

**Annex 4:
Analysis of
Military Justice Reform**



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MEMORANDUM FOR DIRECTOR, DEPARTMENT OF DEFENSE SEXUAL ASSAULT
PREVENTION AND RESPONSE OFFICE

SUBJECT: Military Justice Portion of the Report to the President on Sexual Assault Prevention
and Response

Attached is the military justice portion of the report to the President on sexual assault
prevention and response. I understand that SAPRO will coordinate the entire report, including
the military justice portion, with the Military Departments and other appropriate DoD
Components.

A handwritten signature in black ink, appearing to read "Robert S. Tj".

for Stephen W. Preston

Attachment:
As stated



The Military Justice System's Response to Unrestricted Reports of Sexual Assault

Executive Summary¹

The laws and regulations governing the investigation and trial of military sexual assault cases have been transformed over the past three years. The amount of discretion commanders exercise over such cases has been sharply constrained while the rights available to victims of such offenses, including the military's creation of a robust victim legal representation program, have greatly expanded. Ongoing reform efforts will further improve the military's ability to investigate and fairly try sexual assault cases while protecting victims' privacy interests.

Virtually every portion of the military justice system has been modified, from ensuring that all unrestricted reports of sexual assaults are investigated by the professional Military Criminal Investigative Organizations that are independent of military commanders to imposing significant constraints on commanders' ability to change a court-martial's results after trial.

The National Defense Authorization Act for Fiscal Year 2014 (NDAA for FY14) enacted major reforms, which continue to be phased in. For example, the statute overhauled the Article 32 hearing that, unless waived by the accused, must precede a general court-martial. Changes to the Article 32 hearing process include giving military victims the right to decline to testify at the Article 32 hearing, a right already enjoyed by civilian witnesses. The scope of the hearing will be significantly narrowed and, with certain limited exceptions, judge advocates will be required to preside. The Secretary of Defense has directed that in sexual assault cases, the Article 32 preliminary hearing officer will always be a judge advocate. The President also modified the Manual for Courts-Martial to enhance victims' privacy at Article 32 hearings when evidence of their prior sex acts, psychotherapist-patient communications, or victim advocate-victim communications is offered.

The Secretary of Defense also imposed limitations on which military commanders may exercise prosecutorial discretion over sexual assault allegations, requiring that allegations of penetrative sexual assaults be forwarded to a commander in the grade of O-6 (colonel or Navy captain) or higher who is authorized to convene a special court-martial and who must consult with a judge advocate before deciding what action to take. No lower-ranking officer may dismiss or otherwise dispose of charges in such cases. The NDAA for FY14 further constrained military commanders' pretrial discretion by providing that only general courts-martial have jurisdiction over charges alleging penetrative sexual assaults or attempts to commit such assaults. Any decision by a general court-martial convening authority not to refer a charge alleging one of those offenses for trial must be reviewed by a higher-level official including, in some circumstances, the Secretary of the Military Department.

The military has improved the investigation and prosecution of such charges through each Service's development of a Special Victim Investigation and Prosecution Capability. The Services now pursue an integrated approach to the investigation and prosecution of sexual

¹ For ease of reading, the Executive Summary does not include supporting citations. Supporting citations are provided in footnotes in the main text.

assault cases, relying on collaboration among specially trained investigators, prosecutors, and victim-witness assistants.

The substantive law that applies in military sexual assault cases has also changed, with a new version of Article 120 of the Uniform Code of Military Justice applying to offenses committed on or after June 28, 2012. This new statute cured the constitutional infirmity with the previous version of the sexual assault statute, simplified the theories of criminal liability for military sexual assault offenses, and created additional sex offenses. Congress also eliminated the statute of limitations for sexual assault and sexual assault of a child. The NDAA for FY14 also requires that a service member convicted of a penetrative sexual assault or an attempt to commit such an assault receive a sentence that includes a dishonorable discharge for an enlisted accused or a dismissal for an officer accused.

The military justice system has seen a revolution in the area of victims' rights, with the President, the Secretary of Defense, and Congress adopting measures to better protect the dignity and privacy interests of victims as cases proceed through the military justice system. The most important of these changes is the military's creation of what appears to be the most extensive victim legal representation program in the country. The NDAA for FY14 also enacted a military crime victims' rights statute modeled after its Federal civilian counterpart.

Once the trial is complete, military commanders' authority to overturn convictions has been limited to certain minor offenses and their discretion to reduce sentences has been sharply constrained other than to carry out a plea bargain.

As a result of these substantial reforms, the military is better able to investigate and try sexual assault offenses in a fair, just, and consistent manner with greater sensitivity to the rights and privacy interests of crime victims. DoD nevertheless believes that further improvements are necessary. Several initiatives are currently underway that will result in additional positive change.

DoD has proposed additional military justice reforms in two draft Executive Orders, one of which has been submitted to the Office of Management and Budget and the other of which is currently in the public comment phase. In the Legislative Branch, the House and Senate versions of the National Defense Authorization Act for Fiscal Year 2015 each contain additional revisions of the military justice system, though the scale of those changes is considerably less than that of the NDAA for FY 2014.

Congress established two Federal Advisory Committees to study issues concerning sexual assault in the military and propose reforms. The work of the first of those Federal Advisory Committees, the Response Systems to Adult Sexual Assault Crimes Panel (RSP), is complete. DoD is now reviewing the 132 recommendations included in the RSP's June 2014 report and preparing to implement those recommendations that the Secretary of Defense adopts. The RSP's follow-on Federal Advisory Committee, the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP), is conducting an in-depth study of the substantial military justice reforms that have been adopted over the past three years, with an initial report due on February

4, 2015. Understanding the consequences of the changes that have already been made is critical to informing decisions concerning future reforms.

Another reform effort now underway is the work of the Military Justice Review Group which, at the Secretary of Defense's direction, is performing a comprehensive review of the military justice system. That review will result in a report proposing amendments to the Uniform Code of Military Justice in 2015.

While DoD supports further military justice reforms, it agrees with the RSP's conclusion that such reforms should not include removing prosecutorial discretion from military commanders. As the RSP found, "The evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault or increase reporting of sexual assaults in the Armed Forces." Nor does the evidence "support a conclusion that removing authority to convene courts-martial from senior commanders will improve the quality of investigations and prosecutions or increase the conviction rate in these cases."

Transferring prosecutorial discretion from military commanders to judge advocates would pose a substantial risk of degrading commanders' ability to lead their subordinates and accomplish their assigned missions. Removing prosecutorial discretion from commanders would likely diminish their ability to reduce the prevalence of sexual assault in the military without any empirical basis to suggest offsetting improvements in DoD's ability to prevent sexual assaults or effectively respond to those sexual assaults that do occur. Commanders should be more involved in, and accountable for, the fight against sexual assault, not less.

The Military Justice System's Response to Unrestricted Reports of Sexual Assault

I. Introduction

This report examines the military justice system's response to unrestricted reports of sexual assault, focusing on recent reforms to the system. It begins with an overview of the military justice system. It then discusses major differences between the military and civilian criminal justice systems. The report then addresses major reforms to the military justice system since April 2012, with an emphasis on changes to laws, regulations, and policies governing responses to allegations of sexual assault offenses. The report then describes the major steps that occur in a sexual assault prosecution. It concludes with an examination of additional military justice reform measures that are currently being considered.

The military justice system governs the conduct of more than 1.4 million active duty service members at all times and in all places.² That is a population larger than those of 11 States and the District of Columbia.³ The military justice system also governs the conduct of 850,880 members of the armed forces' Reserve Component when they are performing active duty or inactive duty training in a Federal capacity.⁴ The military justice system also applies to some non-uniformed individuals – including active duty retirees entitled to pay,⁵ civilians accompanying U.S. forces in the field in times of declared war or contingency operations,⁶ and prisoners in custody of the armed forces serving court-martial sentences⁷ – but these authorities are rarely used.⁸

Courts-martial are held in the United States, in foreign countries where U.S. service members are located, and sometimes even on naval vessels at sea. The ability to conduct courts-

² The combined authorized end strength of the five armed forces for fiscal year 2013 was 1,448,560. *See* National Defense Authorization Act for Fiscal Year 2013 (NDAA for FY13), Pub. L. No. 112-239, § 401, 126 Stat. 1632, 1707 (2013); Coast Guard and Maritime Transportation Act of 2012, Pub. L. No. 112-213, § 102, 126 Stat. 1540, 1542. *See also* Uniform Code of Military Justice (UCMJ) art. 5, 10 U.S.C. § 805 (2012) (“This chapter applies in all places.”). The Coast Guard is an armed force within the Department of Homeland Security though during a time of declared war, if Congress so directs in the declaration of war or when the President directs, it operates as a Service in the Navy. *See* 14 U.S.C. § 3 (2012); 10 U.S.C. §101(a)(4) (2012). Regardless of whether the Coast Guard is operating as a Service in the Department of Homeland Security or Department of the Navy, the Uniform Code of Military Justice applies to it. The discussion in this report is generally applicable to the Coast Guard except when addressing Department of Defense-specific matters. For example, neither the Secretary of Defense initiatives nor Department of Defense Instructions discussed in this report apply to the Coast Guard.

³ The combined active duty strength of the five armed forces is larger than the populations of Wyoming, Vermont, North Dakota, Alaska, South Dakota, Delaware, Montana, Rhode Island, New Hampshire, Maine, Hawaii, and the District of Columbia. U.S. Census Bureau, Population Division, NST-EST2013-01, Annual Estimates of the Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2013 (December 2013).

⁴ NDAA for FY13, Pub. L. No. 112-239, § 411, 126 Stat. at 1710 (authorized Reserve Component end strength). *See also* UCMJ art. 2(a)(1), (3) 10 U.S.C. § 802(a)(1), (2) (2012) (establishing jurisdiction over members of the Reserve Component).

⁵ UCMJ art. 2(a)(4), 10 U.S.C. § 802(a)(4) (2012).

⁶ *Id.* at art. 2(a)(10), 10 U.S.C. § 802(a)(10) (2012).

⁷ *Id.* at art. 2(a)(7), 10 U.S.C. § 802(a)(7) (2012).

⁸ For example, the authority to court-martial civilians accompanying U.S. forces in the field – which Congress expanded to include contingency operations in 2006 – has been used only once since the Vietnam conflict. *See United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012).

martial in deployed settings is viewed as an important means of promoting discipline and combat effectiveness.⁹

The constitutional basis for the military justice system rests on Congress's authority to "make Rules for the Government and Regulation of the land and naval Forces."¹⁰ Congress has delegated broad authority to the President, including the power to issue procedural rules for courts-martial¹¹ and to set maximum punishments for non-capital offenses.¹² The President's constitutional authority as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States"¹³ provides an independent source of the President's authority within the military justice system.¹⁴ The President has provided extensive implementing regulations through Executive Orders, which are compiled in the *Manual for Courts-Martial* (MCM).¹⁵

Congress exercised its statutory authority to establish the current military justice system in 1950 by passing the Uniform Code of Military Justice (UCMJ).¹⁶ The UCMJ has been amended dozens of times since – including major revisions in 1968,¹⁷ 1983,¹⁸ and 2013¹⁹ – and continues in force today.

