IS MORE BETTER FOR THE UNIFORM CODE OF MILITARY JUSTICE

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In early 2013 an Air Force general, Lieutenant General Craig Franklin, commander of the Third Air Force, overturned the sexual-assault conviction against one of his subordinates. Lieutenant Colonel James Wilkerson was sentenced to a dismissal and one year confinement for sexual assault of a houseguest. Wilkerson eventually retired as a major, after the Air Force discovered he fathered a child nine years earlier during an extramarital affair. This sparked outrage in the press and with lawmakers. Lieutenant General Franklin announced his retirement on 8 January 2014. This type of discretionary actions led to commanders being stripped of the power to overturn sexual-assault conviction, as well as numerous other changes to the Uniform Code of Military Justice (UCMJ).

When the December 2014 Defense Authorization Act was passed by Congress and signed by the President, it forced upon the military more changes in the Uniform Code of Military Justice and the Manual for Courts-Martial than have been seen in the last 60 years. The vast majority of the changes regard Articles 32 (previously known as formal pretrial investigations and now called preliminary hearings); Article 60, which allows pretrial agreements (except when certain sexual assaults are involved); Article 120 which deals specifically with 14 different kinds of sexual assault and Article 125, forcible sodomy. These changes remove the commanding officers' discretion to convene courts-martial as well as a broad spectrum of repercussions throughout the military justice system.

Typical of most changes that occur because an issue has become a political football, Congress has acted to, as the women of the Senate Armed Services committee say, to protect the rights of "victims of sexual assault." When viewed in their entirety, there is not even a sideward glance at the rights of those who are accused of these offenses. Sexual assault was singled out because of some questionable math put out by the Pentagon and Congress about the increasing number of sexual assaults in the military. Murder, maiming, child pornography, war crimes, treason, and espionage are not even considered within the changes. Commanders are deemed able to handle these types of cases without Congressional handholding. Perhaps one of the most disheartening parts of this multitude of

changes and requirements is that the most significant changes must be implemented before the fall of 2014. This gives almost no time for the Secretary of Defense to provide guidance to the Service Secretaries and for these men to formulate specific methods within the personnel and money restrictions on the military to issue the necessary orders to provide guidance to commanders. And, one wonders, as with previous changes, when will there be time for military committees to study these changes?

While sexual assault of any kind is an invasion of the worst kind, the question that remains is, was the system really unable to handle the problem or is it Congress and the politicians, who have not served in the military or in many cases even seen a court martial, simply responding to a few victims whose issues were not resolved, ignored, or misunderstood.

The scope of this article does not allow for every question and consequence to be answered or resolved, but it highlights some of the problems with some of the changes that may not only unnecessary but do more harm than good. The final issue which will take much time to resolve is, will these changes pass Constitutional muster when undoubtedly the United States Supreme Court and the Court of Appeals for the Armed Forces (CAAF) review them as they come up in trials? Or, has the pendulum been pushed so far as to favor the "victims" rather than protect the rights of the accused in a criminal trial?

ARE THE CHANGES MADE TO THE UCMJ NECESSARY OR EVEN HELPFUL?

So many, many changes and there was so little time. In fact, perhaps grasping that fact, Congress included in the National Defense Authorization Act for Fiscal Year 2014,[1] a mandate that the Secretary of Defense convene a special committee to not only examine the changes adopted in the Act, but to look to making further changes that would remove the commanding officer from all legal decisions.

This study committee is created in section 1726, et. al. in the Defense Authorization Act of 2014 and called by the easily remembered, Department of Defense Sexual Assault Prevention and Response Program. Its many responsibilities and study requirements are set forth in Section 1731 of the Act.[2] Among the issues the Committee was to study and report on were: the idea of removing the commander in all violations of the UCMJ; whether the Special Victims' Counsel should have legal standing to represent the victim during investigations and **during** the trial and Article 32 hearing; the possible creation of a searchable data base for all offenders who are **suspects** in multiple sexual assault investigations. It goes on. The issue with these proposals, and others which have already been approved, is that there is no reasonable, objective or scientific basis for making these changes.

