Congress and the War Department appointed several boards and committees in 1946 to study the complaints and the military justice system.

On 18 March 1946, the Secretary of War appointed a board “to study officer-enlisted man relationships and to make recommendations . . . in order to improve relations between commissioned and enlisted personnel.”³⁴⁴ Although the board’s purpose was not to examine military justice, one of the largest criticisms the board found in the officer-enlisted relationships “was in the field of military justice and courts-martial procedure which permitted inequities and injustices to enlisted personnel.”³⁴⁵ As a result, the board’s report recommended more equality in the administration of military justice.³⁴⁶

On 25 March 1946, the Secretary of War appointed the War Department Advisory Committee on Military Justice “to study the administration of military justice within the Army . . . and to make recommendations to the Secretary of War as to changes in existing laws, regulations, and practices . . . to improve the

³⁴² Sherman, *supra* note 322, at 28; LURIE, *supra* note 329, at 77; *Investigations of the National War Effort*, *supra* note 292, at 3.

³⁴³ Sherman, *supra* note 322, at 28-29.

³⁴⁴ THE REPORT OF THE SECRETARY OF WAR’S BOARD ON OFFICER-ENLISTED RELATIONSHIPS 7 (1946). This report became known as the “Doolittle Report” because the board was led by Lieutenant General Jimmy Doolittle.

³⁴⁵ *Id.* at 18.

³⁴⁶ *Id.* at 29.

administration of military justice in the Army.”³⁴⁷ After eleven months of studying the military justice system, the committee determined that “there was often a disquieting absence of respect for the operation of the [military justice] system” and frequent breakdowns in the system. The committee found that these problems were due in part to “the denial to the courts of independence of action in many instances by the commanding officers who appointed the courts and reviewed their judgements, and who conceived it the duty of the command to interfere for disciplinary purposes.”³⁴⁸ The committee went on to make numerous recommendations to improve the military justice system, including ten specific recommendations regarding the independence of courts-martial and elimination of commander’s influence over the court-martial process.³⁴⁹

Upon receipt of the report of the War Department Advisory Committee on Military Justice, the Secretary of War approved most of the recommendations of the committee and made a proposal to Congress to amend the Articles of War in accordance with the committee recommendations.³⁵⁰ These changes included increasing the size of the Judge Advocate General’s Corps, prohibiting the convening authority from reprimanding court members, requiring legal training for the law

³⁴⁷ *Report of War Department Advisory Committee on Military Justice*, LIBRARY OF CONGRESS 1, http://www.loc.gov/rr/frd/Military_Law/pdf/report-war-dept-advisory-committee.pdf (last visited Apr. 6, 2015) [hereinafter *Vanderbilt Report*].

³⁴⁸ *Id.* at 3.

³⁴⁹ *Id.* at 6-10.

³⁵⁰ LURIE, *supra* note 329, at 82. The report of the War Department Advisory Committee on Military Justice is commonly known as the “Vanderbilt Report,” because the committee was led by Arthur Vanderbilt, a former president of the American Bar Association.

member of the court, and expanding appellate authority.³⁵¹ While the Secretary of War approved most of the Vanderbilt Committee recommendations, he did not approve several key recommendations, such as the recommendation that a judge advocate appoint court members rather than commanders.³⁵²

Meanwhile, members of Congress were conducting their own study of the military justice system. In June 1946, the House of Representatives Committee on Military Affairs issued a report on their investigations of the national war effort.³⁵³ Centered on a debate over whether the military justice system is a “system of justice” or a “system of discipline,”³⁵⁴ the report concluded, “[t]here is no question that discipline must be preserved. Discipline, however, must not be named as a cloak to cover arbitrariness and injustice.”³⁵⁵ The sixty-page report examined the Army’s military justice system and made sixteen recommendations for changing the system.³⁵⁶ The first recommendation, “that the Judge Advocate General's Department be invested with judicial power it does not now possess,” was the most significant recommendation because it would remove all post-trial authority from commanders and increase the responsibilities of judge advocates in the court-martial system.³⁵⁷

Following the recommendations of the committees and the receipt of Army and Navy proposals to amend the Articles of War, the House of Representatives

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Investigations of the National War Effort, supra note 292.*

³⁵⁴ *Id.* at 10-13.

³⁵⁵ *Id.* at 48.

³⁵⁶ *Id.* at 49-60.

³⁵⁷ *Id.* at 49-50.

Committee on Armed Services held hearings in April and July 1947 on the improvement of military justice.³⁵⁸ In January 1948, the House of Representatives passed the Army's bill, H.R. 2575, known as the Elston Act, and forwarded it to the Senate for consideration.³⁵⁹ The bill languished in the Senate for six months due to opposition regarding the fact that the legislation kept commanders in control of courts-martial.³⁶⁰ However, in June 1948, Senator James P. Kem (R-MO) moved to attach the bill to the Selective Service Act of 1948. Once attached, the bill passed with ease and the 1948 Articles of War became law.³⁶¹

The 1948 Articles of War made sweeping reforms of the military justice system that are widely regarded as a precursor to the UCMJ.³⁶² While the 1948

³⁵⁸ *Hearings before Committee on Armed Services of the House of Representatives on Sundry Legislation Affecting the Naval and Military Establishments, Eightieth Congress*, LIBRARY OF CONGRESS, http://www.loc.gov/rr/frd/Military_Law/pdf/hearings_No125.pdf (last visited Apr. 6, 2015) [hereinafter Elston Act Hearings].

³⁵⁹ WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 24 (1973).

³⁶⁰ Sherman, *supra* note 322, at 31.

³⁶¹ GENEROUS, *supra* note 358, at 29; Military Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604, 627-44 (1948) (commonly known as the "Elston Act").

³⁶² Major changes included: authorizing warrant officers and enlisted men to serve as members of courts-martial, requiring a judge advocate to serve as the law member and increasing the authority of the law member, requiring a judge advocate to serve as the trial judge advocate and defense counsel, prohibiting officers from serving in conflicting capacities, authorizing the imposition of a bad conduct discharge, limiting the ability to try noncommissioned officers by summary court-martial, requiring confined American Soldiers to be separated from enemy prisoners, increasing the right of the accused for witnesses and documents, increasing the compulsory self-incrimination protections, giving The Judge Advocate General control over the assignment of judge advocates, increasing the authorities of appellate review bodies, repeal of the authority of wartime commanders to order the execution of a death sentence, prohibiting convening authorities from censoring, reprimanding, or admonishing court members, and increasing the authority of commanders to

changes increased the responsibilities of judge advocates in the court-martial process, commanders retained their authority in the court-martial process.

The UCMJ

Although the Elston Act made major changes to the system of military justice for the Army, the Navy maintained its own system of military justice and thus, the Elston Act did not apply to the Navy. Similar to the Articles of War, the Navy derived their rules from the British naval rules in 1775 and the rules remained nearly unchanged until 1862.³⁶³ After 1862, Congress made only minor changes to the Articles for the Government of the Navy until 1950.³⁶⁴ As the Army sought changes to the Articles of War, the Navy also proposed changes to the Articles for the Government of the Navy. However, when the Army bill experienced delays in the Senate, Congress put the Navy bill on hold as well.³⁶⁵

While the Elston Act was still pending in Congress in 1948, the newly formed and unified National Military Establishment / Department of Defense sought to unify the military justice systems of the Army, the Navy, and the newly formed Air Force.³⁶⁶ Secretary Forrestal appointed a committee to draft rules for the unified

impose nonjudicial punishment on officers. BACKGROUND OF THE UCMJ, *supra* note 292, at 6-9.

³⁶³ GENEROUS, *supra* note 358, at 11; RULES FOR THE REGULATION OF THE NAVY OF THE UNITED COLONIES OF NORTH-AMERICA, NAVAL HISTORICAL CENTER, <http://www.navyhistory.org/rules-for-the-regulation-of-the-navy-of-the-united-colonies-of-north-america/> (last visited Apr. 6, 2015).

³⁶⁴ GENEROUS, *supra* note 358, at 11.

³⁶⁵ *Id.* at 28-29.

³⁶⁶ *Id.* at 34, LURIE, *supra* note 329, at 89-100. The National Security Act of 1947 established the United States Air Force on September 18, 1947. National Security Act of 1947, Pub. L. 80-253, 61 Stat. 495 (1947).

military justice system and on 7 February 1949, Secretary Forrestal forwarded the proposed UCMJ to Congress.³⁶⁷

Although the committee report accompanying the proposed UCMJ claimed that the proposal placed restrictions on command, most of the restrictions were similar to the changes that made by the Elston Act.³⁶⁸ However, the proposal did include a few major changes from the Elston Act: the requirement for a “law officer,” the creation of a civilian court of appeals, and the right to appellate defense counsel.³⁶⁹ Regardless of the changes, the issue of commander involvement in the court-martial process was at the forefront of Congressional debate over the proposed UCMJ.³⁷⁰ Representatives from civilian bar associations encouraged Congress not to pass the UCMJ because the proposal included commanders in the process and thus, the proposal did not satisfy the interests of justice. Other advocates, such as Frederick Bernays Wiener, argued that the military justice system is a system of discipline, which differs from the civilian system of justice because “[t]he object of civilian society is to make people live together in peace and in reasonable happiness. The object of the armed forces is to win wars, not just fight them [but] win them, because they do not pay off on place in a war.”³⁷¹

³⁶⁷ GENEROUS, *supra* note 358, at 34, 42.