The military justice system must simultaneously serve two critical – and sometimes competing – functions: it operates as both a modern criminal justice system and a tool commanders use to preserve good order and discipline within the military. The MCM's Preamble reflects this dual nature: "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."²⁰

The UCMJ creates a command-directed system of justice. Convening authorities – who are generally military commanders – are responsible for deciding the appropriate disposition of

⁹ See generally Defense Legal Policy Board, Report of the Subcommittee on Military Justice in Combat Zones (May 30, 2013).

¹⁰ U.S. CONST., art. I, § 8, cl. 14.

¹¹ UCMJ art. 36(a), 10 U.S.C. § 836(a) (2012).

¹² *Id.* at art. 56, 10 U.S.C. § 856 (2012).

¹³ U.S. CONST., art. II, § 2, cl. 1.

¹⁴ See, e.g., *Swaim v. United States*, 165 U.S. 553 (1897) (holding that the President is authorized, "as commander in chief, to validly convene a general court-martial" even when not statutorily empowered to do so).

¹⁵ For example, there have been 20 Executive Orders revising the MCM since its last major revision in 1984. The MCM was last republished in 2012. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) [hereinafter 2012 MCM]. Two Executive Orders have amended the MCM since. Exec. Order No. 13,643, 78 Fed. Reg. 29,559 (May 15, 2013); Exec. Order No. 13,669, 79 Fed. Reg. 34,999 (June 13, 2014).

¹⁶ Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950). Before the UCMJ's adoption, separate statutes – the Articles of War and the Articles for the Government of the Navy – governed the Army's military justice system and the naval justice system.

¹⁷ Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

¹⁸ Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

¹⁹ National Defense Authorization Act for Fiscal Year 2014 (NDAA for FY14), Pub. L. No. 113-66, tit. XVII, §§ 1701-1753, 127 Stat. 672, 950-85 (2013).

²⁰ 2012 MCM, *supra* note 15, at Pt. I, ¶ 3.

alleged offenses.²¹ While commanders have various non-military justice tools available to promote discipline, including extra military instruction, counseling, and administrative discharges, the UCMJ provides four forums for disposing of charges: (1) nonjudicial punishment; (2) summary courts-martial; (3) special courts-martial; and (4) general courts-martial.

II. Overview of the Military Justice System

A. Forums

1. Nonjudicial punishment

Nonjudicial punishment authority rests exclusively with military commanders and officers-in-charge.²² It is designed as a tool to swiftly impose “disciplinary punishments for minor offenses.”²³ While nonjudicial punishment procedures vary considerably among the Services, the commander serves as the sole decision maker, determining whether to impose punishment for minor offenses.²⁴ But with the exception of those attached to or embarked in vessels, service members may decline to be subjected to nonjudicial punishment,²⁵ in such instances of “NJP refusal,” charges are often (though not invariably) referred to a special court-martial. Nonjudicial punishment is not considered a criminal conviction.²⁶ Nonjudicial punishment is designed to provide “commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavioral changes in servicemembers without the stigma of a court-martial conviction.”²⁷

Authorized nonjudicial punishments vary depending on the grade of both the officer imposing it and the service member receiving it.²⁸ Maximum permissible punishments include correctional custody for up to 60 days (enlisted only), restriction to specified limits (such as place of duty, quarters, dining facility, and place of worship) for up to 60 days, forfeiture of up to ½ pay per month for two months, and reduction to the lowest enlisted grade (enlisted only).²⁹ Junior enlisted service members attached to or embarked in a vessel may also be confined for up to three days on bread and water or diminished rations.³⁰

²¹ See UCMJ art. 30(b), 10 U.S.C. § 830(a) (2012). See also 2012 MCM, *supra* note 15, Rule for Courts-Martial 306(a) [hereinafter R.C.M.].

²² UCMJ art. 15(a), 10 U.S.C. § 815(a) (2012). Certain commanders may delegate their authority to impose nonjudicial punishment to a principal assistant. *Id.*

²³ *Id.* at art. 15(b), 10 U.S.C. § 815(b) (2012).

²⁴ *Id.* at art. 15, 10 U.S.C. § 815 (2012); see also 2012 MCM, *supra* note 15, at Pt. V, ¶ 1.d.(2).

²⁵ UCMJ art. 15(a), 10 U.S.C. § 815(a) (2012); see also 2012 MCM, *supra* note 15, pt. V, ¶ 3.

²⁶ See, e.g., *United States v. Reveles*, 660 F.3d 1138 (9th Cir. 2011).

²⁷ 2012 MCM, *supra* note 15, at Pt. V, ¶ 1.c.

²⁸ UCMJ art. 15(b), 10 U.S.C. § 815(b) (2012).

²⁹ *Id.*

³⁰ *Id.* at art. 15(b)(2)(A), 10 U.S.C. § 815(b)(2)(A) (2012).

The five armed forces combined imposed 62,148 nonjudicial punishments during Fiscal Year 2013.³¹

2. Summary courts-martial

A summary court-martial is a one-officer “court” authorized to handle charges referred to it by a military commander.³² It is designed “to promptly adjudicate minor offenses under a simple procedure.”³³ In practice, those “simple procedure[s]” vary considerably among the Services. A summary court-martial’s presiding officer need not be a lawyer.³⁴ A summary court-martial is not authorized to try officers or cadets or midshipmen.³⁵ Service members may decline to be tried by a summary court-martial,³⁶ such “refusal” cases are often (though not invariably) referred to special courts-martial for trial. A summary court-martial conviction is generally not considered a criminal conviction.³⁷

Maximum punishments that may be imposed by summary courts-martial include confinement for up to 30 days, restriction for up to two months, forfeiture of up to 2/3 pay for one month, and reduction to the lowest pay grade.³⁸

The five armed forces combined tried 1,101 summary courts-martial during Fiscal Year 2013.³⁹

3. Special courts-martial

Special courts-martial are formalized criminal trials almost invariably presided over by a military judge, who must be a judge advocate (uniformed attorney). They follow evidentiary rules almost identical to the Federal Rules of Evidence.⁴⁰ Special court-martial convictions are considered Federal criminal convictions. Such convictions may carry collateral consequences, such as a requirement to register as a sex offender or limitations on the right to possess firearms and ammunition.

The punishments that a special court-martial may impose include a bad-conduct discharge (enlisted only; officers cannot be discharged by a special court-martial); confinement

³¹Annual Report of the Code Committee on Military Justice, U.S. Court of Appeals for the Armed Forces (Oct. 1 2012-Sep. 30, 2013) (total nonjudicial punishments imposed by Service: Army, 42,407; Navy/Marine Corps, 12,525; Air Force, 6,247; Coast Guard, 969).

³²UCMJ art. 20, 22, 10 U.S.C. § 820, 822 (2012); 2012 MCM, *supra* note 15, R.C.M. 1301.

³³2012 MCM, *supra* note 15, R.C.M. 1301(b).

³⁴*See* 2012 MCM, *supra* note 15, R.C.M. 1301(a).

³⁵UCMJ art. 20, 10 U.S.C. § 820 (2012).

³⁶2012 MCM, *supra* note 15, R.C.M. 1303.

³⁷*Middendorf v. Henry*, 425 U.S. 25, 34-42 (1976); *but see Coram v. Board of Examiners, Sex Offender Registry of the State of New York*, 758 N.Y.S. 2d 235 (N.Y. Sup. Ct. 2003) (“Petitioner’s conviction by summary court-martial to Indecent Assault and Sodomy by Force Without Consent is a ‘sex offense’ within the present statute requiring him to register as a sex offender”).

³⁸UCMJ art. 20, 10 U.S.C. § 820 (2012); 2012 MCM, *supra* note 15, R.C.M. 1301(d).

³⁹Annual Report of the Code Committee (2013) (total summary courts-martial by Service: Army, 380; Navy, 31; Marine Corps, 526; Air Force, 144; Coast Guard, 20).

⁴⁰*See generally* 2012 MCM, *supra* note 15, Pt. III, Military Rules of Evidence.

for up to 12 months (enlisted only; officers cannot be confined by a special court-martial); forfeiture of up to 2/3 pay per month for 12 months, and reduction to the lowest pay grade (enlisted only).⁴¹

The accused at a special court-martial may choose to be tried by a military judge alone or a panel of at least three service members chosen by the convening authority⁴² (the individual – almost invariably a military commander – “who is authorized to convene and refer charges to a court-martial”⁴³). An enlisted accused has the right to choose to have at least one-third of the panel members be enlisted as well.⁴⁴ If the service member chooses to be tried by a panel of members, that panel will also sentence the accused if a conviction results; military judges impose sentences only when the accused elects to be tried by a military judge alone and is convicted.⁴⁵ In a trial with members, a 2/3 majority is required for a conviction; any fraction less than that results in an acquittal.⁴⁶ Similarly, a 2/3 majority vote is required for the sentence.⁴⁷

The five armed forces combined tried 1,213 special courts-martial during Fiscal Year 2013.⁴⁸

4. General courts-martial

Like special courts-martial, general courts-martial are formalized judicial proceedings and resulting convictions are considered Federal criminal convictions. A general court-martial may impose any sentence authorized for a particular offense, including death.⁴⁹

The power to convene general courts-martial is generally limited to generals and admirals in command of large military units.⁵⁰ The UCMJ imposes statutory prerequisites to referring charges for trial by a general court-martial. Unless waived by the accused, an Article 32 investigation (which will be restyled as an Article 32 preliminary hearing for offenses occurring on or after December 26, 2014) must be held to determine whether an adequate factual basis exists for the charges.⁵¹ The convening authority must also receive written advice from his or her staff judge advocate concerning the charges. Referral to a general court-martial is not allowed unless the staff judge advocate advises that the specification alleges an offense under the

⁴¹ UCMJ art. 19, 10 U.S.C. § 819 (2012); 2012 MCM, *supra* note 15, R.C.M. 201(f)(2)(B).

⁴² UCMJ art. 16, 10 U.S.C. § 816 (2012).

⁴³ *Witham v. United States*, 355 F.3d 501, 502 n.1 (6th Cir. 2004).

⁴⁴ UCMJ art. 25(c), 10 U.S.C. § 825(c) (2012).

⁴⁵ *See United States v. Lawson*, 34 M.J. 38, 42 (C.M.A. 1992) (Cox, J., concurring) (“In the military, unlike most jurisdictions, sentencing is done by court members unless the accused affirmatively requests that it be done by judge alone.”); *see also* UCMJ art. 51(d), 10 U.S.C. § 851(d) (2012).

⁴⁶ *Id.* at art. 52(a), 10 U.S.C. § 852(a) (2012); 2012 MCM, *supra* note 15, R.C.M. 921.

⁴⁷ UCMJ art. 52(b)(3), 10 U.S.C. § 852(b)(3) (2012).