There is no way to examine the new math that lawmakers used to create the number of sexual assault victims about which they are so concerned. Most of the numbers include alleged victims who have not reported an assault. How does that work? From what are these figures extrapolated? And how do military statistics compare to the number of cases reported, prosecuted, and going to sentencing in the civilian world? None of that data has been published. In fact that precise comparison is being set up and will not be kicking off until the summer of 2014. Apparently, regardless of the findings of that comparison, the more than 36 changes made will already be in effect. The explosive numbers being thrown around by Congress are based on a survey not about "sexual assault" but about "sexual contact" which is a whole other ball of wax, and would obviously include a

[1] National Defense Authorization Act for Fiscal Year 2014, H.R. 1960, 113th Cong., 1st Sess. (2013), http://www.gpo.gov/fdsys/pkg/BILLS-113hr1960pcs/pdf/BILLS-113hr1960pcs.pdf.
[2] Id. at p. 247.

much-greater number of responses. In fact "sexual contact" varies from service to service.

Of the hundred thousand or so service members who were sent the survey, asking about "sexual contact," only 20%, or one in five, actually responded.[3] Undeterred by reality, the Senate Armed Services subcommittee headed by Senator Kirsten Gillibrand marched on.

Some victims, especially those who testified behind closed doors at Senate hearings, complained that they were afraid to come forward, because the alleged perpetrator was senior to them and that no one would believe them. Assuming that this did happen sometimes, the entire system did not need to be changed. It just needed some fine-tuning. There are request mast procedures in all of the services which allow service members to proceed directly to higher authority with complaints if immediate superiors will not listen. That is the way sexual harassment is handled when seniors are involved. And when those immediate seniors fail to act on a substantiated complaint, they too can be charged at a court-martial.

Alleged victims can go to the specially appointed Sexual Assault Response Team members and seek out personnel which every service and most major units have on board. They can go to the hospital and report to the emergency room and they will handle the complaint. There are Victim Assistance Programs which have been available for over a decade at every command. There are always military police persons, criminal investigators or the Naval Criminal Investigative Service, Office of Special Investigations and the Criminal Investigative Division who each have jurisdiction to open their own investigations and bring the finding directly to the commander and even the commanding general. How can there be no one to whom to report? Where is the fear factor? There are also special staff officers who report directly to the general and his/her chief of staff. Tell the Chaplain, tell the Staff Judge Advocate. They are outside the victim's chain of command.

If any victim experiences "retaliation for reporting" sexual assault there are Department of Defense directives and service wide orders that prevent such

[3] Lindsay L. Rodman, *The Pentagon's Bad Math on Sexual Assault*, WALL ST. J., May 19, 2013, http://online.wsj.com/news/articles/SB10001424127887323582904578484941173658754.

retaliation and the command inspector general or service inspector general or even the Department of Defense inspector general can initiate his or her own investigation concerning any retaliation. Statistics are a funny thing. Greater numbers of reports of sexual assault are read by Congress as a need to change the system and take commanders out of command. Maybe the increased numbers rebut the notion that victims are afraid to report and have, indeed decided to report.

There is also the educational aspect for dealing with sexual assault. It starts with an ounce of prevention. New service members, regardless of sex should be educated thoroughly on reporting sexual assault, what it is, what the punishments are AND how to prevent becoming a victim. The vast majority of sexual assaults involve alcohol or drugs on base, off base or in the barracks. The military is quick to establish a "buddy system" for visits to Tijuana or out to the civilian communities overseas. We sponsor designated drivers to remain sober to assist their fellow service members home without injury or accident. Why not make that same rule for drinking at parties. A person is less likely to be victimized if they are not alone in the office at night, or walking home at night alone or involved in a party and left alone to fend for him or herself. The Navy used to have such indoctrination 20 years ago. Where is it now?? What team member leaves someone behind who is intoxicated or unconscious or about to make a dangerous decision about being alone in someone's room after leaving a party?

None of this requires the sweeping and unmanageable changes to the UCMJ that are now about to be implemented. The question that still remains is will these changes do any good or will they simply make the process more cumbersome. Reports from Naval District Norfolk Virginia indicate that the last six straight sexual assault cases referred to a court-martial have resulted in acquittals. Should we then remove members and judges because they find an accused not guilty?

In July of 2013, Legal Counsel to the Chairman of the Joint Chiefs of Staff released a report to Senator Carl Levin, the senior member of the Senate Committee on Armed Services. In the letter, counsel reports on the inquiries made during Senate hearings about what our allies are doing about removing commanders as convening authorities. That issue was studied and the letter reported:

> "…none of the allies surveyed could draw a correlation between their new system and any increased (or decreased) reporting by victims of sexual assault. There was no statistical or anecdotal evidence that removing commanders from the charging decision had any effect of victims' willingness to report crimes. Similarly, we found no studies by our allies that examined the impact of the changes on prosecution rates, conviction rates, or processing times, although generally their cases now take longer"

The delay in determining where the truth lies is a tragedy in itself. This delay could, according to CAAF (Court of Appeal of the Armed Forces) result in a case being overturned for lack of due process. Waiting for victim input, as prescribed by the new changes will be only part of the long delays that already occur

In January 2014, the members of the Response Systems to Adult Sexual Assault Crimes Panel reported their findings. The committee concluded there is no evidence that stripping commanders of their authority would reduce sexual assaults or increase reporting of sexual assaults.