³⁶⁸ *Id.* at 42-43.

³⁶⁹ *Id.* at 43-44.

³⁷⁰ *Id.* at 42, 51.

³⁷¹ *Id.* at 47-48 (quoting Armed Services Committee, Hearings before a Subcommittee . . . on H.R. 2498: A Bill to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice, 81st Congress, 1st Session, 1949, pg. 778-779).

Despite the objections, Congress approved the UCMJ and on 5 May 1950, President Truman signed the UCMJ into law with an effective date of 31 May 1951.³⁷² While Congress did make changes to the UCMJ proposal before passing it, the changes did not affect the role of commanders in the court-martial process and “the compromise between command and justice was left intact.”³⁷³ Under the approved UCMJ,

[t]he commander would appoint counsel, law officer, and court members, and he would be the first reviewer. But the presence of a lawyer at the pretrial investigation . . . was intended to guarantee that a man would not be tried on spurious charges, perhaps filed by a vindictive commander. The law officer would ensure that the trial itself was conducted according to law and not the general’s whim. Lawyers at the trial and in the review system would use every possible defense argument that could be squeezed out of the fact situation. And perhaps most importantly, the all-civilian Court of Military Appeals would reverse every case where there was evidence of command tampering.³⁷⁴

In addition to the changes made in the UCMJ itself, the UCMJ established a procedure for recommending future changes. Article 67(g) of the 1951 UCMJ required the newly established Court of Military Appeals and the Judge Advocates General of each service to “meet annually to make a comprehensive survey of the operation of this code and report to [Congress] . . . the number and status of pending cases and any recommendations relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate.”³⁷⁵ This group,

³⁷² Uniform Code of Military Justice, Pub. L. 81-506, 64 Stat. 107 (1950).

³⁷³ GENEROUS, *supra* note 358, at 51.

³⁷⁴ *Id.*

³⁷⁵ UCMJ art. 67(g) (1951).

commonly known as the “Code Committee,” submitted the first annual report in May 1952 and continues to submit annual reports to this day.³⁷⁶

The first annual report, submitted on 31 May 1952, acknowledged “[m]any important questions and controversial matters concerning the administration of military justice.”³⁷⁷ Specifically, the 1952 annual report noted that the Code Committee was aware of suggestions regarding “the convening of courts by others [sic] than commanding officers [and] a further limitation on command control over the administration of military justice.”³⁷⁸ However, the Code Committee declined to make any recommendations at that time regarding commander involvement in the court-martial process.³⁷⁹

In subsequent years between 1952 and 1968, the annual reports included recommendations for changes to the UCMJ, but the annual reports did not mention or recommend any further limitation on the involvement of commanders in the military justice system.³⁸⁰ Rather, several annual reports actually recommended increasing the authority of commanders to administer non-judicial punishment under Article 15, UCMJ. In 1954, The Judge Advocates General of the Army, Navy, and Air Force all recommended increasing the non-judicial punishment authority of commanders.

³⁷⁶ GENEROUS, *supra* note 358, at 86-87; ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES (May 31, 1951 – May 31, 1952) [hereinafter 1952 ANNUAL REPORT], *available at* <http://www.armfor.uscourts.gov/newcaaf/annual/1952AnnualReport.pdf> (last visited Apr. 6, 2015); ANNUAL REPORTS, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm (last visited Apr. 6, 2015).

³⁷⁷ 1952 ANNUAL REPORT, *supra* note 375, at 3.

³⁷⁸ *Id.* at 3.

³⁷⁹ *Id.* at 4.

³⁸⁰ ANNUAL REPORTS, *supra* note 375.

Discussing the deficiencies of the existing non-judicial punishment rules, The Army Judge Advocate General commented that the UCMJ, “with its heavy accent on formalities and its restrictions on commanders, has done much to destroy this highly desirable and effective method of maintaining discipline.”³⁸¹ The Navy Judge Advocate General similarly noted that “[t]he power of the commanding officer . . . is now so slight and so ineffective that he must make more frequent use of the court-martial.”³⁸²

The recommendation to increase the non-judicial punishment authority of commanders, as well as the other recommendations of the Code Committee eventually made it into a bill that the Department of Defense presented to Congress in 1956.³⁸³ However, the bill did not pass Congress, in part because of disagreement over command authority. While the services requested more command authority, other groups not only opposed the expansion of the authority of commanders, but some persisted in their attempts to remove all command authority.³⁸⁴

Debate over these issues continued for several years and the services presented the recommendations to Congress in various forms several more times between 1956 and 1959, to no avail.³⁸⁵ Simultaneously, the American Legion presented Congress with a proposal to change the UCMJ by moving all judge advocates under the

³⁸¹ ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF THE TREASURY 22 (Jan. 1, 1954 – Dec. 31, 1954) [hereinafter 1954 ANNUAL REPORT], *available at* <http://www.armfor.uscourts.gov/newcaaf/annual/1954AnnualReport.pdf> (last visited Apr. 6, 2015).

³⁸² *Id.* at 29.

³⁸³ H.R. 6583, 84th Congress, 2d Session (1956).

³⁸⁴ GENEROUS, *supra* note 358, at 94-95.

³⁸⁵ *Id.* at 137.

Secretary of Defense and increasing the penalty for attempting to influence a court-martial.³⁸⁶ Congress did not support any of the recommended changes, but discussion over the balance between discipline and justice and the involvement of commanders in the process continued.³⁸⁷

By 1959, The Judge Advocate General of the Army recommended that the Secretary of the Army solicit the opinion of line officers in order to determine the effectiveness of the UCMJ and make recommendations to improve it. In October 1959, the Secretary of the Army established the “Committee on the [UCMJ], Good Order and Discipline in the Army.” Commonly known as the “Powell Committee” after the Committee Chairman, Lieutenant General Herbert B. Powell, the Committee consisted of The Army Judge Advocate General,³⁸⁸ the Assistant Judge Advocate General for Military Justice,³⁸⁹ and seven senior line officers.³⁹⁰ After three months,

³⁸⁶ *Id.* at 138.

³⁸⁷ *Id.*

³⁸⁸ Major General George W. Hickman, Jr. was The Judge Advocate General for the Army from 1957 to 1960.

³⁸⁹ Charles L. Decker, a graduate of the United States Military and former infantry officer, served as one of the primary drafters of the UCMJ. When appointed as a member of the Powell Committee, Brigadier General Decker was serving as The Assistant Judge Advocate General for Military Justice under Major General Hickman from 1957 to 1961. He became The Judge Advocate General in 1961 and served in that position until his retirement in 1963. http://www.loc.gov/rr/frd/Military_Law/pdf/Decker-collection.pdf.

³⁹⁰ Lieutenant General Herbert B. Powell, Deputy Commanding General, United States Continental Command Army for Reserve Forces; Major General George E. Bush, Commanding General of VI Corps; Major General Hugh P. Harris, Deputy Chief of Staff for Operations, Plans and Training, United States Continental Army Command; Major General Rush B. Lincoln, Jr., Deputy Chief of Transportation; Major General William C. Westmoreland, Commanding General, 101st Airborne Division; Major General Bruce Easley, Deputy Adjutant General; and Brigadier General Howard M. Hobson, Commanding General, The Provost Marshal Center. REPORT TO HONORABLE WILBER M. BRUKER SECRETARY OF THE ARMY BY THE COMMITTEE ON THE UNIFORM CODE OF MILITARY AND JUSTICE GOOD ORDER AND

the committee submitted its 287-page report on 18 January 1960.³⁹¹ The report presented findings and recommendations in ten general areas, two of which were “command responsibility” and “commanders’ corrective powers.”³⁹² As a supplement to the report, the Powell Committee submitted an extensive legislative proposal consistent with their findings and recommendations. Among other things, the proposal recommended simplifying the court-martial process by eliminating summary and special courts-martial, and increasing the authority of commanders to administer non-judicial punishment under Article 15, UCMJ.³⁹³

Although the Secretary of the Army approved the Powell Report and all the services believed in the necessity of an increase in non-judicial punishment authority, the proposal was not widely supported outside the Army.³⁹⁴ By 1961, all of the services came to an agreement regarding an increase of non-judicial punishment authority and eliminating the summary court-martial. The 1961 Annual Report to Congress included two separate legislative proposals regarding non-judicial punishment and the summary court-martial.³⁹⁵ Congress approved the proposed bill

DISCIPLINE IN THE ARMY (1960) [hereinafter POWELL REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Powell_report.pdf (last visited Apr. 6, 2015).