⁴⁸ Annual Report of the Code Committee (2013) (total special courts-martial by Service: Army, 376; Navy, 172; Marine Corps, 292; Air Force, 359; Coast Guard, 14).

⁴⁹ UCMJ art. 18, 10 U.S.C. § 818 (2012).

⁵⁰ *See id.* at art. 22, 10 U.S.C. § 822 (2012).

⁵¹ *See id.* at art. 32, 10 U.S.C. § 832 (2012); *see also* NDAA for FY14, Pub. L. No. 113-66, § 1702(a), 127 Stat. at 954.

UCMJ, that the specification is warranted by the evidence presented at the Article 32 proceeding, and that a court-martial would have jurisdiction over the accused and the offense.⁵²

The panel of members in a general court-martial must number at least five (or 12 in capital cases).⁵³ Except in capital cases, which must be tried before a members panel, the accused may generally elect to be tried by a military judge alone instead of a members panel.⁵⁴ As at a special court-martial, the members will also impose the sentence if the case is tried before them. A 2/3 majority vote is required for conviction.⁵⁵ A unanimous vote is required for a death sentence and a 3/4 majority vote is required for confinement for more than 10 years.⁵⁶ All other sentences require a 2/3 majority vote.⁵⁷

The five armed forces combined tried 1,239 general courts-martial during Fiscal Year 2013.⁵⁸

B. Military Justice System's Structure

Courts-martial are not standing courts.⁵⁹ Rather, they are called into existence by an order from the convening authority to hear a specific case and they go out of existence once the case is complete. The military's appellate courts, on the other hand, are standing courts.⁶⁰

A case that results in a conviction is initially reviewed by the convening authority, who has some power – though it was greatly limited by the NDAA for FY14 – to reduce the sentence or set aside convictions.⁶¹

Cases with certain sentences automatically qualify for further review by the military justice system's appellate courts. There are four intermediate-level appellate courts, called the Courts of Criminal Appeals – one for each Military Department and one for the Coast Guard. Either uniformed lawyers or civilians may serve as judges on the Courts of Criminal Appeals,⁶² though – with the exception of the Coast Guard Court of Criminal Appeals – military appellate judges are the norm. General and special court-martial cases that result in a conviction and punitive discharge, confinement for a year or more, or death are automatically appealed to those courts, though (except in death penalty cases) the accused may waive that appeal.⁶³ While it is possible for cases that result in a conviction but a lesser sentence to be referred to one of the Courts of Criminal Appeals, those cases almost invariably are reviewed by uniformed lawyers,

⁵² UCMJ art. 34, 10 U.S.C. § 834 (2012).

⁵³ *Id.* at art. 16, 25A, 10 U.S.C. §§ 816, 825A (2012).

⁵⁴ *Id.* at art. 16(1)(B), 2(B), 10 U.S.C. § 816(1)(B), 2(B) (2012); 2012 MCM, *supra* note 15, R.C.M. 903.

⁵⁵ UCMJ art. 52, 10 U.S.C. § 852 (2012). The only exception to this rule is for spying, a war-time-only offense for which a death sentence is mandatory. *See* UCMJ art. 106, 10 U.S.C. § 906 (2012).

⁵⁶ *Id.* at art. 52(b)(1), (2), 10 U.S.C. § 852(b)(1), (2) (2012).

⁵⁷ *Id.* at art. 52(b)(3), 10 U.S.C. § 852(b)(3) (2012).

⁵⁸ Annual Report of the Code Committee (2013) (total general courts-martial by Service: Army, 714; Navy, 121; Marine Corps, 135; Air Force, 260; Coast Guard, 9).

⁵⁹ *United States v. Wiechmann*, 67 M.J. 456, 461 (C.A.A.F. 2009), *cert. denied*, 559 U.S. 904 (2010).

⁶⁰ *Denedo v. United States*, 66 M.J. 114, 124 (C.A.A.F. 2008), *aff'd*, 556 U.S. 904 (2009).

⁶¹ *See* UCMJ art. 60, 10 U.S.C. § 860 (2012); NDAA for FY14, Pub. L. No. 113-66, § 1702(b), 127 Stat. at 955.

⁶² UCMJ art. 66(a), 10 U.S.C. § 866(a) (2012).

⁶³ *Id.* at art. 66(b), 10 U.S.C. § 866(b) (2012).

but not courts.⁶⁴ It is also possible for the government to file interlocutory appeals in some instances.⁶⁵ The Courts of Criminal Appeals are also authorized to issue extraordinary writs, such as writs of habeas corpus or mandamus, which can occasionally result in an enforceable judicial order at times when an appeal is not available.⁶⁶

Cases reviewed by a Court of Criminal Appeals may be further reviewed by the Court of Appeals for the Armed Forces, an Article I court consisting of five civilian judges appointed by the President and confirmed by the Senate.⁶⁷ That court's docket is largely discretionary, though it must exercise jurisdiction over cases in which a Court of Criminal Appeals affirmed a death sentence.⁶⁸ In non-capital cases, the court may grant or deny review of cases petitioned to it by convicted service members.⁶⁹ Additionally, the four Judge Advocates General may certify cases to the court.⁷⁰

Since 1984, the Supreme Court has had statutory certiorari jurisdiction over cases that were decided by the Court of Appeals for the Armed Forces, though the Supreme Court does not have such jurisdiction over cases that the Court of Appeals for the Armed Forces declined to review.⁷¹

Once direct appeal of a court-martial conviction is complete, a service member may seek collateral review in either United States district court⁷² or the United States Court of Federal Claims.⁷³

C. Punitive Articles

The Uniform Code of Military Justice includes 65 punitive articles, many of which include more than one offense.⁷⁴ Many of the punitive articles create military-specific offenses, such as desertion, absence without leave, violation of a lawful order, and misbehavior before the enemy.⁷⁵ Other punitive articles are similar to civilian criminal statutes, such as those prohibiting murder, rape, robbery, and burglary.⁷⁶

Most of the UCMJ's provisions governing sexual offenses appear in Articles 120 ("Rape and sexual assault generally"), 120b ("Rape and sexual assault of a child"), and 120c ("Other sexual misconduct").⁷⁷ Together, those three articles establish 10 crimes: (1) rape, (2) sexual assault, (3) aggravated sexual assault, (4) abusive sexual contact, (5) rape of a child, (6) sexual

⁶⁴ See *id.* at art. 64, 69, 10 U.S.C. § 864, 869 (2012).

⁶⁵ *Id.* at art. 62, 10 U.S.C. § 862 (2012); see also 2012 MCM, *supra* note 15, R.C.M. 908.

⁶⁶ See, e.g., *United States v. Denedo*, 556 U.S. 904 (2009).

⁶⁷ UCMJ arts. 67, 141-142, 10 U.S.C. §§ 867, 941-42 (2012).

⁶⁸ *Id.* at art. 67(a)(1), 10 U.S.C. § 867(a)(1) (2012).

⁶⁹ *Id.* at art. 67(a)(3), 10 U.S.C. § 867(a)(3) (2012).

⁷⁰ *Id.* at art. 67(a)(2), 10 U.S.C. § 867(a)(2) (2012).

⁷¹ *Id.* at art. 67a, 10 U.S.C. § 867a (2012); 28 U.S.C. § 1259 (2012).

⁷² See generally *Allen v. U.S. Air Force*, 603 F.3d 423, 429-30 (8th Cir.), *cert. denied*, 131 S. Ct. 830 (2010).

⁷³ See generally *Matias v. United States*, 923 F.3d 821, 823-25 (Fed. Cir. 1990).

⁷⁴ UCMJ art. 77-134, 10 U.S.C. §§ 877-934 (2012).

⁷⁵ *Id.* at art. 85, 86, 92, 99, 10 U.S.C. §§ 885, 886, 892, 899 (2012).

⁷⁶ *Id.* at art. 118, 120, 122, 129, 10 U.S.C. §§ 918, 920, 922, 929 (2012).

⁷⁷ *Id.* at art. 120, 120b, 120c, 10 U.S.C. §§ 920, 920b, 920c (2012).

assault of a child, (7) sexual abuse of a child; (8) indecent viewing, visual recording, or broadcasting; (9) forcible pandering; and (10) indecent exposure. Attempts to commit those offenses can be prosecuted under Article 80 of the UCMJ.⁷⁸ Other sex offenses are established by other UCMJ articles, including Article 125's prohibition of forcible sodomy (which is also chargeable under Article 120) and the specified Article 134 offenses of pandering and prostitution.⁷⁹

Article 134 of the UCMJ is the "general article."⁸⁰ It can be violated in one of three ways: (1) engaging in conduct prejudicial to good order and discipline; (2) engaging in conduct of a nature to bring discredit upon the armed forces; and (3) violating a non-capital Federal civilian criminal statute.⁸¹ The President has specified 52 non-exclusive offenses that can be tried under the general article.⁸² Some of them, such as fraternization and breaking restriction, are military-specific offenses.⁸³ Others, such as negligent homicide, kidnapping, and obstructing justice, are common civilian crimes.⁸⁴

Congress delegated to the President the authority to prescribe the maximum sentences for non-capital military offenses.⁸⁵ The maximum punishment for each military offense, including the 52 specified Article 134 offenses, is set out in Part IV of the MCM.

D. Rules of Procedure and Evidence

While the UCMJ provides the military justice system's broad framework, Congress delegated to the President the authority to establish the system's procedural rules and rules of evidence.⁸⁶ In carrying out that responsibility, the President is to adopt rules "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence" used in criminal trials in United States district courts.⁸⁷ Presidents have carried out that authority by promulgating and revising the MCM, which includes, among other provisions, the Rules for Courts-Martial and the Military Rules of Evidence.⁸⁸ To assist in keeping the Manual for Courts-Martial updated, the Department of Defense's Joint Service Committee on Military Justice, which operates under the supervision of the General Counsel of the Department of Defense, conducts an annual review of the MCM, solicits public input, proposes rule changes, and prepares a draft Executive Order, which is published in the Federal Register for public

⁷⁸ *Id.* at art. 80, 10 U.S.C. § 880 (2012).

⁷⁹ *Id.* at art. 125, 10 U.S.C. § 925 (2012); 2012 MCM, *supra* note 15, at Pt. IV, ¶ 97. A specified Article 134 offense is one prescribed by the President in Pt. IV of the MCM as a recognized application of the general article. Such conduct must be either prejudicial to good order and discipline or of a nature to discredit the armed forces. *See infra* notes 80-82 and accompanying text.

⁸⁰ UCMJ art. 134, 10 U.S.C. § 934 (2012).

⁸¹ *Id.*

⁸² 2012 MCM, *supra* note 15, Pt. IV, ¶¶ 60-113.

⁸³ *Id.*, ¶¶ 83, 102.

⁸⁴ *Id.*, ¶¶ 85, 92, 96.

⁸⁵ UCMJ art. 56, 10 U.S.C. § 856 (2012).

⁸⁶ *Id.* at art. 36, 10 U.S.C. § 836 (2012).

⁸⁷ *Id.* at art. 36(a), 10 U.S.C. § 836(c).