> "The evidence does not support a conclusion that removing such authority will increase confidence among victims of sexual assault about the fairness of the military justice system or reduce their concerns about possible reprisal."

Finally, trying to tell any commander that he/she does not know his/her troops well enough to make an informed decision about the forum for sexual assault, defines all commanders as witless and unable to exercise leadership and discretion. Commanders who are aware of the mandatory sentencing guidelines might be even less likely to refer misconduct as sexual assault. Members, schooled in the mandatory minimums may be less likely to convict an accused of sexual assault.

With the commanders' hands tied with regard to pretrial agreements that include sexual assault, the question becomes what is the defense counsel's motivation to negotiate. Negotiated pleas are the bread and butter of any criminal justice system. If there is no motivation to plead guilty for a lighter sentence because of the mandatory minimums, many more cases will be not guilty pleas. If this happens, the entire system will break down. There are not enough judges, members, or lawyers to have that many contested cases. If the new math indicating tens of thousands of sexual assault victims is remotely accurate, the new UCMJ will grind

to a halt without pretrial agreements. How does that help the victims? Without pretrial agreements, every alleged victim will be required to testify and in the past, this has always been referred to as "revictimization." How does that help alleged victims?

One more unanswered question is when does an act of sexual assault become relevant in an unrelated trial? Recently, in a trial for fraternization, the ex-girlfriend who reported that her former boyfriend was having an overly familiar relationship with the accused suddenly claimed to be a victim of sexual assault. She was not a victim in the case being tried nor did her allegation involve any of the parties or witnesses. Still the defense counsel was hamstrung on cross and could not ask her who, what, when or why she had not reported this earlier to the prosecution or defense. The court was shut down several times during the witness's irrelevant testimony. She was the only prosecution witness. Now we have witness bolstering by sexual assault. Once again, the victims gain nothing and the accused loses any notion of fundamental fairness.

REMOVING THE DISCRETION OF CONVENING AUTHORITIES IN SEXUAL ASSAULT CASES

Historically when making a determination about how to handle an offense under the UCMJ, commanders, alternatively known as Convening Authorities, were given wide decisional latitude on how to dispose of an offense. The commander could send the matter to an administrative hearing; either an Administrative Separation Board, for enlisted service members, or a Board of Inquiry, for officers. The commander had available other forums for less serious matters such as nonjudicial punishment, Chapter 15,[4] or Summary Courts-Martial. These administrative punishments accord an accused fewer substantive rights, but there is a cap on punishment. Finally, if the commander determined that criminal punishment was necessary, he could send the case to a Special Court-Martial, the equivalent of a misdemeanor court, or to a General Court-Martial, the equivalent of a felony court where the punishment could include life without the possibility of parole or even the death sentence.

Additionally, the commander could engage in negotiating a pretrial agreement, the equivalent of a plea bargain. The pretrial agreement is beneficial to both the Government and the accused. The Government is relieved of the burden of proving the elements of a crime, in exchange for the accused entering a plea of guilty and receiving a less serious punishment. The victims in any kind of case should never have to be called to the stand. Similarly, the accused receives the benefit of a limitation on the potential punishment, which could come in the form of relief from fines, limitations on the length of time spent in confinement, or a promise of not receiving a bad conduct discharge or dishonorable discharge.

With the passage of the 2014 NDAA, this has all changed in the area of sexual assaults. First, § 1705(a)[5] provides for the mandatory minimum punishment of a

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[4] Uniform Code of Military Justice, 10 U.S.C.A. §815 (2014).

[5] SEC. 1705. DISCHARGE OR DISMISSAL FOR CERTAIN SEX-RELATED OFFENSES AND TRIAL OF SUCH OFFENSES BY GENERAL COURTS-MARTIAL.