³⁹¹ *Id.*

³⁹² *Id.* at 3-4.

³⁹³ GENEROUS, *supra* note 358, at 139-140.

³⁹⁴ POWELL REPORT, *supra* note 389, at i; GENEROUS, *supra* note 358, at 144-145.

³⁹⁵ ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF THE TREASURY 7-27 (Jan. 1, 1961 – Dec. 31, 1961) [hereinafter 1961 ANNUAL REPORT], *available at* <http://www.armfor.uscourts.gov/newcaaf/annual/1961AnnualReport.pdf> (last visited Apr. 6, 2015).

regarding non-judicial punishment in 1962 and the changes went into effect on 1 February 1963.³⁹⁶ Congress did not consider the proposed bill to eliminate the summary court-martial.³⁹⁷

Increasing the non-judicial punishment authority of commanders did not solve all of the alleged problems with the UCMJ and debate continued. In 1967, Congress received numerous bills to amend the UCMJ.³⁹⁸ In 1968, Congress consolidated the bills into one bill, “The Military Justice Act of 1968,” which passed Congress on 24 October 1968 and went into effect on 1 August 1969.³⁹⁹ This act, the first major reform of the UCMJ since its’ establishment in 1951, eliminated the law officer and created the requirement for military judges, required representation for the accused at special courts-martial, made changes to post-trial proceedings and reviews, and made two minor changes regarding improper command influence.⁴⁰⁰

At the same time as Congress was making changes to the UCMJ in 1968, a decision of the United States Supreme Court changed the landscape of the military justice system. In June 1969, in the case of *O’Callaghan v. Parker*, the United States Supreme Court held that courts-martial could only try offenses with some sort of service-connection.⁴⁰¹ Quoting their earlier decision in *Toth v. Quarles*, the Court commented on the fairness of the military justice system:

³⁹⁶ GENEROUS, *supra* note 358, at 149; Act of Sep. 7, 1962, Pub. L. 87-648, 76 Stat. 447 (1962).

³⁹⁷ GENEROUS, *supra* note 358, at 149-150.

³⁹⁸ *Id.* at 197.

³⁹⁹ Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

⁴⁰⁰ *Id.*; Sherman, *supra* note 322, at 54-59.

⁴⁰¹ *O’Callaghan v. Parker*, 395 U.S. 258, 274 (1969).

Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been, and probably never can be, constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.⁴⁰²

Adding fuel to the debate over whether the military justice system should be a system of discipline or a system of justice, this Supreme Court decision highlighted the fact that the military justice system does not include all of the due process and fairness that is inherent in the civilian legal system.⁴⁰³ For the next eighteen years, the holding in *O'Callaghan v. Parker* limited the jurisdiction of courts-martial to only service-connected crimes and civilian courts had to prosecute all other crimes.⁴⁰⁴

Recognizing the impact that the Vietnam War, the increased size of the Army, and the “substantial and vocal opposition to the war” was having on discipline in the Army, in 1971, General Westmoreland, a former member of the Powell Committee and now serving as the Chief of Staff of the Army, established the “Committee for Evaluation of the Effectiveness of the Administration of Military Justice.” The purpose of this committee was to “assess the role of the administration of the military justice system as it pertains to the maintenance of morale and discipline at the small unit level.”⁴⁰⁵ Unlike prior committees and reviews of military justice, this committee

⁴⁰² *Id.* at 262-63.

⁴⁰³ *Id.*

⁴⁰⁴ *O'Callaghan v. Parker* was overturned in 1987 by *U.S. v. Solario*, 483 U.S. 435 (1987).

⁴⁰⁵ THE COMMITTEE FOR EVALUATION OF THE EFFECTIVENESS OF THE ADMINISTRATION OF MILITARY JUSTICE, REPORT TO GENERAL WILLIAM C.

looked solely at the effectiveness of the military justice system on discipline, as observed by commanders and non-commissioned officers.⁴⁰⁶ The committee report made numerous recommendations but when it came to the contentious issue of the authority of commanders, the Westmoreland Committee merely quoted the Powell Report.⁴⁰⁷

After the Westmoreland Committee concluded, there was very little legislation with respect to the UCMJ for several years. However, as the military recovered from the Vietnam War, a revival of the debate over the authority of commanders in the court-martial process began in Congress. Although it did not pass, on 15 January 1979, Representative Charles Bennett (D-FL) introduced a bill that would have established a “Courts-Martial Command” within the Office of the Judge Advocate General for the purpose of convening courts-martial and detailing personnel to courts-martial.⁴⁰⁸ Representative Bennett reintroduced the bill in 1981 but did not pass Congress after receiving negative comments from the Department of Defense.⁴⁰⁹ Instead, in 1981 Congress passed the Military Justice Amendments of 1981, which made minor changes to the UCMJ regarding excess leave and the timeline for petitions to the Court of Military Appeals.⁴¹⁰

WESTMORELAND, CHIEF OF STAFF, U.S. ARMY 3 (1 June 1971) [hereinafter WESTMORELAND COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Report_General-Westmoreland.pdf (last visited Apr. 6, 2015).

⁴⁰⁶ *Id.* at 5.

⁴⁰⁷ *Id.* at 7-8.

⁴⁰⁸ Military Justice Act of 1979, H.R. 68, 96th Congress (1979).

⁴⁰⁹ Military Justice Act of 1979, H.R. 17, 97th Congress (1981).

⁴¹⁰ Military Justice Amendments of 1981, Pub. L. 97-81, 95 Stat. 1085 (1981).

In 1982, The Judge Advocate General of the Army established the Wartime Legislation Team to evaluate the Army's military justice system in order to ensure that it "would be able to function fairly and efficiently [in an armed conflict], without unduly burdening commanders, or unnecessarily utilizing resources."⁴¹¹ After a year of study, the team presented The Judge Advocate General of the Army with recommendations that would simplify and improve the administration of military justice during hostilities. Among those recommendations, the team suggested that during hostilities, "convening authorities at all levels should be allowed to delegate some functions which are not outcome determinative."⁴¹²

Congress adopted some of the Wartime Legislation Team's recommendations when they passed the Military Justice Act of 1983.⁴¹³ Military law practitioners consider The Military Justice Act of 1983 as the first major change to the UCMJ since 1968. Changes included permitting convening authorities to delegate the authority to excuse court members, removing the requirement that convening authorities detail military judges and counsel, and requiring convening authorities to receive advice from their staff judge advocate prior to referring a case to a court-martial.⁴¹⁴ While pre-trial advice became a requirement, Congress did not obligate convening authorities to follow the advice of their staff judge advocate. Rather, Congress expressly acknowledged the authority of commanders in the court-martial process and

⁴¹¹ 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).

⁴¹² *Id.* at 155.

⁴¹³ Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983).

⁴¹⁴ *Id.* at § 3.

did not change that authority. In the Senate Report to accompany the Military Justice Act of 1983, Congress noted that

[t]he primary responsibility for the administration of military justice rests with the military commander. This reflects the fact that the commander is responsible for discipline within his command. The commander determines which cases should go to trial, what level of trial is appropriate, who should serve as members of the court-martial, and what action should be taken on the results of trial. The bill does not change the basic responsibilities of the commander, but makes a number of changes to facilitate the administration of military justice without undercutting the fundamental fairness of the system.⁴¹⁵

Sexual Assault Scandals and Recent Legislation

After 1983, Congress continued to make minor changes to the UCMJ, usually through legislation included in the annual NDAAAs, but none of the changes affected the authority of commanders in the court-martial process. However, the Tailhook scandal in 1991 triggered Congressional debate over the military's ability to handle sexual assault cases. A series of sexual assault scandals since the 1990s continued to fuel the debate and has led to recent legislation changing the UCMJ.

The first scandal, Tailhook, arose from events that occurred at the Tailhook Association convention in Las Vegas, Nevada in September 1991.⁴¹⁶ The Tailhook Association is a private, non-profit organization of naval aviators established in 1956.⁴¹⁷ In accordance with tradition, during the annual conventions, various flight squadrons hosted hospitality suites in the convention hotel. In the evenings, the hospitality suites would turn into party rooms, where participants would consume

⁴¹⁵ S. REP. NO. 98-53, at 4 (1983).

⁴¹⁶ DEP'T OF DEFENSE INSPECTOR GEN., TAILHOOK 91, PART 2: EVENTS AT THE 35TH ANNUAL TAILHOOK SYMPOSIUM (1993), *available at* <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ada269008> (last visited Apr. 6, 2015) [hereinafter TAILHOOK REPORT].