⁸⁸ *See generally* 2012 MCM, *supra* note 15.

comment and is the subject of a public hearing.⁸⁹ Once the draft Executive Order is approved within DoD, it is submitted to the President through the Office of Management and Budget.

E. Overlapping Jurisdiction

In most instances, a violation of one of the UCMJ's non-military-specific punitive articles will also constitute a civilian offense that can be prosecuted by one or more civilian jurisdictions. Off-base offenses committed by service members in the United States are generally triable in State court and/or court-martial. On-base offenses committed by service members are generally triable in United States district court or court-martial; in areas of military installations subject to concurrent jurisdiction, trial could also occur in State court. A memorandum of understanding between the Department of Justice and Department of Defense helps to allocate the exercise of jurisdiction between those Departments.⁹⁰ Similar memoranda are often in place between military installation commanders and State and local authorities. Offenses committed by U.S. service members in non-combat situations in foreign countries may often be tried by the host nation, court-martial, or both, though the United States generally attempts to maximize its exercise of jurisdiction in such instances. Offenses committed on military bases overseas also are generally triable in United States district court.⁹¹ Status of forces agreements may preclude host nations from trying U.S. service members and may provide guidance for allocating prosecutorial discretion over cases with overlapping jurisdiction.

III. Major Differences Between Civilian and Military Justice Systems

A lawyer with experience trying criminal cases in United States district court would have little trouble acclimating to litigation in a general or special court-martial. The rules of evidence are nearly identical and the trial procedures are broadly analogous. Nevertheless, important differences do exist between the military justice system and its civilian analogues.

A. Role of the Commander

One of the key differences between the military and civilian criminal justice systems concerns the role of the commander. Military commanders who are designated as court-martial convening authorities exercise prosecutorial discretion, select the court-martial's equivalent of the civilian jury venire (the group of citizens selected for jury duty from which jurors in a particular case are seated), and have limited clemency authority once the case is complete.⁹²

⁸⁹ See generally Exec. Order No. 12473, 49 Fed. Reg. 17,152 (1984) (providing, *inter alia*, that the "Secretary of Defense shall cause [the MCM] to be reviewed annually and shall recommend to the President any appropriate amendments"); DoD Directive 5500.17, Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice (May 3, 2003).

⁹⁰ Memorandum of Understanding between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes (August 1981). See generally DoD Instruction 5525.07, Implementation of the Memorandum of Understanding (MOU) Between the Departments of Justice (DoJ) and Defense Regarding the Investigation and Prosecution of Certain Crimes (June 18, 2007) (reproducing the MOU at Enclosure 2); see also 2012 MCM, *supra* note 15, at Appendix 3.

⁹¹ See generally *United States v. Passaro*, 577 F.3d 207, 212-14 (4th Cir. 2009).

⁹² See generally UCMJ art. 25, 30(b), 60, 10 U.S.C. §§ 825, 830(b), 860 (2012).

B. Unlawful Command Influence

Unlawful command influence is frequently called “the mortal enemy of military justice.”⁹³ Commanders’ pervasive role in the system coupled with the extensive control they exercise over their subordinates in a wide range of contexts not limited to military justice creates the danger that a commander may unfairly influence a case’s outcome, either intentionally or unintentionally. The fair administrative of justice could be imperiled based on the mere perception that the commander desired a particular outcome, even if that perception were mistaken.⁹⁴

Article 37 of the UCMJ prohibits convening authorities and other military members from engaging in unauthorized attempts to influence the findings or sentence of a court-martial.⁹⁵ Article 37 also prohibits taking certain adverse actions against court-martial members (jurors), defense counsel, and military judges as a result of their performance of their duties in the military justice system.⁹⁶ The Court of Appeals for the Armed Forces has developed procedures to evaluate claims that a case has been improperly influenced.⁹⁷ Article 37 and that case law are without counterpart in civilian justice systems.

C. Personnel

There are several differences between the personnel who operate the military justice system and those in civilian justice systems.

The military justice system performs better than many of its civilian counterparts concerning the availability of counsel. A military defense counsel is made available to every service member who is tried by a special or general court-martial without cost to the service member regardless of indigence.⁹⁸ A military appellate defense counsel is also provided without cost to the service member in those cases that qualify for review before a military appellate court and, if applicable, the United States Supreme Court.⁹⁹ While service members may hire civilian counsel to represent them either at a court-martial or on appeal,¹⁰⁰ the universal right to government-provided defense counsel distinguishes the system from its civilian counterparts.

The military justice system also stands apart in providing counsel to the victims in sexual assault cases.¹⁰¹ The Services offer to provide counsel to every victim in a sexual assault case who is statutorily eligible to receive legal assistance.¹⁰² The Services’ Special Victims’

⁹³ See, e.g., *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004).

⁹⁴ See, e.g., *United States v. Ayers*, 54 M.J. 85, 94-95 (C.A.A.F. 2000) (discussing the dangers of even the mere appearance of unlawful command influence).

⁹⁵ UCMJ art. 37(a), 10 U.S.C. § 837(a) (2012).

⁹⁶ *Id.* at art. 37(a), (b), 10 U.S.C. § 837(a), (b).

⁹⁷ See generally *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999).

⁹⁸ UCMJ art. 27(a)(1), 10 U.S.C. § 827(a)(1) (2012).

⁹⁹ UCMJ art. 70, 10 U.S.C. § 870 (2012).

¹⁰⁰ UCMJ art. 38(b)(2), 70(d), 10 U.S.C. § 838(b)(2), 870(d) (2012).

¹⁰¹ This report’s use of the word “victim” includes alleged victims and is not intended to convey any presumptions concerning allegations of criminal offenses. Cf. Fed. R. Evid. 412(d) (“Definition of ‘Victim.’ In this rule, ‘victim’ includes an alleged victim.”).

¹⁰² See generally 10 U.S.C.A. § 1044e (West 2014 supp.).

Counsel/Victims' Legal Counsel organizations appear to collectively form the most extensive victim representation program in the country.

On the other hand, the military justice system's relatively high personnel turnover rate compares unfavorably with that in many civilian criminal justice systems. Military assignments typically last no longer than three years, and the same is generally true of service as a military judge, prosecutor, or defense counsel. While some civilian judges, prosecutors, and public defenders may develop decades of experience in their roles, that is not usually the case within the military justice system.

Another key difference between courts-martial and civilian trials concerns jury selection and its military equivalent. Rather than being randomly selected cross-sections of the community, court-martial panels are comprised of members selected by the convening authority, who is responsible for choosing members "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."¹⁰³

D. Defense Access to Evidence

Congress has provided that an accused and the prosecution generally have an equal right of access to evidence.¹⁰⁴ Military courts have sometimes pointed to that provision, as well as Rule for Courts-Martial 701,¹⁰⁵ as establishing a broader defense discovery right in the military compared to civilian jurisdictions.¹⁰⁶ However, unlike in civilian criminal justice systems, the parties have an unequal ability to subpoena evidence. While the prosecutor is empowered to issue subpoenas, neither the court-martial itself nor the defense counsel may do so.¹⁰⁷ Procedures are in place, however, for a defense counsel to ask the prosecutor to issue a subpoena for evidence the defense seeks and, if the prosecutor refuses, to obtain judicial review of that decision.¹⁰⁸ Congress also recently enacted a provision generally precluding defense counsel from directly approaching the victim of a sex offense, requiring the defense counsel to approach such a victim through the prosecutor.¹⁰⁹

E. Preliminary Hearings

In marked contrast to grand jury proceedings, the defense is permitted to participate in the adversarial Article 32 preliminary hearing, which (unless waived by the defense) is a prerequisite for referring a case to a general court-martial.¹¹⁰ While the scope of Article 32 hearings will be narrowed for offenses that occur on or after December 26, 2014,¹¹¹ the accused

¹⁰³ UCMJ art. 25(d)(2), 10 U.S.C. § 825(d)(2) (2012). These members are subject to voir dire and the military judge must excuse any member who is, or appears to be, biased. *See generally* R.C.M. 912. The prosecution and the defense are each also permitted to exercise one peremptory challenge. UCMJ art. 41(b)(1), 10 U.S.C. § 841(b)(1).

¹⁰⁴ UCMJ art. 46; 10 U.S.C. § 846 (2012).

¹⁰⁵ 2012 MCM, *supra* note 15, at R.C.M. 701.

¹⁰⁶ *See, e.g., United States v. Adens*, 56 M.J. 724, 733 (A. Ct. Crim. App. 2002).

¹⁰⁷ *See* 2012 MCM, *supra* note 15, R.C.M. 703(e)(2)(C).

¹⁰⁸ *See generally id.* at R.C.M. 703(c)(2), (f)(3).

¹⁰⁹ NDAA for FY 2014, Pub. L. No. 113-66, § 1704, 127 Stat. at 958-59 (to be codified at 10 U.S.C. § 846(b)).

¹¹⁰ *See generally* UCMJ art. 32, 10 U.S.C. § 832 (2012).

¹¹¹ *See* NDAA for FY14, Pub. L. No. 113-66, § 1702(a), 127 Stat. at 954 (to be codified at 10 U.S.C. § 832).

will still have the right to present relevant evidence for the preliminary hearing officer's and staff judge advocate's consideration when recommending how the case should be disposed of and for the convening authority's consideration when making that disposition decision.¹¹²

F. Plea bargaining

Like in civilian criminal justice systems, most court-martial cases are resolved through plea bargains. The plea bargaining process is somewhat different, however, in the military context. A plea bargain in the military is between the accused and the convening authority, rather than the prosecutor.¹¹³ The plea bargain typically involves the convening authority's agreement to reduce a sentence to no greater than a certain amount in exchange for the accused's guilty pleas to some or all of the offenses or lesser-included offenses. The sentencing authority (military judge alone or court-martial members), however, will not be informed of the sentence cap to which the convening authority agreed.¹¹⁴ If the sentencing authority adjudges a sentence that is less than that agreed to by the convening authority, the accused will receive that lesser sentence.¹¹⁵ If, on the other hand, the sentencing authority adjudges a sentence greater than that agreed to by the convening authority, the convening authority will reduce the sentence to the agreed-upon cap.¹¹⁶

G. Sentencing

While the guilt/innocence phase of a court-martial looks much like its civilian counterparts, the sentencing proceeding does not. Most significantly, where a military accused exercises his or her right to be tried before a panel of military members (the equivalent of a jury), that panel will also decide the sentence.¹¹⁷ No presentencing report is prepared following a conviction, as is the norm in civilian Federal prosecutions.¹¹⁸ Rather, the sentencing authority – be it a panel of members or a military judge alone – imposes a sentence following an adversarial sentencing hearing at which the prosecution and the defense present evidence.¹¹⁹ That sentencing hearing generally occurs without delay following the members' or military judge's announcement of a conviction.¹²⁰

¹¹² See UCMJ art. 32(d)(2), 10 U.S.C.A. § 832(d)(2) (West Supp. 2014).