(a) Mandatory Discharge or Dismissal Required-

(1) IMPOSITION- Section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), is amended--

(A) by inserting `(a)' before `The punishment'; and

(B) by adding at the end the following new subsection:

dishonorable discharge, or dismissal in the case of officers, for the following offenses: rape (Art. 120(a)), sexual assault (Art. 120(b)), rape of a child (Art. 120b (a)), forcible sodomy (Art. 125), or attempts to commit any of these offenses. Second, under § 1705(b)[6], all offenses listed in § 1705(a) may only be sent to a general court-martial.

Thus, now when a commander is faced with an alleged sexual assault, he is extremely limited in the actions he can take. All of the administrative measures listed above are off the table. Also, there is no possibility of dealing with the case as a misdemeanor. All sexual assaults are now felonies. The commander also may not consider the character of the service member when determining what forum is appropriate in light of all factors including an investigation and input from both the prosecution and the defense. There is no intent to condone substantiated complaints of sexual assault, but not every single set of circumstances is identical. With the current mandatory minimum sentencing, not only is the commander's

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`(b)(1) While a person subject to this chapter who is found guilty of an offense specified in paragraph (2) shall be punished as a general court-martial may direct, such punishment must include, at a minimum, dismissal or dishonorable discharge, except as provided for in section 860 of this title (article 60).

`(2) Paragraph (1) applies to the following offenses:

`(A) An offense in violation of subsection (a) or (b) of section 920 of this title (article 120(a) or (b)).

`(B) Rape and sexual assault of a child under subsection (a) or (b) of section 920b of this title (article 120b).

`(C) Forcible sodomy under section 925 of this title (article 125).

`(D) An attempt to commit an offense specified in subparagraph (A), (B), or (C) that is punishable under section 880 of this title (article 80).'

6 (b) Jurisdiction Limited to General Courts-martial- Section 818 of title 10, United States Code (article 18 of the Uniform Code of Military Justice), is amended--

(1) by inserting `(a)' before the first sentence;

(2) in the third sentence, by striking `However, a general court-martial' and inserting the following:

`(b) A general court-martial'; and

(3) by adding at the end the following new subsection:

`(c) Consistent with sections 819, 820, and 856(b) of this title (articles 19, 20, and 56(b)), only general courts-martial have jurisdiction over an offense specified in section 856(b)(2) of this title (article 56(b)(2)).'.

(c) Effective Date- The amendments made by this section shall take effect 180 days after the date of the enactment of this Act, and apply to offenses specified in section 856(b)(2) of title 10, United States Code (article 56(b)(2) of the Uniform Code of Military Justice), as added by subsection (a)(1), committed on or after that date.

discretion taken away, the members of the panel have their sworn duty undermined when they are told what their sentence must include regarding a punitive discharge. Why have a panel of members anymore since they really have no say in sentencing sexual assault findings. Congress has already decided that for the panel.

Any conviction for a sexual assault defense will automatically result in the service members being kicked out of the military with the worst possible discharge and being required to register as a sex offender for the rest of his or her life no matter where the service member chooses to live. To keep this in perspective, commanders still have all of their options and discretion in cases involving murder, aggravated assault, manslaughter or numerous other serious offenses under the UCMJ. Only sexual-assault offenses will be treated differently.

As mentioned above, all criminal justice systems rely on the plea bargaining process. For example, in the federal criminal system in the year 2003 there were 75,573 cases disposed on in federal district court. Of these 95 percent were disposed of by a guilty plea.[7]

It is not entirely clear what impacts the new changes to sexual assault crimes will have on the military criminal justice system. One thing is for sure; the increased limitations on the discretion of commanders will greatly hamper the parties reaching a mutually beneficial pretrial agreement in sexual-assault cases and provide for more revictimization of victims due to the ever-rising number of contested cases.

[7] Lindsey Devers, *Plea and Charge Bargaining: Research Summary*, U.S DEP'T. OF JUSTICE BUREAU OF JUSTICE ASSISTANCE i, 1 (2011), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

WHY SINGLE OUT JUST SEXUAL ASSAULT CRIMES?

The Uniform Code of Military Justice, the Manual for Courts Martial and the publications and regulations that support and implement it are a "system." They work together like an ecosystem. If the balance is upset, the whole of the system is jeopardized. If you take a part of the drive train of a car out, unless it is replaced with a substantially similar part, the car does not perform efficiently or effectively. Or, if you remove the spleen from the human system, it dies without a similar, compatible replacement. It is a very delicate surgery or the patient dies. It is not performed by a carpenter or someone who has read a book about the human body, but a very specialized surgeon. The body is a system. Military justice is like a clock with gears, not a battery that can be replaced. Pull one gear and the clock stops. The list of analogies could go on. But Congress does not seem to get the idea at all that a system has many moving parts that must work together.