⁴¹⁷ THE TAILHOOK ASSOCIATION, <http://www.tailhook.net> (last visited Apr. 6, 2015).

massive quantities of alcohol.⁴¹⁸ One evening during the convention, male aviators conducted a ritual known as “the gauntlet,” where the males lined both sides of the hallway. The men fondled and groped any women who passed through “the gauntlet” as they tried to get to the hospitality suites.⁴¹⁹

After one female aviator, Paula Coughlin, complained of assault, an investigation began. When the investigation failed to uncover any facts, the media and victims accused the Navy of covering up the incident, which led to the resignation of the Secretary of the Navy, H. Lawrence Garrett, III.⁴²⁰ However, a series of subsequent Inspector General investigations revealed that eighty-three women and seven men were assaulted during the Tailhook 1991 convention. The Inspector General referred the files of 140 officers to the Acting Secretary of the Navy for appropriate action regarding their involvement in the Tailhook scandal.⁴²¹ Although many of the officers received reprimands, were relieved, or not promoted due to their involvement in the Tailhook scandal, the Navy did not prosecute anyone for misconduct associated with Tailhook.⁴²² The failure of the Navy to prosecute any individuals involved in the Tailhook scandal led to Congressional scrutiny over the military’s ability to handle sexual assault cases. While Congress cut 10,000 jobs in the

⁴¹⁸ TAILHOOK REPORT, *supra* note 415, at V-1-V-10.

⁴¹⁹ 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 750, 751 (2007); TAILHOOK REPORT, *supra* note 415, at VI-1-VI-13.

⁴²⁰ Browne, *supra* note 418, at 752.

⁴²¹ TAILHOOK REPORT, *supra* note 415.

⁴²² Browne, *supra* note 418, at 754-762.

Navy and placed approximately 4,500 promotions on hold as a result of the Tailhook scandal, Congress made no changes to the UCMJ as a direct result of the scandal.⁴²³

Several years after Tailhook, another sexual assault scandal in the military got the attention of Congress and the public. In 1996, the Army charged twelve male officers and non-commissioned officers with sexual assault of female trainees at Aberdeen Proving Ground, Maryland. Courts-martial convicted one officer and three non-commissioned officers, and the Army took administrative action against the other eight.⁴²⁴ As a result of this scandal, the Army made internal changes to prevent sexual assault in training units, Congress held several hearings regarding the investigation, and the NDAA Act for Fiscal Year 1998 required changes to the selection and training of drill sergeants.⁴²⁵ However, again, Congress made no changes to the UCMJ.

By 2000, Congressional concern regarding the prosecution of sexual assault cases in the military had grown. Senator Paul Sarbanes (D-MD) requested that the Army recommend improvement for the prosecution of sexual offenses. As a result, the Secretary of the Army established a “Process Action Team (PAT) Joint Council for Sexual Misconduct Initiatives to recommend improvements for investigating and

⁴²³ Browne, *supra* note 418, at 752.

⁴²⁴ Jackie Spinner, *In Wake of Sex Scandal, Caution is the Rule at Aberdeen*, WASH. POST (Nov. 7, 1997), <http://www.washingtonpost.com/wp-srv/local/longterm/library/aberdeen/caution.htm> (last visited Apr. 6, 2015).

⁴²⁵ National Defense Authorization Act for Fiscal Year 1998, Pub. L. 105-85, §§ 556-566, 111 Stat. 1629 (1997); Maria R. Gervais, *Violating the Sacred Trust: Sexual Misconduct in Initial Entry Training* (Mar. 15, 2008), *available at* <http://www.dtic.mil/dtic/tr/fulltext/u2/a479653.pdf> (last visited Apr. 6, 2015).

prosecuting sexual offenses and for providing services to sexual offense victims.”⁴²⁶

The team made many recommendations to improve the investigation of sexual offenses and provide better services to victims, but none of the recommendations required congressional action.⁴²⁷

In 2001, the National Institute of Military Justice sponsored a commission to conduct a review of the UCMJ. The commission, known as the “Cox Commission,”⁴²⁸ recommended “immediate action to address four problem areas of court-martial practice and procedure.”⁴²⁹ Of the four “problem areas,” the commission noted that “the far-reaching role of commanding officers in the court-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces.” The commission therefore recommended that Congress “modify the pretrial role of the convening authority in both selecting court-martial members and making other pre-trial legal decisions that best rest within the purview of a sitting military judge.”⁴³⁰

In 2003, another sexual assault scandal came into the spotlight. On 2 January 2003, an Air Force Academy cadet sent an e-mail to the Secretary of the Air Force, Chief of Staff of the Air Force, several members of Congress, and the media alleging

⁴²⁶ ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, § 3, 4 (Oct. 1, 1999 – Sept. 30, 2000), *available at* <http://www.armfor.uscourts.gov/newcaaf/annual/fy00/FY00ArmyReport.pdf> (last visited Apr. 6, 2015).

⁴²⁷ *Id.*

⁴²⁸ The Honorable Walter T. Cox, III, retired Chief Judge of the Court of Appeals for the Armed Forces, served as the Chair of the Commission.

⁴²⁹ REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 5 [hereinafter COX COMMISSION REPORT], http://www.loc.gov/rr/frd/Military_Law/pdf/Cox-Commission-Report-2001.pdf (last visited Apr. 6, 2015).

⁴³⁰ *Id.* at 6-7.

a sexual assault problem at the Air Force Academy.⁴³¹ The Secretary of the Air Force immediately established a working group to examine the complaints.⁴³² Despite the efforts of the Secretary of the Air Force, on 16 April 2003, as part of the Emergency Wartime Appropriations Act, the President “established a panel to review sexual misconduct allegations at the United States Air Force Academy.”⁴³³ The panel found that leadership of the Air Force had been aware of sexual assault and sexual harassment problems at the Air Force Academy since 1993.⁴³⁴

The next year, in 2004, The Judge Advocate General of the Army appointed a committee, known as the Military Justice Review Committee, to “determine how the military justice system might be transformed to better serve the needs of soldiers and commanders in a transformed Army.”⁴³⁵ Acknowledging the dual-role of the UCMJ as a criminal code and a system of discipline, the committee determined that “[t]he commander must retain a high level of control over what charges a service member faces, how those charges are to be disposed of, and how and when clemency must be

⁴³¹ Inspector Gen., U.S. Dep’t of Air Force, Air Force Inspector General Summary Report Concerning the Handling of Sexual Assault Cases at the United States Air Force Academy 1 (14 Sep. 2004), *available at* <http://www.afhso.af.mil/shared/media/document/AFD-060726-033.pdf> (last visited Apr. 6, 2015).

⁴³² *Id.*

⁴³³ Emergency Wartime Appropriations Act of 2003, Pub. L. 108-11, § 501, 117 Stat. 559, 609 (2003).

⁴³⁴ REPORT OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY 13 (2003), *available at* <http://www.defense.gov/news/Sep2003/d20030922usafareport.pdf> (last visited Apr. 6, 2015).

⁴³⁵ RESPONSE SYSTEMS PANEL, EXECUTIVE SUMMARY MILITARY JUSTICE REVIEW 1, *available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140312_ROC/Materials/02_Army_MilJusticeReview2004_ExecutiveSummary.pdf (last visited Apr. 6, 2015).

granted.”⁴³⁶ However, the committee made recommendations to “reduce the administrative burden on commanders,” such as giving military judges more oversight during the pretrial phases of courts-martial, randomly selecting court-martial panel members, making sentences effective upon announcement, and completely changing the post-trial process.⁴³⁷ In light of the recent sexual assault scandals in the other services, the committee also recommended a revision of the punitive sexual offense articles.⁴³⁸

The following year, in the 2005 NDAA, Congress directed the Department of Defense to “review the [UCMJ] and the Manual for Courts-Martial with the objective of determining what changes are required to improve the ability of the military justice system to address issues relating to sexual assault.”⁴³⁹ In response, the Joint Service Committee on Military Justice formed a subcommittee to comply with the direction of the 2005 NDAA. Although “[t]he subcommittee concluded that they were unable to identify any sexual misconduct that cannot be prosecuted under the current UCMJ and MCM,” the subcommittee made recommendations to improve the military justice system.⁴⁴⁰

Despite the fact that the subcommittee to the Joint Service Committee on Military Justice believed that no change was necessary, the Department of Defense

⁴³⁶ *Id.* at 2.

⁴³⁷ *Id.* at 3-6.

⁴³⁸ *Id.* at 4.

⁴³⁹ National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571(a), 118 Stat. 1920-1921 (2004).