¹¹³ See generally 2012 MCM, *supra* note 15, R.C.M. 705(d)(3).

¹¹⁴ See *id.* at R.C.M. 705(e), 910(f)(3).

¹¹⁵ See, e.g., *United States v. Rivera*, 44 M.J. 527, 528 (A.F. Ct. Crim. App. 1996), *aff'd*, 46 M.J. 52 (C.A.A.F. 1997).

¹¹⁶ See 2012 MCM, *supra* note 15, R.C.M. 705(b)(2)(E).

¹¹⁷ Cf. Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 953 n.1 (2003) (“In noncapital felony cases, only five States – Arkansas, Missouri, Oklahoma, Texas, and Virginia—permit juries to make the sentencing decision.”).

¹¹⁸ See 2012 MCM, *supra* note 15, at A21-72 (drafters' analysis to R.C.M. 1001) (noting that “[s]entencing procedures in Federal civilian courts can be followed in courts-martial only to a limited degree. . . . The military does not have – and it is not feasible to create – an independent, judicially supervised probation service to prepare presentence reports.”).

¹¹⁹ *Id.* (noting that at courts-martial, evidence is presented to the sentencing authority “within the protections of an adversarial proceeding, to which rules of evidence apply, although they may be relaxed for some purposes” (internal citation omitted)).

¹²⁰ See Lieutenant Colonel David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as an Authorized Punishment under Rule for Courts-Martial 1003(b)*, 52 NAVAL L. REV. 1, 42 (2005) (“the military usually has its sentencing hearings immediately following the findings”).

Portions of the sentence that may be adjudged in court-martial cases are unique. For example, most UCMJ violations carry the possibility of a punitive discharge (bad-conduct discharge or dishonorable discharge) for an enlisted accused.¹²¹ An officer convicted by a general court-martial of any offense may be sentenced to a dismissal, which is considered the equivalent of a dishonorable discharge for officers.¹²² A punitive discharge stigmatizes an accused and can result in loss of veteran benefits.¹²³ Other unique aspects of court-martial sentences include reprimands, forfeiture of pay and allowances, reduction in pay grade for enlisted members, and restriction to specified limits.¹²⁴

H. Post-trial Review

In civilian justice systems, judicial appellate review of criminal convictions is generally available, though such appellate review is often waived pursuant to a plea bargain.¹²⁵

The military's post-trial review system differs significantly from the civilian model. First, there is an initial level of review by the convening authority with no true counterpart in civilian practice. While the convening authority's power to modify a court-martial conviction and sentence was sharply reduced by the NDAA for FY14,¹²⁶ military commanders retain the discretion to set aside convictions for certain minor offenses as well as to grant clemency concerning some portions of court-martial sentences,¹²⁷ a power that can be exercised to correct legal errors, to promote efficiency, to bestow mercy, or on equitable grounds.

Following the convening authority's action, the rules governing access to the military judicial appellate system and the review provided by that system differ substantially from the civilian norm – sometimes to the accused's advantage and sometimes to his or her disadvantage.

Not all military justice cases qualify for judicial appellate review. Generally, a military accused may appeal a conviction to a court only if the sentence includes death, a punitive discharge, or a year or more of confinement.¹²⁸ The Judge Advocates General have the authority to refer cases that do not meet that threshold to the relevant Court of Criminal Appeals for appellate review,¹²⁹ but in practice such referrals are rare. While a judge advocate will review cases that do not qualify for appellate review,¹³⁰ some military accused are disadvantaged compared to their civilian counterparts by being deprived of any opportunity for a direct appeal

¹²¹ See generally 2012 MCM, *supra* note 15, at Pt. IV; see also *id.* at R.C.M. 1003(b)(8)(B), (C).

¹²² See generally *id.* at R.C.M. 1003(b)(8)(A).

¹²³ See, e.g., *United States v. Altier*, 71 M.J. 427, 428 (C.A.A.F. 2012) (“A punitive discharge adds to the stigma of a federal conviction and severely limits the opportunity of the former servicemember to receive important benefits, such as those administered by the Department of Veterans Affairs.”).

¹²⁴ See generally 2012 MCM, *supra* note 15, at R.C.M. 1003(b)(1), (2), (4), (5).

¹²⁵ See, e.g., Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209 (2005) (surveying a random sample of Federal criminal cases from Fiscal Year 2003 and finding that two-thirds included an appeal waiver).

¹²⁶ NDAA for FY14, Pub. L. No. 113-66, § 1702(a), 127 Stat. at 954.

¹²⁷ See generally UCMJ art. 60, 10 U.S.C.A. § 860 (West Supp. 2014).

¹²⁸ UCMJ art. 66(c), 10 U.S.C. § 866(c) (2012).

¹²⁹ UCMJ art. 69(d), 10 U.S.C. § 869(d) (2012).

¹³⁰ UCMJ art. 64, 69; 10 U.S.C. §§ 864, 869 (2012).

to a court. On the other hand, unlike defendants in the Federal civilian criminal justice system, a military accused cannot waive appellate review as part of a plea bargain,¹³¹ resulting in widespread appeals of military guilty plea cases.

The review provided by the military justice system's intermediate appellate courts also departs from the civilian model. The military Courts of Criminal Appeals exercise two powers that are unavailable in most civilian appellate courts. First, the Courts of Criminal Appeals have an independent duty to review the record in each case qualifying for automatic appellate review to determine whether the findings of guilty are factually correct.¹³² Applying that factual sufficiency review power, the Courts of Criminal Appeals will reverse some findings of guilty that would be affirmed under the more easily satisfied legal sufficiency standard that most appellate courts apply.¹³³ Second, the Courts of Criminal Appeals perform a *de novo* review of the appropriateness of the sentence approved by the convening authority.¹³⁴ The Court of Criminal Appeals must set aside any portion of the approved sentence that it determines to be inappropriately severe; it may not increase the sentence.¹³⁵

Finally, unlike their civilian counterparts, some military accused may not seek Supreme Court review of appellate decisions in their case. The Supreme Court's statutory certiorari jurisdiction over military appellate decisions, which has existed only since 1984,¹³⁶ does not reach most cases that enter the military appellate system.¹³⁷ The Supreme Court may review only four categories of cases: (1) cases falling within the Court of Appeals for the Armed Forces' mandatory jurisdiction where the Court of Criminal Appeals affirmed a death sentence; (2) cases which one of the four Judge Advocates General sends (or "certifies") to the Court of Appeals for the Armed Forces for review of the Court of Criminal Appeals' decision; (3) cases in which the Court of Appeals for the Armed Forces exercises its discretionary jurisdiction by granting an accused's petition for review; and (4) extraordinary writ cases in which the Court of Appeals for the Armed Forces grants relief, such as by issuing a writ of habeas corpus directing a service member's release from custody or a writ of mandamus directing some government official to perform a specified act.¹³⁸ The Supreme Court's certiorari jurisdiction does not extend to the vast majority of cases docketed with the Court of Appeals for the Armed Forces in which the court denies the service member's petition for review.¹³⁹ By contrast, Supreme Court certiorari jurisdiction exists for all Federal court criminal defendants who appeal their cases¹⁴⁰ as well as for State court criminal defendants regardless of whether a State appellate court denied discretionary review of the case.¹⁴¹ If a direct appeal to a higher State court is not authorized for a particular State conviction, certiorari is also available.

¹³¹ 2012 MCM, *supra* note 15, R.C.M. 705(c)(1)(B).

¹³² UCMJ art. 66(c), 10 U.S.C. § 866(c) (2012).

¹³³ *See generally United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

¹³⁴ UCMJ art. 66(c), 10 U.S.C. § 866(c) (2012).

¹³⁵ *Id.*

¹³⁶ Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (effective August 1, 1984).

¹³⁷ *See generally* UCMJ art. 67a, 10 U.S.C. § 867a (2012); 28 U.S.C. § 1259 (2012).

¹³⁸ 28 U.S.C. § 1259 (2012).

¹³⁹ UCMJ art. 67a(a), 10 U.S.C. § 867a(a) (2012).

¹⁴⁰ *See* 28 U.S.C. § 1254 (2012).

¹⁴¹ *See generally* 28 U.S.C. § 1257 (2012).

IV. Major Reforms to the Military Justice System Since April 2012

The military justice system has evolved substantially and rapidly since April 2012. The discretion of convening authorities is far more constrained today than three years ago while victims have far greater rights. Perhaps the most significant change has been the creation of a victim representation program that has enhanced victims' ability to participate meaningfully in the military justice system while protecting their privacy interests.

A. Investigations

In 2013, DoD policy was revised to clarify that all unrestricted reports of sexual assault, non-consensual sodomy, and attempts to commit those offenses with adult victims must be referred to a Military Criminal Investigative Organization (MCIO).¹⁴² The MCIOs – the U.S. Army Criminal Investigation Command, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations – are professional law enforcement agencies independent of military commanders.¹⁴³ The MCIOs are required to “initiate investigations of all offenses of adult sexual assault of which they become aware . . . that occur within their jurisdiction regardless of the severity of the allegation.”¹⁴⁴ Command-directed investigations of sexual assaults are expressly prohibited.¹⁴⁵ Thus, commanders may neither investigate such offenses themselves nor order their subordinates to conduct such investigations.

B. Preliminary Hearings

Title XVII of the NDAA for Fiscal Year 2014, enacted on December 26, 2013, included major reforms of the military justice system.¹⁴⁶ Those reforms included a substantial overhaul of the Article 32 pretrial investigation¹⁴⁷ that, unless waived by the accused, must precede a general court-martial. The Article 32 reforms, which will apply to offenses committed on or after December 26, 2014, include:

¹⁴² DoD Instruction 5505.18, Investigation of Adult Sexual Assault in the Department of Defense, ¶ 4.b.(2) (January 25, 2013, amended May 1, 2013) (requiring the Office of the Secretary of Defense and DoD Component Heads to ensure that Component commanders “at all levels immediately report to the appropriate MCIO all adult sexual assault allegations of which they become aware involving persons affiliated with the DoD, including active duty personnel and their dependents, DoD contractors, and DoD civilian employees.”); DoD Instruction 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures, Enclosure 2 at ¶ 6.i.(3) (“A unit commander who receives an Unrestricted Report of an incident of sexual assault shall immediately refer the matter to the appropriate MCIO.”); *see also* NDAA for FY14, Pub. L. No. 113-66, § 1742, 127 Stat. at 979 (requiring a “commanding officer who receives a report of a sex-related offense involving a member of the Armed Forces in the chain of command of such officer” to immediately refer the report to the appropriate MCIO).

¹⁴³ *See generally* DoDI 5505.03, Initiation of Investigations by Defense Criminal Investigative Organizations (March 24, 2011).

¹⁴⁴ DoD Instruction 5505.18, Investigation of Adult Sexual Assault in the Department of Defense, ¶ 3.a (January 25, 2013, amended May 1, 2013).

¹⁴⁵ DoD Instruction 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures, Enclosure 2 at ¶ 6.i.(3) (“A unit commander shall not conduct internal command directed investigations on sexual assault (i.e., no referrals to appointed command investigators or inquiry officers) or delay immediately contacting the MCIOs while attempting to assess the credibility of the report.”).