The commander of a unit is the keystone of the system. Remove the keystone of the arch and it falls. Without confidence in the leadership of the unit at all times, the unit falls apart. Like any system, there are parts that go bad. There are a few commanders, even though screened, who do not recognize sexual assaults when they are reported, or worse seek to cover them up. Congress calls these commanders "toxic leadership". The Commandant of the Marine Corps recently claimed that there are none of those people in positions of trust like drill instructors or recruiters who then abuse their authority. But those parts, these broken commanders, those men and women, can be replaced and held accountable. The entire system is not broken.

The new changes to the military justice system have created a special, different, less efficient, more-complicated gear that will break the system. Moreover, these significant changes appear to be implemented for no apparent reason. Why sex crimes? There are certainly more serious or more frequently-occurring crimes. What about sexual harassment? Why is that not covered by these new special rules? Sexual harassment is a crime that is underreported and frequently involves senior-to-subordinate misconduct. What about espionage, war crimes, murder, or terrorism? These crimes are not only at least as serious as sexual assault; they are effectively handled under the present system with the commanders and the investigating officers having the discretion that all cases demand. It cannot be the

insidious nature of sexual assault because drugs are the most insidious crimes and one of the most frequently occurring. Commanders never like to admit that there is a drug problem in their units. Yet the do and they investigate and effectively prosecute drug crimes. Child pornography is aggressively prosecuted under the present system and that is the most hidden of all crimes and has the most voiceless victims. Commanders and their investigators are trusted to find that behavior out.

All of these crimes have human victims, often multiple victims at the same time. Still, they are handled by the commanders and the investigating officers without all the new trapping, and complexity demanded now of sexual assault cases. The justification for this singular and complex new system solely for sexual assault cases cannot be the frequency with which sexual assaults occur. Nothing occurs more frequently than fraud, drugs and larceny. These are property crimes, true, but the magnitude of the loss and money and effect on the victims is staggering. Again, the commanders are deemed able, and have been for decades, to handle these crimes.

Commanding officers "are responsible for the physical, mental, and moral welfare, as well as the discipline and military training"[8] of those serving our nation. The morale, safety, readiness, training, and the war fighting ability of every service member are ultimately the responsibility of the commander. Discipline has always been in the hands of the commander as long as there have been militias. Article I, Section 8 of the U.S. Constitution provides for a military that is armed and disciplined. It is not a new concept. The point is, if responsibility for discipline and the discretion of the commander is removed for a special type of offense, what does it say to the rest of the unit? The message sent is that the commander cannot be trusted to exercise his or her best discretion in sexual-assault cases. The commander has made so many mistakes in just this one area that this special brand of crime has to be pulled from his or her hands and given to another, higher authority, to make a decision for the commander. The commanders' hands are tied. What that says to the members of that command is that their leader, their commanding officer, is less than a leader. He or she is a wounded part of the ecosystem. Morale, discipline, welfare, and efficiency suffer.

[8] U.S. Marine Corps, *supra* p. 97.

The commanders who are appointed as convening authorities[9] are screened and vetted. That process is not perfect. There are always exceptions to the rules. Are there commanders who do not believe sexual assault victims or choose not to treat the complaints as serious enough to send the charge to a court-martial, or thoroughly investigate the allegations? Of course there are. But that happens with every allegation, and holds true in military and civilian criminal systems. Do commanding officers at Recruit Depots dislike taking drill instructors to courts-martial? Certainly they do. The drill instructors are supposed to be the cream of the crop. But the commander is still trusted to do the right thing and investigate, review, and charge an accused when appropriate. These very same commanders who are entrusted to properly handle crimes, including those that involve the death penalty, are now not trusted to handle sexual assaults. That is a ridiculous and counterintuitive assumption.

The explanation for this new cumbersome process, which questions and hog ties the commander's discretion, is that the victims are afraid that they will not be believed so they do not report these serious allegations. Then why is there a spike in reported cases? Apparently Congress read these statistics, be they ever so incorrect,[10] as a sign that commanders cannot be trusted. Actually it is quite the contrary. The numbers are higher because there is more confidence among victims. With heightened awareness and more belief in the system as it is, victims are reporting their allegations. More cases are being prosecuted, more cases are being successfully taken through sentencing and the sentences have tripled in severity, all before the changes go into effect. So where is the problem?