⁴⁴⁰ Memorandum from Colonel (COL) Michael J. Child, Exec. Chair, Joint Serv. Comm. On Military Justice, to Office of General Counsel, DoD, ATTN: Mr. Robert E. Reed (Feb. 18, 2005), *available at* http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf (last visited Apr. 6, 2015).

proposed amendments to the UCMJ to “restructure and expand upon the treatment of sexual assault and other sex-related offenses.”⁴⁴¹ In the 2006 NDAA, Congress partially adopted the recommendations of the Department of Defense and completely re-wrote Article 120 of the UCMJ to align more closely with the federal definitions of sexual assault.⁴⁴² However, the new statute shifted the burden to the accused to prove consent and was extremely complicated. These problems led to several years of litigation and uncertainty regarding the statute.⁴⁴³ Recognizing the problems with the new version of Article 120, Congress re-wrote Article 120 again in 2011 and included the revision in the 2012 NDAA.⁴⁴⁴

Within a few weeks of Congress re-writing Article 120 of the UCMJ, *The Invisible War* premiered at the 2012 Sundance Film Festival and Congress shifted their focus from the statutory language of Article 120 to the military’s handling of sexual assault cases.⁴⁴⁵ On 20 April 2012, Secretary of Defense Leon Panetta withheld

⁴⁴¹ Letter from Daniel J. Dell’Orto, Principal Deputy Gen. Counsel, U.S. Dep’t of Def., to The Honorable John W. Warner, Chairman, Comm. On Armed Services, U.S. Senate (Apr. 7, 2005), *available at* http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf (last visited Apr. 6, 2015); Letter from Daniel J. Dell’Orto, Principal Deputy Gen. Counsel, U.S. Dep’t of Def., to The Honorable Duncan Hunter, Chairman, Comm. On Armed Services, U.S. House of Representatives (Apr. 7, 2005), *available at* http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf (last visited Apr. 6, 2015).

⁴⁴² National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256-63 (2006). The new version of Article 120 took effect on 1 October 2007. *Id.* at § 552(f).

⁴⁴³ Patrick D. Pflaum, *The Continuous Evolution of Military Sexual Assault Law*, A.B.A. L. & TRENDS PRACTICE AREA NEWSLETTER, vol. 7, no. 2 (Winter 2011), *available at* https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/2011_winter/military_sexual_assault_law.html (last visited Apr. 6, 2015).

⁴⁴⁴ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1299, 1404-11 (2011).

⁴⁴⁵ *See infra* chapter 1.

disposition authority for sex-related offenses to commanders in the grade of O-6 or higher.⁴⁴⁶ By January 2013, Congress' concern about the military's handling of sexual assault cases had increased, causing Congress to direct the Secretary of Defense to "establish a panel to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under [Article 120 of the UCMJ]."⁴⁴⁷

However, before Secretary of Defense Panetta was able to establish the panel as directed by Congress, the situation became worse. On 26 February 2013, Air Force Lieutenant General Craig Franklin, disapproved the findings and sentence and dismissed the sexual assault charges against Lieutenant Colonel Wilkerson.⁴⁴⁸ This action opened a flurry of activity in Congress. Within two weeks, a subcommittee of the SASC held a hearing on the issue and members of Congress introduced bills to amend the UCMJ in both the House of Representatives and the Senate.⁴⁴⁹

In May 2013, as previously directed by Congress, the new Secretary of Defense, Chuck Hagel, established the "Response Systems to Adult Sexual Assault Crimes Panel" (hereinafter "Response Systems Panel").⁴⁵⁰ The Response Systems

⁴⁴⁶ Memorandum from Secretary of Defense, for Secretaries of the Military Departments, Subject: Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012), *available at* http://www.dod.gov/dodgc/images/withhold_authority.pdf (last visited Apr. 6, 2015).

⁴⁴⁷ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632, 1758 (2013) [hereinafter FY13 NDAA].

⁴⁴⁸ *Wilkerson Record of Trial*, *supra* note 14.

⁴⁴⁹ *13 March 2013 Hearing*, *supra* note 62.

⁴⁵⁰ RSP REPORT, *supra* note 169, at 55.

Panel held its first public meeting on 27 June 2013.⁴⁵¹ After three months of work by the panel, Secretary of Defense Hagel further established three subcommittees to the Response Systems Panel, including the Role of the Commander Subcommittee.⁴⁵² In addition to the congressionally mandated panel, in October 2013, Secretary of Defense Hagel established the “Military Justice Review Group” to “conduct a comprehensive review of the [UCMJ].”⁴⁵³

The fact that the Response Systems Panel had begun working did not halt activity within Congress regarding the issue of sexual assault in the military. Rather, debate within Congress over sexual assault in the military and the need to amend the UCMJ increased. During the 113th Congress, members of Congress introduced over sixty bills in the Senate and House of Representatives to amend the UCMJ or make other changes related to the military’s handling of sexual assault cases.⁴⁵⁴

Debate over the issue crossed party lines, with both Republicans and Democrats agreeing that changes to the UCMJ were necessary. However, Congress was divided on what changes were necessary, making it difficult to pass any

⁴⁵¹ Transcript of the Jun. 27, 2013 Public Session of the Response Systems to Adult Sexual Assault Crimes Panel, *available at* http://responsesystemspanel.whs.mil/public/docs/meetings/20130627/Transcript_20130627.pdf (last visited Apr. 6, 2015).

⁴⁵² REPORT OF THE ROC SUBCOMM., *supra* note 78.

⁴⁵³ Memorandum from Chuck Hagel, Secretary of Defense, to Secretaries of the Military Departments, subject: Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013), *available at* http://www.dod.mil/dodgc/images/mjrg_secdef_memo.pdf (last visited Apr. 6, 2015).

⁴⁵⁴ The 1st Session of the 113th Congress was in session from 3 January 2013 to 26 December 2013. The 2nd Session of the 113th Congress was in session from 3 January 2014 to 16 December 2014. LIBRARY OF CONGRESS, <https://www.congress.gov> (last visited Apr. 6, 2015). See appendix A for a summary of the legislation proposed during the 113th Congress.

legislation.⁴⁵⁵ After several months of heated debates, with Congress still divided on the issue, it appeared as though legislation to amend the UCMJ would not pass before Congress adjourned.⁴⁵⁶ However, on 26 December 2013, Congress came to an agreement and included substantial changes to the UCMJ in the NDAA for Fiscal Year 2014. Although members of Congress such as Senator Kirsten Gillibrand (D-NY) and Representative Jackie Speier (D-CA) made several proposals to remove commanders from the decision on whether to prosecute an offense, the legislation included in the FY14 NDAA did not include such sweeping measures. The approved changes included things such as: improving the rights of victims, changing how preliminary hearings are conducted, limiting the action convening authorities can take on a sentence, eliminating the statute of limitations for sex-related offenses, requiring discharge of service members convicted of certain sex-related offenses, and establishing review procedures for decisions not to refer sex-related offenses to a court-martial.⁴⁵⁷ Appendix B contains a complete list of the changes to the UCMJ made by the FY14 NDAA.

As Congress debated the issue of changing the UCMJ to address the sexual assault problem in the military, the Response Systems Committee continued its work conducting a “review and assessment of the systems used to investigate, prosecute,

⁴⁵⁵ Lauren Fox, *Gillibrand Versus McCaskill and Levin: The War to Solve Military Sexual Assaults Heats Up*, U.S. NEWS AND WORLD REPORT (Jul. 29, 2013), <http://www.usnews.com/news/articles/2013/07/29/gillibrand-versus-mccaskill-and-levin-the-war-to-solve-military-sexual-assaults-heats-up> (last visited Apr. 6, 2015).

⁴⁵⁶ Jacqueline Klimas, *Political quagmire stymies military sex-assault solutions*, WASH. TIMES (Dec. 8, 2013), <http://www.washingtontimes.com/news/2013/dec/8/congress-creates-a-legislative-fortress-for-milita/?page=all> (last visited Apr. 6, 2015).

⁴⁵⁷ 2014 NDAA, *supra* note 75. A complete summary of the changes made to the UCMJ by the 2014 NDAA is included at Appendix B.

and adjudicate crimes involving adult sexual assault and related offenses.”⁴⁵⁸ The Role of the Commander Subcommittee completed work and submitted their report to the Response Systems Panel in May 2014.⁴⁵⁹ After completing a twelve-month review, the Response Systems to Adult Sexual Assault Crimes Panel submitted their report to Congress and the Secretary of Defense on 27 June 2014.⁴⁶⁰ The comprehensive report included 125 recommendations, which included eight recommendations related to the role of commanders in the military justice system and the convening authorities’ ability to grant clemency.⁴⁶¹ The panel “determined and concluded (with two members dissenting) that Congress should not further limit the authority of convening authorities under the UCMJ to refer charges for sexual assault crimes to trial by court-martial beyond the recent amendments to the UCMJ and DoD policy” and recommended that “congress repeal Section 1744 of the FY14 NDAA, and Congress not enact Section 2 of the Victims Protection Act of 2014.”⁴⁶² The specific recommendations of the Response Systems Panel are included at Appendix C.

On 25 November 2014, Secretary of Defense Hagel submitted a report to the President on sexual assault prevention and response within the Department of Defense.⁴⁶³ The report detailed that since 2012, the prevalence of sexual assault and

⁴⁵⁸ FY13 NDAA, *supra* note 446, at § 576.

⁴⁵⁹ REPORT OF THE ROC SUBCOMM., *supra* note 78.

⁴⁶⁰ RSP REPORT, *supra* note 169, at 22-25.

⁴⁶¹ *Id.* at 11-53.

⁴⁶² *Id.* at 6-7.