¹⁴⁶ NDAA for FY14, Pub. L. No. 113-66, tit. XVII, §§ 1701-1753, 127 Stat. at 950-85.

¹⁴⁷ *Id.* at § 1702(a), 127 Stat. at 954.

1. Giving military victims the right to decline to testify at the Article 32 preliminary hearing, a right already enjoyed by civilian witnesses.

2. Narrowing the scope of Article 32 preliminary hearings. The purpose of the preliminary hearing will be limited to determining whether probable cause exists to believe that the accused committed the charged offense, and developing information to aid the convening authority in exercising prosecutorial discretion over the case. Before the amendment, defense counsel commonly used Article 32 hearings to gather evidence by calling witnesses whom they would question about a broad range of topics; such defense discovery will no longer be an authorized purpose of an Article 32 hearing.

3. Requiring, with certain narrow exceptions, that the preliminary hearing officer be a judge advocate and be equal to or senior in grade compared to the detailed government and defense counsel. The Secretary of Defense has directed that in sexual assault cases, the Article 32 preliminary hearing officer will, without exception, be a judge advocate.¹⁴⁸

4. Requiring that Article 32 preliminary hearings be audio recorded and guaranteeing the victim an opportunity to review the recording.

The President further protected victims' privacy interests by requiring that the same procedures, including the use of closed hearings and sealing of records, that protect victims' privacy interests when rape shield, psychotherapist-patient privilege, and victim advocate-victim issues are litigated at courts-martial be used at Article 32 hearings.¹⁴⁹

C. Disposition of Sexual Assault Allegations

The authority to dispose of allegations of penetrative sexual assaults and attempts to commit such assaults has been limited to senior levels of command,¹⁵⁰ trial of such cases has been limited to general courts-martial,¹⁵¹ and general court-martial convening authorities' decisions not to refer such cases for trial must be reviewed by higher-level officials.¹⁵²

1. On April 20, 2012, the Secretary of Defense required that all allegations of penetrative sexual assaults be forwarded to a commander in the grade of O-6 (colonel or Navy captain) or higher who is authorized to convene a special court-martial, who must consult with a judge advocate before deciding what action to take. No lower-ranking officer can dismiss or otherwise dispose of charges in such cases.

¹⁴⁸ Secretary of Defense Chuck Hagel, Memorandum: Sexual Assault Prevention and Response (August 14, 2013), available at http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf.

¹⁴⁹ Exec. Order No. 13,669, 79 Fed. Reg. 34,999 (June 13, 2014).

¹⁵⁰ Secretary of Defense Leon Panetta, Memorandum: Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr 20, 2012).

¹⁵¹ NDAA for FY14, Pub. L. No. 113-66, § 1705(b), 127 Stat. at 959-60.

¹⁵² *Id.* at § 1744, 127 Stat. at 980-81.

2. Congress further constrained convening authorities' discretion in such cases by providing that "only general courts-martial have jurisdiction over" charges alleging rape, sexual assault, forcible sodomy, or attempts to commit those offenses.¹⁵³

3. General court-martial convening authorities' decisions not to refer sexual assault charges to court-martial are subject to higher-level review, including by the Service Secretary if the convening authority declines to order a court-martial where his or her staff judge advocate has recommended such referral.¹⁵⁴

D. Special Victim Investigation and Prosecution Capability

In accordance with the requirements of the NDAA for Fiscal Year 2013,¹⁵⁵ each Military Department has developed a comprehensive integrated approach to the investigation and trial of sexual assault cases, relying on collaboration among specially trained investigators, prosecutors, and victim-witness assistants.¹⁵⁶ This approach has enhanced the military's ability to investigate and prosecute sexual assault cases. The Services have also instituted programs – including hiring civilian experts to train and advise military prosecutors – that have further improved their skill in litigating sexual assault cases.

E. Substantive Law

On June 28, 2012, a new version of the military's rape and sexual assault statutes took effect.¹⁵⁷ This new statute cured the constitutional infirmity with the previous version of the sexual assault statute,¹⁵⁸ simplified the theories of criminal liability for military sexual assault offenses, and created additional sex offenses, including voyeurism and video voyeurism. The new statute has thus far withstood constitutional challenge.¹⁵⁹

F. Statute of Limitations

Congress eliminated the statute of limitations for sexual assaults and sexual assaults of a child that occur on or after December 26, 2013.¹⁶⁰ (Rape and rape of a child already had no statute of limitations.)

¹⁵³ *Id.* at § 1705(b), 127 Stat. at 959-60.

¹⁵⁴ *Id.* at § 1744, 127 Stat. at 980-81.

¹⁵⁵ NDAA for FY13, Pub. L. No. 112-239, § 573, 126 Stat. 1632, 1755-56 (2013).

¹⁵⁶ *See generally* Inspector General Department of Defense, Directive-type Memorandum 14-002, The Establishment of Special Victim Capability (SVC) Within the Military Criminal Investigative Organizations (February 11, 2014); Under Secretary of Defense for Personnel and Readiness, Directive-type Memorandum 14-003, DoD Implementation of Special Victim Capability (SVC) Prosecution and Legal Support (February 12, 2014).

¹⁵⁷ *See* NDAA for FY12, Pub. L. No. 112-81, § 541, 125 Stat. 1298, 1404 (2011).

¹⁵⁸ *See generally United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011).

¹⁵⁹ *See United States v. Torres*, No. NMCCA 201300396, 2014 WL 4348266, at *8-*9 (N-M. Ct. Crim. App. Aug. 28, 2014) (rejecting as-applied vagueness challenge to Article 120(b)(3)), *petition filed*, __ M.J. __ (C.A.A.F. Oct. 27, 2014) (mem.).

¹⁶⁰ NDAA for FY14, Pub. L. No. 113-66, § 1703, 127 Stat. at 958.

G. Enhanced Rights for Victims

The President, the Secretary of Defense, and Congress have substantially enhanced victims' rights in the military justice system. The most important of these changes is the creation of the Services' Special Victims' Counsel/Victims' Legal Counsel programs.

1. Following a successful pilot program by the Air Force, in 2013 the Secretary of Defense directed the Services to implement programs to provide legal counsel to sexual assault victims.¹⁶¹ Congress subsequently codified the program, which applies to victims who are authorized to receive legal assistance (generally service members on active duty and their family members, retirees, and DoD employees outside the United States).¹⁶² Congress also expanded the scope of the program to include both adult and child sexual assault victims, as well as victims of certain other offenses including stalking, voyeurism, forcible pandering, and indecent exposure.¹⁶³ Victims' legal counsel have the right to participate in court-martial hearings concerning rape shield evidence and certain evidentiary privileges and to seek relief from military appellate courts where the victim disagrees with the trial judge's rulings on those matters.¹⁶⁴

2. The NDAA for FY14 included a military crime victims' rights statute modeled after its Federal civilian counterpart.¹⁶⁵ It provides victims the right to notice of public hearings related to a case as well as notice of the accused's release or escape. Victims are also given the right to be reasonably heard at the accused's pretrial confinement hearing, sentencing hearing, and clemency and parole hearing.

3. The NDAA for FY14 generally precluded defense counsel from directly approaching victims of alleged sexual offenses; contact must instead be initiated through the prosecutor.¹⁶⁶

4. The NDAA for FY14 gave victims the right to make a submission to the convening authority before the post-trial action in the accused's case.¹⁶⁷ It also precluded the convening authority from considering information about the victim's character that was not admitted at trial.¹⁶⁸ The President revised the MCM on June 13, 2014 to implement these requirements.¹⁶⁹

¹⁶¹ Secretary of Defense Chuck Hagel, Memorandum: Sexual Assault Prevention and Response (August 14, 2013), available at http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf.

¹⁶² NDAA for FY14, Pub. L. No. 113-66, § 1716, 127 Stat. at 966-69 (to be codified at 10 U.S.C. § 1044e).

¹⁶³ *Id.* (to be codified at 10 U.S.C. § 1044e(g)).

¹⁶⁴ See generally *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013).

¹⁶⁵ NDAA for FY14, Pub. L. No. 113-66, § 1701, 127 Stat. at 952-54 (to be codified at 10 U.S.C. § 806b); cf. 18 U.S.C. § 3771 (2012).

¹⁶⁶ NDAA for FY14, Pub. L. No. 113-66, § 1704, 127 Stat. at 958-59.

¹⁶⁷ *Id.* at § 1706(a), 127 Stat. at 960-61.

¹⁶⁸ *Id.* at § 1706(b), 127 Stat. at 961.

¹⁶⁹ Exec. Order No. 13,669, 79 Fed. Reg. 34,999 (June 13, 2014) (codified at R.C.M. 1105A).

H. Mandatory Punitive Discharges

The NDAA for FY14 required that a service member convicted of rape, sexual assault, forcible sodomy, or an attempt to commit one of those offenses receive a sentence that includes a dishonorable discharge for an enlisted accused or a dismissal for an officer accused.¹⁷⁰

I. Limited Post-trial Discretion

The NDAA for FY14 limited convening authorities' post-trial power to overturn convictions to certain minor offenses and sharply constrained their post-trial power to reduce sentences other than to carry out a plea bargain.¹⁷¹

As a result of these reforms, the military is better able to investigate and prosecute sexual assault offenses in a professional and consistent manner with appropriate regard for the rights and interests of crime victims.

V. Case Flow

The major military justice milestones that occur following the report of a penetrative sexual assault, or an attempt to commit such an assault, are set out below.¹⁷² These milestones are based on an alleged offense occurring after all of the NDAA for FY14's provisions have taken effect. This discussion is limited to the military justice aspects of the response to such a report; medical, therapeutic, and other services that would be provided to the victim are discussed in other sections of this report.

Report of sexual assault: A service member who reports a sexual assault, either on a restricted or unrestricted basis, will be advised that she or she is eligible to be represented by a lawyer known as a Special Victims' Counsel (SVC) (or a Victims' Legal Counsel (VLC), as those lawyers are called in the Navy and Marine Corps). If the report is unrestricted, it must be forwarded to the relevant Service's Military Criminal Investigative Organization (MCIO). As part of the Services' Special Victim Investigation and Prosecution (SVIP) Capabilities, each of the MCIOs has a cadre of specially trained investigators available for assignment to such cases.

Initiation of the SVIP Capability: Within 24 hours of receiving the report of a sexual assault offense, the MCIO's assigned investigator will notify a specially trained SVIP prosecutor. Within 48 hours, the MCIO's assigned investigator will consult with the assigned prosecutor. Further consultation will occur on at least a monthly basis and may include specially trained paralegals and victim witness assistance personnel.

¹⁷⁰ *Id.* at § 1705, 127 Stat. at 959-60.

¹⁷¹ *Id.* at § 1702(b), 127 Stat. at 955.