⁴⁶³ DEPARTMENT OF DEFENSE, REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE (2014) [hereinafter DOD

unwanted sexual contact has decreased, while the number of reports of sexual assault has increased.⁴⁶⁴ According to the report, this trend indicates “growing trust of command and confidence in the response system.”⁴⁶⁵ While the report indicates positive changes with respect to sexual assault prevention and response in the military, it also acknowledges that additional change is necessary. However, Secretary of Defense Hagel cautions in the report that “future reforms should not include transferring prosecutorial discretion from commanders to judge advocates” because it “would like not only degrade mission readiness, but also diminish commanders’ effectiveness in the fight against sexual assault in the military.”⁴⁶⁶

Just prior to adjournment in December 2014, the 113th Congress passed the NDAA for Fiscal Year 2015.⁴⁶⁷ With respect to the UCMJ and sexual assault, the FY15 NDAA made a few minor changes to the UCMJ and revised several provisions of the FY14 NDAA, but did not make any changes regarding the role of commanders in the military justice process.

The reforms made by the 113th Congress have been the most comprehensive changes to the UCMJ since 1968.⁴⁶⁸ While commander’s discretion has decreased, the UCMJ remains “a command-directed system of justice.”⁴⁶⁹ Commanders determine

REPORT TO PRESIDENT], *available at* http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Full_Report.pdf (last visited Apr. 6, 2015).

⁴⁶⁴ *Id.* at 15.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at 23.

⁴⁶⁷ Carl Levin and Howard “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291 (2014).

⁴⁶⁸ DOD REPORT TO PRESIDENT, *supra* note 462, at 23.

⁴⁶⁹ *Id.* at Annex 4, page 5.

the appropriate disposition for offenses, impose non-judicial punishment,⁴⁷⁰ convene courts-martial,⁴⁷¹ detail members of the court-martial,⁴⁷² and conduct post-trial reviews of courts-martial.⁴⁷³ Commanders also have the authority to accept plea-bargains,⁴⁷⁴ set aside certain convictions,⁴⁷⁵ and approve, disapprove, commute, or suspend a court-martial sentence for certain offenses.⁴⁷⁶

Conclusion

The military justice system in the United States has been in existence since the Continental Congress established the Continental Army on 14 June 1775. At that time, the United States military was not a professional organization. Over the years, the United States military gradually developed characteristics of a profession and today's military is a profession. As the United States military professionalized, the military justice system also developed to adapt to the professionalization of the military. As a mechanism for enforcing the military's ethical code, the military justice system was a critical component in the professionalization of the military.

Initially created as a "system of discipline" with commanders responsible for the good order and discipline of their units, the military justice system gradually evolved, adding elements of a "system of justice." With the evolution, Congress

⁴⁷⁰ UCMJ art. 15 (2014).

⁴⁷¹ UCMJ arts. 22, 23, 24 (2014).

⁴⁷² UCMJ art. 25 (2014).

⁴⁷³ UCMJ art. 60 (2014).

⁴⁷⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(d)(3) (2012).

⁴⁷⁵ UCMJ art. 60 (2014).

⁴⁷⁶ *Id.*

added lawyers to the process and the responsibility of lawyers in the military justice system gradually has increased. However, commanders remain responsible for the military justice system and the current military justice system is a delicate balance between a “system of discipline” and a “system of justice.” Using the history of the United States military as a profession and the history of the military justice system in the United States, the next chapter will analyze the impact that removing commanders from the military justice system would have on the United States military’s status as a profession.

DRAFT

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

Introduction

As discussed in chapter 2, militaries around the world began professionalizing after the French Revolution and now, most scholars agree that the military is a profession. Following its European military counterparts, the United States military began professionalizing sometime after the War of 1812 and most scholars believe that by the end of World War I in 1918, the United States military was a profession. Since 1918, the United States military has gone through several periods of professional turmoil, each leading to increased emphasis on professionalism. Now, after over ten years of conflict in Iraq, 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.

As military leaders renew their commitment to the military profession, debate over sexual assault and senior leader misconduct in the military has caused several members of Congress to seek military justice reform. Senator Kirsten Gillibrand (D-NY) and Representative Jackie Speier (D-CA) have proposed legislation that would remove commanders from the military justice process and replace them with lawyers. However, 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 may have a negative impact on the United States military's status as a profession.

Evolution of the Military Justice System for a Professional Military

As noted in the previous chapter, rules have existed to govern the conduct and discipline of soldiers for centuries, even before the emergence of the military as a profession.⁴⁷⁷ 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.⁴⁷⁸ 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.”⁴⁷⁹ 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 process.”⁴⁸⁰ In fact, discipline was so important that the Articles of War denied Soldiers the basic civil liberties for which they were fighting.⁴⁸¹

The importance of discipline remained after the American Revolutionary War and therefore, Congress made only minor changes to the Articles of War until after

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⁴⁸⁰ WARD, *supra* note 292, at 30.

⁴⁸¹ *Id.* at 30, 35.

the American Civil War.⁴⁸² 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.⁴⁸³ 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.⁴⁸⁴ 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 1775.⁴⁸⁵ While this major revision to the Articles of War did not 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.⁴⁸⁶

Between the end of the American Civil War in 1865 to 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.⁴⁸⁷ It is no coincidence that the next major revision to the Articles of War occurred in 1916, almost simultaneously with the United States

482

⁴⁸³ Matthew Moten, *Who Is a Member of the Military Profession?* JOINT FORCES QUARTERLY, 3d Quarter 2011, 16.

⁴⁸⁴ HUNTINGTON, *supra* note 86, at 230; Cooper, *supra* note 235, at 184-185.

⁴⁸⁵ 1874 Articles of War, *supra* note 317; BACKGROUND OF THE UCMJ, *supra* note 292, at 3.

⁴⁸⁶ BACKGROUND OF THE UCMJ, *supra* note 292, at 3.

487

military becoming a profession.⁴⁸⁸ 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.⁴⁸⁹ 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.⁴⁹⁰

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 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.⁴⁹¹ The disagreement led to intense debates between 1917 and 1920 over the fairness of the military justice system.⁴⁹² 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

488

489

⁴⁹⁰ WARD, *supra* note 292, at 41; *1776 Articles of War*, *supra* note 306, at Section XIV, articles 1 and 11; BACKGROUND OF THE UCMJ, *supra* note 292, at 3.

491

492

to transform it into a more civilian-like system of justice.⁴⁹³ 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.

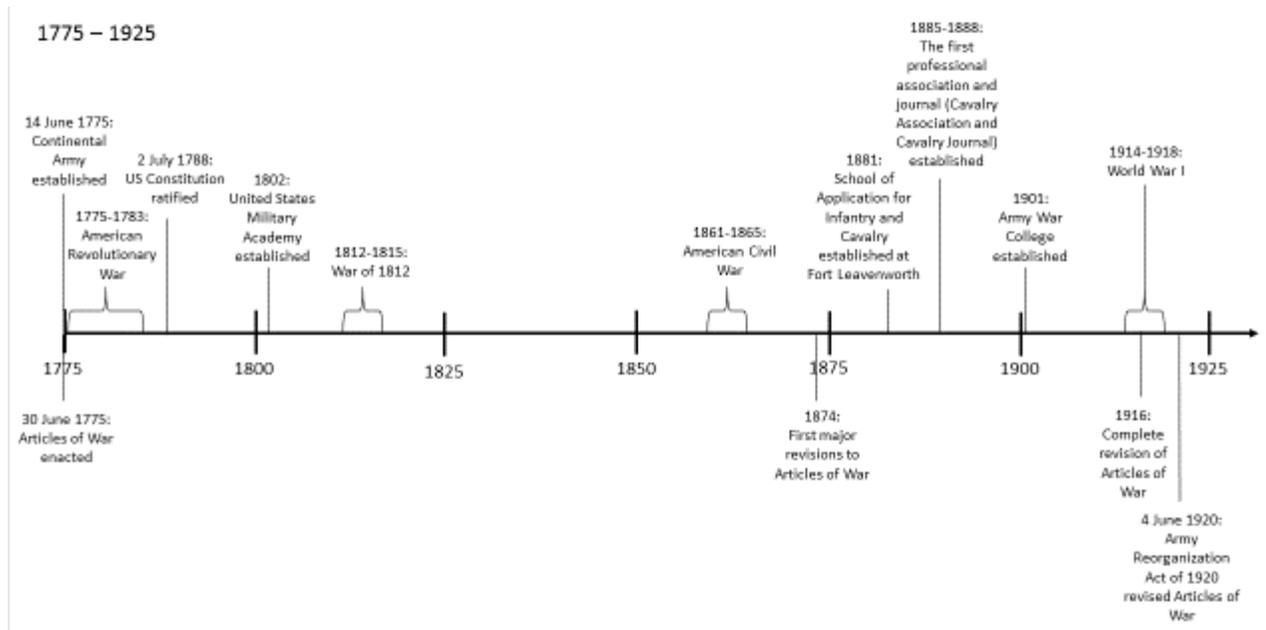
As a result of the Ansell-Crowder debate, Congress revised the Articles of War in 1920.⁴⁹⁴ Although the 1920 Articles of War included some of Brigadier General Ansell's proposals to make the system more fair, the revised Articles of War did not include the most drastic changes and commanders retained their authority over the military justice system.⁴⁹⁵ 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.

493

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495

Table 2. Timeline of Events from 1775 to 1925



Source: Created by author.

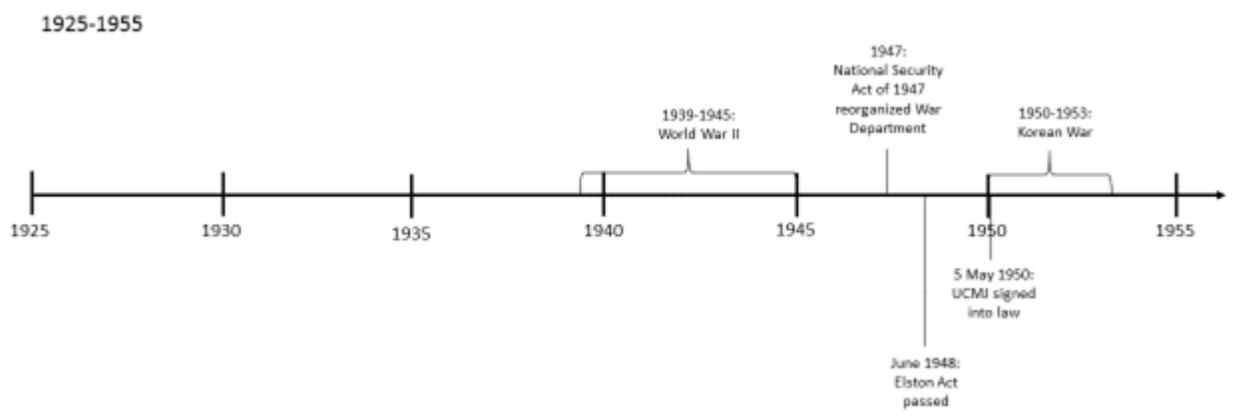
Most scholars agree that by the end of World War I in 1918, the United States military had become a profession.⁴⁹⁶ However, throughout the twentieth century, military professionalism in the United States continued to evolve as the military adapted to changing circumstances both in the United States and 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 directly 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.⁴⁹⁷ 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 Department of Defense and created the United States Air Force.⁴⁹⁸

Under the newly unified Department of Defense, 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 Government of the Navy. Therefore, the reorganization of the military in 1947 directly led to the creation of the UCMJ in 1950.⁴⁹⁹

Table 3. Timeline of Events from 1925 to 1955



Source: Created by author.

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After it became effective in 1951, the first major change to the UCMJ was in 1968.⁵⁰⁰ 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 Tet Offensive, a series of attacks against the South Vietnamese and the United States that amounted to the largest military campaign in the Vietnam War. 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.⁵⁰¹

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.⁵⁰² This one widely known incident is a representation of the lack of professionalism that 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 was working 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.⁵⁰³ By increasing the non-judicial punishment authority of commanders, the 1968 revisions to the UCMJ gave

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commanders additional options for handling the lack of professionalism that became so apparent during the Vietnam War.⁵⁰⁴

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.⁵⁰⁵ Throughout the 1970s, the military attempted to recover from the 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 year-long study evaluating the effectiveness of the UCMJ in wartime, Congress made the next major revisions to the UCMJ in 1983.⁵⁰⁶ By reducing the commander's burden of administering military justice during combat, the 1983 revisions increased the responsibility and authority of judge advocates.⁵⁰⁷ Thus, the military justice system became more of a balance between a system of justice and a system of discipline.

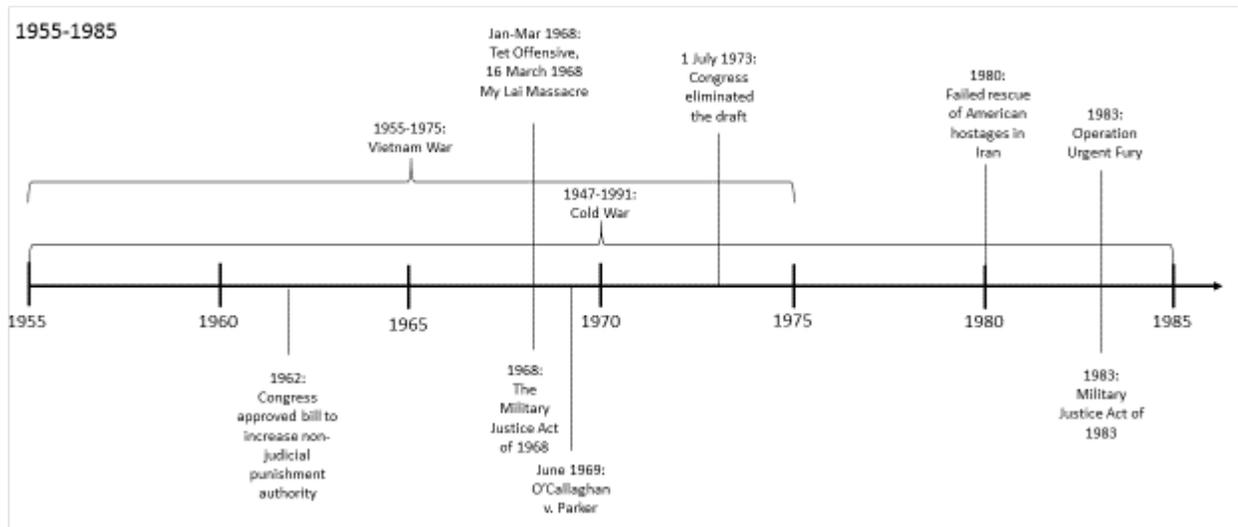
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Table 4. Timeline of Events from 1955 to 1985



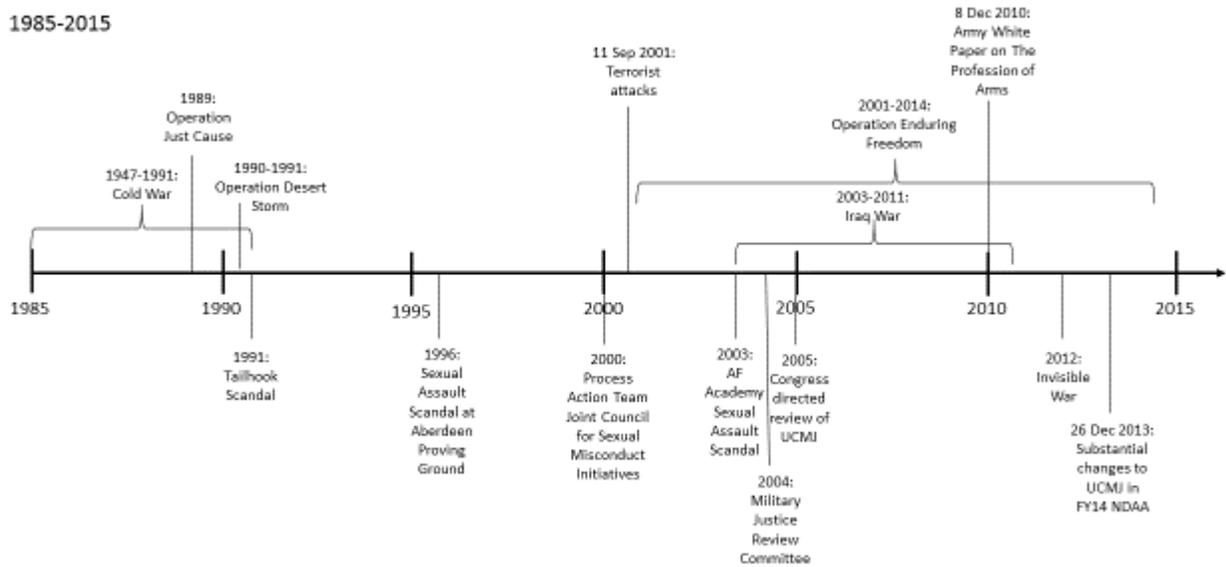
Source: Created by author.

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 over ten 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.⁵⁰⁸ As a result, Congress made significant changes to the UCMJ in 2013 and 2014 and is considering additional changes.⁵⁰⁹

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Table 5. Timeline of Events from 1985 to 2015



Source: Created by author.

As history shows, the military justice system and the professionalization of the United States military are inexorably linked. As the military became more professional, Congress revised the military justice system to make it more fair 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.

Trust – Self-Policing

Summary and conclusions

GLOSSARY

Profession. “A profession is a trusted self-policing and relatively autonomous vocation whose members develop and apply expert knowledge as human expertise to render an essential service to society in a particular field. This explanation of a profession has five aspects: Professions provide a unique and vital service to the society served, one it cannot provide itself. Professions provide this service by applying expert knowledge and practice. Professions earn the trust of the society because of effective and ethical application of their expertise. Professions self-regulate; they police the practice of their members to ensure it is effective and ethical. This includes the responsibility for educating and certifying professionals. Professions are therefore granted significant autonomy and discretion in their practice of expertise on behalf of the society.”⁵¹⁰

DRAFT

⁵¹⁰ ADRP 1, *supra* note 115.