¹⁷² Charges for non-penetrative sexual offenses, including the Article 120 offenses of aggravated sexual contact and abusive sexual contact, can be and sometimes are tried by courts-martial. However, some unique rules govern the response to the penetrative offenses of rape, sexual assault, and forcible sodomy, as well as attempts to commit those offenses. This description of case flow sets out the rules that apply to penetrative sexual assaults.

Pretrial confinement review: If the accused is ordered into pretrial confinement, the victim will be notified of any public hearing concerning the continuation of pretrial confinement and has the right to be heard at that hearing.

Possible reassignment of either the victim or the accused: Following an unrestricted report of a sexual assault, the victim can request reassignment; the command can also reassign the accused to a different military installation or to a different location within the same installation on a permanent or a temporary basis.

Limitation on defense counsel initiating an interview with the victim: Under the ethical rules that govern the practice of law in each Service, if the victim is represented by a legal counsel, including an SVC or VLC, the defense counsel may not directly contact the victim. Additionally, once the trial counsel notifies the defense counsel of the intention to call the victim as a witness at either an Article 32 hearing or court-martial, the defense counsel shall make any request to interview the victim through the trial counsel.

Elevated case disposition: The MCIO's report of investigation will be forwarded to an initial disposition authority (IDA), who is an officer in the grade of at least O-6 (colonel or Navy captain) who is authorized to convene a special court-martial, for a review and disposition decision. Before deciding how to proceed, the IDA must consult with a judge advocate.

Article 32 preliminary hearing: The IDA may choose to order an Article 32 preliminary hearing in the case. A judge advocate will be detailed to preside over the hearing and prepare a report. The victim will be notified of the hearing and be given the right to attend, subject to exclusion upon a finding by the preliminary hearing officer that the victim's testimony would be materially altered by hearing other testimony at the proceeding. The victim, however, cannot be compelled to testify at the Article 32 preliminary hearing.

Referral decision: The Article 32 preliminary hearing officer will prepare a report that will be provided to the IDA. If the IDA concludes that the case should be tried by a court-martial, the IDA will forward the preliminary hearing officer's report to a general court-martial convening authority, who is almost invariably a military commander in the grade of brigadier general or rear admiral (lower half) or higher. The general court-martial convening authority's staff judge advocate will prepare a recommendation. The general court-martial convening authority will then decide whether to refer the case to a general court-martial, the only level of court-martial authorized to try a charge of a penetrative sexual assault or an attempt to commit such an assault. If the general court-martial convening authority decides not to refer the case for trial, that decision will be reviewed. If the staff judge advocate recommended against referral, then a non-referral decision will be reviewed by the next superior in the chain of command authorized to convene a general court-martial. If the staff judge advocate recommended that charges be referred, then a non-referral decision will be reviewed by the Secretary of the Military Department.

Rape shield or evidentiary privilege hearing: If the defense seeks to admit evidence of the victim's prior sexual conduct, the military judge will order a closed hearing at which the victim has a right to attend and be heard through counsel. The record of that hearing will be sealed.

Similarly, if the defense seeks to obtain or introduce into evidence any of the victim's statements covered by the psychotherapist-patient privilege or the victim advocate-victim privilege, the victim will be notified, given the right to attend a hearing, and be allowed to be heard through counsel. The record of that hearing will also be sealed.

Trial: The victim will be notified of the trial. The victim has the right to attend any trial session, subject to exclusion upon a finding by the military judge that his or her testimony would be materially altered by hearing other testimony at the proceeding.

Sentencing: If the accused is convicted, the victim has the right to be heard at a sentencing hearing. If the accused is convicted of a penetrative sexual assault offense, the sentence must include a dishonorable discharge in the case of an enlisted member or a dismissal in the case of an officer. If the accused is sentenced to confinement, that punishment will begin immediately.

Post-trial review: If the case results in a conviction, it will be forwarded to the convening authority for action. Before the convening authority acts, both the accused and the victim may provide input, but the convening authority may not consider any information about the victim's character that was not admitted into evidence at trial. The convening authority's staff judge advocate will also provide a recommendation. The convening authority may not set aside a finding of guilty for any sexual assault offense. The convening authority must act on the sentence but may not set aside or reduce a punitive discharge (a bad-conduct or dishonorable discharge in the case of an enlisted accused or a dismissal in the case of an officer) or a sentence to confinement for more than six months imposed on any accused unless required to do so pursuant to a plea bargain or upon the recommendation of a prosecutor in recognition of substantial assistance by the accused in the investigation or prosecution of another person. No plea bargain can result in setting aside a dismissal for an officer convicted of a penetrative sexual assault; a plea bargain can provide for reducing a mandatory dishonorable discharge for an enlisted accused to a bad-conduct discharge, but may not result in an enlisted accused receiving no punitive discharge.

VI. Further Reforms

While substantial reforms to the military justice system have been implemented over the past three years, DoD believes that further improvements to the military justice system are necessary.

Reforming the military justice system is a continuous process. Current reform efforts include draft Executive Orders prepared by DoD and potential UCMJ amendments included in the respective congressional Houses' National Defense Authorization Acts for Fiscal Year 2015. Additional reform will result from DoD's consideration of the report of the Response Systems to Adult Sexual Assault Crimes Panel (RSP). The ongoing work of another Federal Advisory Committee – the Judicial Proceedings Panel – will likely result in further reforms, as will the upcoming report of the Military Justice Review Group, which was established by the Secretary of Defense to perform a comprehensive review of the military justice system.

A. Draft Executive Orders

On August 18, 2014, the Department of Defense forwarded to the Office of Management and Budget a draft Executive Order amending the MCM. This draft Executive Order proposes further improvements to rules governing sexual assault trials in the military justice system. In addition to proposing a broad range of more general rule changes, the draft Executive Order includes several provisions directly related to the prosecution of sexual assault offenses:

1. Implementing regulations for the NDAA for FY12's amendments to Article 120 and enactment of Articles 120b and 120c, including providing elements of and model specifications for various offenses under those articles.
2. Implementing regulations for the NDAA for FY14's enactment of mandatory punitive discharges for penetrative sexual assaults and attempts to commit such assaults.
3. Implementing regulations for the NDAA for FY14's provisions generally prohibiting defense counsel from contacting victims of sex-related offenses except through the prosecutor.
4. Establishment of an indecent conduct offense under Article 134, covering acts such as showing sexually explicit images to a minor via Skype. Unlike the earlier offense of indecent acts with another, the proposed indecent conduct offense does not require the presence of another person.

On October 3, 2014, the Department of Defense published another draft Executive Order in the Federal Register.¹⁷³ That draft Executive Order, which is currently in the public comment phase, also proposes a broad-range of MCM amendments, including the following provisions directly related to the prosecution of sexual assault offenses:

1. Implementing regulations for the NDAA for FY14's limitation of jurisdiction to try penetrative sexual assault offenses, and attempts to commit such offenses, to general courts-martial.
2. Implementing regulations for the NDAA for FY14's establishment of the victim's right to notice of, and to be heard at, hearings concerning the accused's continuation in pretrial confinement and the victim's right to notice of an accused's release or escape from pretrial confinement.
3. Implementing regulations for the NDAA for FY14's recasting of Article 32 investigations into preliminary hearings and reflecting the victim's general right to be present and right not to testify at such proceedings.
4. Elimination, for purposes of Article 32 preliminary hearings, of the exception to the rape shield rule and the psychotherapist-patient and victim

¹⁷³ Manual for Courts-Martial; Proposed Amendments, 79 Fed. Reg. 59938 (Oct. 3, 2014).

advocate-victim privileges for evidence the exclusion of which would violate the constitutional rights of the accused; elimination of the exception at the Article 32 stage is permissible because the accused does not have a constitutional right to confrontation or to present a defense at that forum.

5. Implementing regulations for the NDAA for FY14's provision requiring a military judge to appoint a legal guardian to exercise the rights within the military justice system of a juvenile or incompetent victim.

6. Codification of case law holding that a victim has the right to be heard through counsel at hearings concerning the admissibility of rape shield evidence, psychotherapist-patient communications, and victim advocate-victim communications.

7. Expansion of the victim advocate-victim privilege to cover communications with staff of the DoD Safe Helpline.

8. Implementing regulations for the NDAA for FY14's establishment of the right of a victim to be present at court-martial proceedings unless the military judge determines by clear and convincing evidence that the victim's testimony would be materially altered by hearing other testimony in the case.

9. Implementing regulations for the NDAA for FY14's provision giving the victim a right to be heard at sentencing proceedings.

10. Increase in the maximum authorized confinement for maltreatment of a subordinate from one year to two years.

11. Implementing regulations for the NDAA for FY14's limitations on convening authorities' discretion to modify a court-martial's findings or sentence.

B. Pending Legislation

Both the version of the National Defense Authorization Act for Fiscal Year 2015 passed by the House of Representatives – H.R. 4435¹⁷⁴ – and that reported by the Senate Armed Services Committee but not yet considered on the Senate floor – S. 2410¹⁷⁵ – contain provisions that would further reform the military justice system.

¹⁷⁴ Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 4435, 113th Cong. (2014) [hereinafter H.R. 4435].

¹⁷⁵ Carl Levin National Defense Authorization Act for Fiscal Year 2015, S. 2410, 113th Cong. (2014) [hereinafter S. 2410].

1. H.R. 4435

The House-passed¹⁷⁶ Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 includes the following provisions relevant to sexual assault prosecutions:

(a) Convening authority-victim consultation: A requirement that convening authorities consult with victims of sexual assaults in the United States to determine the victim’s preference as to whether the offense should be prosecuted by the military or by a civilian jurisdiction.¹⁷⁷ The bill would also require that where the victim is represented by an SVC or VLC, the SVC or VLC advise the victim concerning the relative advantages and disadvantages of prosecution by civilian and military authorities.¹⁷⁸

(b) Enforcement of crime victims’ rights: A provision allowing victims to challenge military trial judges’ rulings on rape shield and psychotherapist-patient issues by filing a petition for extraordinary relief with a Court of Criminal Appeals, which would be required to rule on the petition within 72 hours.¹⁷⁹

(c) Mandatory minimum confinement: Establishment of a mandatory minimum period of confinement of two years, in addition to the current mandatory dishonorable discharge or dismissal, for convictions of penetrative sexual assaults or attempts to commit such assaults.¹⁸⁰

(d) Good military character evidence: A requirement to limit the admissibility of good military character offenses to military-specific offenses.¹⁸¹

(e) Psychotherapist-patient privilege: A requirement to eliminate the exception to the psychotherapist-patient privilege that applies when admission or disclosure of a communication is constitutionally required; the constitutionally required exception would “be deemed to no longer apply or exist as a matter of law.”¹⁸²

2. S. 2410

The Carl Levin National Defense Authorization Act for Fiscal Year 2015, which has been favorably reported by the Senate Armed Services Committee¹⁸³ but not yet considered on the Senate floor, includes the following provisions relevant to sexual assault prosecutions:

¹⁷⁶ 160 CONG. REC. H4812 (daily ed. May 22, 2014) (recording passage of H.R. 4435).