APPENDIX A

PROPOSALS TO AMEND THE UCMJ MADE BY THE 113TH CONGRESS

HOUSE OF REPRESENTATIVES				
Bill #	Date Introduced	Sponsor	Title	Related Bills
H.R. 430	25 Jan 13	Speier	Protect Our Military Trainees Act	
H.R. 840	26 Feb 13	Sablan	To improve services for victims of sexual assault and domestic violence	
H.R. 1079	26 Mar 13	Speier	Military Judicial Reform Act of 2013	
H.R. 1593	17 Apr 13	Speier	Sexual Assault Training Oversight and Prevention (STOP) Act	
H.R. 1864	7 May 13	Walorski	To amend title 10, U.S.C., to require an IG investigation of allegations of retaliatory personnel actions	S. 1092
H.R. 1867	8 May 13	Turner	Better Enforcement for Sexual Assault Free Environments (BE SAFE) Act of 2013	H.R. 2207 S. 1032
H.Res. 213	14 May 13	McCollum	Establishing the Special Committee on Sexual Assault and Sexual Abuse in the Armed Forces	
H.R. 1986	15 May 13	Lipinski	SANE Deployment Act	
H.R. 2002	15 May 13	Ryan	Combating Military Sexual Assault Act of 2013	S. 871
H.R. 2016	16 May 13	Benishek	Military Justice Improvement Act of 2014	S. 967 S. 1752 S. 2970 S. 2992
H.R. 2059	20 May 13	Tsongas	Coast Guard STRONG Act	S. 1050
H.R. 2206	23 May 13	Turner	No Tolerance Act	
H.R. 2207	23 May 13	Turner	Better Enforcement for Sexual Assault Free Environments (BE SAFE) Act of 2013	H.R. 1867 S. 1032
H.R. 2227	3 Jun 13	Noem	To improve the response to and prevention of sexual assaults involving members of the Armed Forces	
H.R. 2230	3 Jun 13	Sanchez	Track It to Prevent It Act	
H.R. 2777	22 Jun 13	Griffin	Stop Pay for Violent Offenders Act	
H.R. 3360	28 Oct 13	Turner	To reform Article 32 of the UCMJ to specify the burden of proof applicable at the investigative hearing, the required qualifications for the investigating officer, the permitted scope of the investigation to assist the convening authority, and the protection of witnesses, and for other purposes.	S. 1644 H.R. 3459
H.R. 3459	12 Nov 13	Speier	Article 32 Reform Act	S. 1644 H.R. 3360
H.R. 3767	12 Dec 13	Ryan	Shield Act	
H.R. 3775	16 Dec 13	Barr	Military SAVE Act	
H.R. 4485	10 Apr 14	Turner	Fair Military Act	
H.R. 4730	22 May 14	Grayson	To allow the return of personal property to victims of sexual assault incidents involving a member of the Armed Forces	
H.R. 5524	17 Sep 14	Speier	Access to Contraception for Women Servicemembers and Dependents Act of 2014	S. 2687

SENATE				
Bill #	Date Introduced	Sponsor	Title	Related Bills
S. 538	12 Mar 13	McCaskill	To amend title 10, USC, to modify the authorities and responsibilities of convening authorities in taking actions on the findings and sentences of courts-martial	H.R. 2016 S. 967
S. 548	12 Mar 13	McCaskill	Military Sexual Assault Prevention Act of 2013	
S. 871	7 May 13	Murray	Combating Military Sexual Assault Act of 2013	H.R. 2002
S. 964	15 May 13	McCaskill	To require a comprehensive review of the adequacy of the training, qualifications, and experience of the DoD personnel responsible for sexual assault prevention and response	
S. 967	16 May 13	Gillibrand	Military Justice Improvement of 2013	S. 1752 S. 2970 S. 2992 H.R. 2016
S. 992	21 May 13	Shaheen	To provide for offices on sexual assault prevention and response under the Chiefs of Staff of the Armed Forces.	
S. 1032	23 May 13	McCaskill	Better Enforcement for Sexual Assault Free Environments (BE SAFE) Act of 2013	H.R. 1867 H.R. 2207
S. 1041	23 May 13	Blumenthal	Military Crime Victims' Rights Act of 2013	
S. 1050	23 May 13	Collins	Coast Guard STRONG Act	H.R. 2059
S. 1081	23 May 13	Warner	Military Whistleblower Protection Enhancement Act of 2013	
S. 1092	4 Jun 13	Klobuchar	To amend title 10, USC, to require an Inspector General investigation of allegations of retaliatory personnel actions taken in response to making protected communications	H.R. 1864
S. 1581	28 Oct 13	Sanders	Survivors of Military Sexual Assault and Domestic Abuse Act of 2013	
S. 1644	5 Nov 13	Boxer	Article 32 Reform Act	H.R. 3360 H.R. 3459
S. 1752	20 Nov 13	Gillibrand	Military Justice Improvement Act of 2013	S. 967 S. 2970 S. 2992 H.R. 2016
S. 1775	21 Nov 13	McCaskill	Victims Protection Act of 2013	S. 1917
S. 1917	14 Jan 14	McCaskill	Victims Protection Act of 2014	S. 1775
S. 2222	8 Apr 14	Walsh	To require a Comptroller General of the U.S. report on the sexual assault prevention activities of the DoD and the Armed Forces	
S. 2687	30 Jul 14	Shaheen	Access to Contraception for Women Servicemembers and Dependents Act of 2014	H.R. 5524
S. 2703	30 Jul 14	Boxer	Military SAFE Standards Act	
S. 2970	2 Dec 14	Gillibrand	Military Justice Improvement Act of 2014	S. 967 S. 1752 S. 2992 H.R. 2016
S. 2992	9 Dec 14	Gillibrand	Military Justice Improvement Act of 2014	S. 967 S. 1752 S. 2970 H.R. 2016

* These charts exclude all bills related to the NDAAs and National Defense Appropriations Acts, which all included proposals to amend the UCMJ.

Source: Created by author. Data obtained from The Library of Congress, Thomas website located at <http://thomas.loc.gov/home/thomas.php>.

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APPENDIX B

SUMMARY OF CHANGES TO THE UCMJ MADE BY THE NATIONAL DEFENSE

AUTHORIZATION ACT FOR FISCAL YEAR 2014⁵¹¹

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⁵¹¹ 2014 NDAA, *supra* note 75.

APPENDIX C

RECOMMENDATIONS OF THE RESPONSE SYSTEMS PANEL REGARDING THE ROLE OF COMMANDERS IN THE MILITARY JUSTICE SYSTEM

RSP Recommendation 36: Congress not adopt the proposals in the Sexual Assault Training Oversight and Prevention Act or the Military Justice Improvement Act to modify the authority vested in convening authorities to refer sexual assault charges to courts-martial

RSP Recommendation 37: Congress not further limit the authority under the UCMJ to refer charges for sexual assault crimes to trial by court-martial beyond the recent amendments to the UCMJ and DoD policy.

RSP Recommendation 38: The Secretary of Defense ensure all officers preparing to assume senior command positions at the grade of O-6 and above receive dedicated legal training that fully prepares them to exercise authorities assigned to them under the UCMJ.

RSP Recommendation 39: Congress repeal Section 1744 of the National Defense Authorization Act for Fiscal Year 2014, which requires a convening authority's decision not to refer certain sexual assault cases be reviewed by a higher general court-martial convening authority or the Service Secretary, depending on the circumstances, due to the real or perceived undue pressure it creates on staff judge advocates to recommend referral, and on convening authorities to refer, in situations where referral does not serve the interests of victims or justice.

RSP Recommendation 40: If Congress does not repeal Section 1744 of the National Defense Authorization Act for Fiscal Year 2014, and the requirement for elevated review of non-referred case files continues, the Secretary of Defense direct a standard format be developed for declining prosecution in a case, modeled after the contents of civilian jurisdiction declination statements or letters

RSP Recommendation 41: Congress not enact Section 2 of the Victim's Protection Act of 2014, which would require the next higher convening authority or Service Secretary to review a case if the senior trial counsel disagreed with the staff judge advocate's recommendation against referral or the convening authority's decision not to refer one of these sexual assault cases

RSP Recommendation 42: Congress not adopt additional amendments to Article 60 of the UCMJ beyond the significant limits on discretion already

adopted, and the President should not impose additional limits to the post-trial authority of convening authorities.

RSP Recommendation 43: Congress amend Section 1702(b) of the National Defense Authorization Act for Fiscal Year 2014 to allow convening authorities to grant clemency as formerly permitted under the UCMJ to protect dependents of convicted Service members by relieving them of the burden of automatic and adjudged forfeitures.⁵¹²

DRAFT

⁵¹² RSP REPORT, *supra* note 169, at 22-25.

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