¹⁷⁷ H.R. 4435, *supra* note 174, at § 534(b).

¹⁷⁸ *Id.* at § 534(a).

¹⁷⁹ *Id.* at § 535.

¹⁸⁰ *Id.* at § 536.

¹⁸¹ *Id.* at § 537.

¹⁸² *Id.* at § 539.

¹⁸³ S. REP. NO. 113-176 (2014).

(a) Depositions: A limitation on the purposes for which depositions, at which witnesses are questioned out of court but on the record to preserve their testimony for later use at an Article 32 hearing or trial, may be ordered.¹⁸⁴

(b) Psychotherapist-patient privilege: A requirement to clarify or eliminate the exception to the psychotherapist-patient privilege that applies when admission or disclosure of a communication is constitutionally required; the bill would also establish a legal threshold that must be met before a military judge will order an *in camera* review of a record of a psychotherapist-patient communication.¹⁸⁵

(c) Victim's right to be heard through counsel: A requirement that the MCM be amended to provide that where a victim has the right to be heard, the victim may be heard through counsel.¹⁸⁶

(d) Notice of scheduling of proceedings to victim's counsel: A requirement that the Secretaries of the Military Departments establish policies to ensure that counsel representing a victim, including SVCs and VLCs, are provided prompt notice of the scheduling of any hearing, trial, or other proceeding in the case.¹⁸⁷

(e) Eligibility of members of the Reserve Component for assistance by SVCs and VLCs: An expansion of those authorized to receive SVC and VLC services to include members of the Reserve and National Guard who are not eligible to receive legal assistance.¹⁸⁸

(f) Convening authority-victim consultation: A requirement that convening authorities consult with victims of sexual assaults in the United States to determine the victim's preference as to whether the offense is prosecuted by the military or by a civilian jurisdiction.¹⁸⁹ The bill would also require that where the victim is represented by an SVC or VLC, the SVC or VLC advise the victim concerning the relative advantages and disadvantages of prosecution by civilian and military authorities.¹⁹⁰

(g) Good military character evidence: A requirement to limit the admissibility of good military character offenses to military-specific offenses.¹⁹¹

¹⁸⁴ S. 2410, *supra* note 175, at § 541, as reported by the Senate Armed Services Committee.

¹⁸⁵ *Id.* at § 542.

¹⁸⁶ *Id.* at § 543(a).

¹⁸⁷ *Id.* at § 543(b).

¹⁸⁸ *Id.* at § 544.

¹⁸⁹ *Id.* at § 545(b).

¹⁹⁰ *Id.* at § 545(a).

¹⁹¹ *Id.* at § 545(g).

(h) Review of non-referral decisions: A requirement that the Secretary of the Military Department review a general court-martial convening authority's decision not to refer a sex-related case for trial by court-martial where the Service's chief prosecutor (or another judge advocate designated for this purpose) requests review of the non-referral decision.¹⁹²

(i) Capturing and preserving some information from restricted reports: A requirement that the Department of Defense preserve in a database information from both restricted and unrestricted reports concerning the alleged assailant and the offense.¹⁹³

(j) Federal Advisory Committee: The establishment of a Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, to be appointed by the President, to study a random sample of cases involving rape, forcible sodomy, sexual assault, and other sexual misconduct in the military and provide advice to the Secretary of Defense concerning the cases' investigation, prosecution, and defense.¹⁹⁴

(k) Collaboration between the Department of Justice and DoD: A requirement for the Secretary of Defense and the Attorney General to jointly develop a strategy for ongoing collaboration between DoD and the Department of Justice to prevent and respond to sexual assault, including the handling of cases with overlapping jurisdiction and determining whether the Department of Justice should designate an advisor on military sexual assaults, with representatives at military installations, to provide investigative and prosecutorial assistance to DoD.¹⁹⁵

C. Federal Advisory Committees

1. Response Systems to Adult Sexual Assault Crimes Panel (RSP)

On June 27, 2014, the congressionally mandated RSP issued its report, based on its year-long evaluation of the military justice system, on how to improve the effectiveness of the military's investigation and prosecution of sexual assault cases.¹⁹⁶ The RSP's report included 132 recommendations.

¹⁹² *Id.* at § 546.

¹⁹³ *Id.* at § 548.

¹⁹⁴ *Id.* at § 552.

¹⁹⁵ *Id.* at § 553.

¹⁹⁶ Report of the Response Systems to Adult Sexual Assault Crimes Panel through the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives, June 27, 2014 [hereinafter RSP Report]. The 313-page RSP Report is available at:

http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/00_Report_Final_20140627.pdf. The report's Annexes are available at:

http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/01_Annex_Final_Web.pdf.

The RSP's recommendations addressed seven major areas:

- (a) Measuring the scope of sexual assault in the military and civilian communities.
- (b) Assessing the role of the commander, including the commander's responsibility and accountability for sexual assault prevention and the commander's role as the convening authority.
- (c) Strengthening the SVC program and victims' rights, support, and services.
- (d) Ensuring fairness and due process to those suspected or accused of sexual assault.
- (e) Improving military justice procedures.
- (f) Sustaining and adequately funding promising DoD programs and initiatives.
- (g) Conducting independent audits and assessments.

DoD is currently reviewing each of the RSP's 132 recommendations and will implement those that the Secretary of Defense approves. This will produce further reform of the military justice system.

2. Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP)

The NDAA for FY13 created the JPP to conduct a further review following the RSP's report.¹⁹⁷ The JPP is tasked with studying military judicial proceedings for sexual assault offenses since Congress's 2011 amendments to Article 120 and enactment of Articles 120b and 120c took effect. The JPP will study 11 principal issues:¹⁹⁸

- (a) The impact of the 2011 amendments to Article 120.
- (b) The number of courts-martial, nonjudicial punishments, and administrative discharges for sex-related offenses and the appropriateness of disposition decisions.
- (c) Court-martial sentences for sex-related offenses, including an evaluation of their consistency and a comparison with sentences in Federal and State courts.

¹⁹⁷ NDAA for FY13, Pub. L. No. 112-239, § 576, 126 Stat. 1632, 1758 (2013).

¹⁹⁸ The JPP's duties are prescribed by the NDAA for FY13, Pub. L. No. 112-239, § 576, 126 Stat. at 1761, and the NDAA for FY14, Pub. L. No. 113-66, § 1731(b)(1), 127 Stat. at 974-75.

- (d) Appellate review of military sexual assault convictions.
- (e) Use of evidence of the victim's prior sexual conduct at both Article 32 hearings and courts-martial.
- (f) Training and experience of military prosecutors and defense counsel.
- (g) The Services' SVIP Capability.
- (h) The withholding of initial disposition authority to commanders in the grade of O-6 (colonel or Navy captain) or higher who are authorized to convene special courts-martial.
- (i) The Services' SVC/VLC programs.
- (j) The mandatory punitive discharge for those convicted of penetrative sexual assaults or attempts to commit such offenses.
- (k) Compensation and restitution proposals for sexual assault victims.
- (l) The desirability of amending the definition to rape and sexual assault under Article 120 to apply where a service member commits a sexual act by abusing the service member's position in the chain of command to gain access to or coerce the victim.

The JPP will submit its first report by February 4, 2015 and will submit annual reports thereafter until terminating on September 30, 2017.

D. The Military Justice Review Group

On October 18, 2013, the Secretary of Defense directed a comprehensive review of the military justice system. The Honorable Andrew S. Effron, the former Chief Judge of the Court of Appeals for the Armed Forces and the nation's preeminent expert on military law, is heading the Military Justice Review Group (MJRG), which has been tasked with conducting the comprehensive review. The MJRG's review is not focused on sexual assault cases; rather, it seeks to ensure that the entire military justice system is operating efficiently and justly. Nevertheless, any proposals advanced by the MJRG could have a profound effect on the manner in which sexual assault cases are tried in the military. The MJRG will issue a first report proposing UCMJ changes no later than March 25, 2015, and a second report recommending changes to the MCM and other implementing regulations no later than September 21, 2015.

E. Proposals to transfer prosecutorial discretion from commanders to judge advocates

As the initiatives discussed above demonstrate, DoD is not merely receptive to further improvements in the military justice system, but is actively working to identify and implement enhancements. One proposal that DoD has analyzed and believes should not be adopted, however, is a transfer of prosecutorial discretion over all or a limited class of cases from commanders to judge advocates.

The RSP thoroughly studied the role of commanders and by a 7-2 vote concluded that removing their prosecutorial discretion would be inappropriate. The RSP found that “[t]he evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault or increase reporting of sexual assaults in the Armed Forces.”¹⁹⁹ Nor does the evidence “support a conclusion that removing authority to convene courts-martial from senior commanders will improve the quality of investigations and prosecutions or increase the conviction rate in these cases.”²⁰⁰ As former U.S. Representative and former Brooklyn, New York District Attorney Elizabeth Holtzman, a member of the RSP and the Chair of the JPP, succinctly summarized, transferring prosecutorial discretion from commanders to judge advocates “is not the solution to the problem.”²⁰¹

The United States’ military is unique. It has no rival in its global reach. Our armed forces must take the military justice system with them wherever they go – in combat zones and occupied territory, on humanitarian missions, and at sea. The military commander plays a crucial role in ensuring that the military justice system is fully deployable. Removing prosecutorial discretion from those commanders – a move that is not empirically tied to an improvement in the military’s efforts to prevent or respond to sexual assault – would risk degrading the system’s deployability. Diminishing commanders’ ability to hold service members appropriately accountable in deployed settings would create a concomitant risk of reducing good order and discipline and combat readiness.

Military commanders play an enormous role in influencing the behavior of their subordinates. Past command-driven efforts have successfully diminished other forms of misconduct in the ranks, such as illegal drug use and drunk driving. The best method of reducing the prevalence of sexual assault in the military is to engage commanders more, not less, and to hold them accountable. Making the response to sexual assaults an issue for lawyers, rather than commanders, carries the potential to diminish commanders’ effectiveness in the fight against sexual assault in the military.

F. Maintaining a Balanced System

Finally, any discussion of the military justice system must note the importance of preserving a fair criminal justice system for those service members who are accused of offenses.

¹⁹⁹ RSP Report, *supra* note 196, at 22.

²⁰⁰ *Id.*

²⁰¹ Transcript of May 16, 2014 public meeting of the RSP at 56, *available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/20140516/20140516_Transcript_Final.pdf.

As the RSP observed, “In addition to protecting Service members from sexual assault and responding appropriately to incidents when they occur, commanders have an equally important obligation to support and safeguard the due process rights of those accused of sexual assault crimes.”²⁰²

Just as military commanders must appropriately balance the rights of victims and accused service members, so too should those who control the military justice system’s framework. Some aspects of the military justice system that may appear unduly supportive of the accused exist to offset other areas where the system affords the accused fewer rights than their civilian counterparts. Care must be taken when reforming the military justice system to ensure that the reforms are balanced and promote a fair justice system for everyone with a stake in any particular case’s outcome.

²⁰² RSP Report, *supra* note 196, at 37.