The problem is the changes. They are complicated, time consuming, and inefficient. Just the decision to refer charges could take weeks. If there is the dispute between the commander and the Staff Judge Advocate, that dispute must be decided by the next higher level, which could well be the Department level at the Pentagon. That could take weeks or even months. There is the negotiating process for a pretrial agreement that involves the prosecution, the defense, the victim and the victim's attorney, which could also add days or weeks to the

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[9] Joint Service Committee on Military Justice, *Manual for Courts-Martial United States*, JOINT SERV. COMM. ON MILITARY JUSTICE 1, II-1 (2012), http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf.

[10] Lindsay L. Rodman, *The Pentagon's Bad Math on Sexual Assault*, WALL ST. J., May 19, 2013, http://online.wsj.com/news/articles/SB10001424127887323582904578484941173658754.

process. Then the commander has to jump through hoops to determine if the pretrial agreement can be accepted. The forum cannot be negotiated. The sentence cannot be negotiated and the discharge cannot be negotiated. There is still the preliminary hearing, formerly the Article 32 investigation, but what is the point of that? If the case is a sexual-assault case, it has to go to a general court-martial regardless of the recommendation of the investigating officer who heard all of the evidence available. Essentially this makes the preliminary hearing a farce which is a tiger without teeth…. a paper tiger.

The new system, designed only for sexual-assault crimes, is cumbersome to say the least. How many cases will be lost because of mistakes in the procedures for this one exception in the system? This is still a problem in the current system, which judge advocates and commanders have been working with for decades. Then there are the multiple questions that remain unanswered about this singularity of sexual assault crimes.

What if a commander does a diligent investigation and does not believe there has been a sexual assault, which can be proven beyond a reasonable doubt? Perhaps the Article 32 officer agrees. Nothing prevents the commander from sending the allegation to an Administrative Discharge Board or a Competency Review Board or a Board of Inquiry, all administrative means of ensuring discipline. Because of the required mandatory-minimum sentence, will fewer cases be sent forward to court-martial? When members understand what the mandatory consequences of a finding a guilty are, will they be more or less likely to convict? There is no objective data to answer these questions yet, but currently, the prosecution is losing sexual-assault cases before military judges and panels of members in various locations.

What if there are other charges on the charge sheet along with an allegation of sexual assault? How is that to be handled, negotiated, or reviewed? What if there are charges in the alternative, for example, sexual assault and adultery, because it is not known if the act was consensual? If the finding is adultery, is it reviewed under the present system where the commander has discretion to lower or suspend all or part of the sentence or disapprove the finding? Since a service member's character cannot be considered if it is a sexual assault case, when the finding is not guilty to sexual assault but guilty of adultery, how is that lack of evidence made up

to the accused? If the military judge finds the accused not guilty or the members find the accused not guilty, should we take away their discretion because they do not support the victim?

Why does the sexual-assault victim have the right to stay in the courtroom during the proceedings? All other witnesses are sequestered. The prosecutor does not represent the victim; he or she represents the Government. The reason that all witnesses are sequestered is so their testimony is not influenced by the testimony of other witnesses. If there are other charges, is the victim sequestered just for those charges? How about the confidence the accused, and the public are supposed have in the system? If his accuser is sitting in the courtroom, listening to the defense case and the cross-examination, what are the chances that his or her testimony will not be influenced? They are great enough that in every judicial system in the country and in every other crime in the UCMJ, witnesses may not discuss their testimony with others and may not hear the testimony of others until after the witness testifies.

The singling out of sexual-assault cases from all other crimes makes no sense. In the 14th Century there was a Franciscan monk named Occam. His proposition was that if there is more than one answer to a problem, the simplest one is probably the correct one. With this one part of the military justice system, sexual assault crimes, pulled out of the system, the system will die.

WHAT LESSONS CAN BE LEARNED FROM CHANGES IN THE MILITARY JUSTICE SYSTEM IN OTHER COUNTRIES?

When all of the changes required go into effect, the question becomes; have we improved the system or just changed it?

According to the hearings held in the subcommittee of the Senate Armed Services Committee, the changes signed into law and those that are proposed within those changes, the military justice system is supposed to become more efficient and more responsive to sexual assault victims. Further, removing the commanders from their role as convening authorities will instill more confidence in alleged victims to come forward. Sounds great to Senator Gillibrand and her committee mates, but to them it is a great experiment. No one member of that subcommittee has ever served in the military and not one of them has ever observed a court-martial or witnessed the pretrial or post-trial process as it now exists. It is never a great idea to poke holes in the fabric of a system that is unknown to the poker.

But, fortunately, what the Defense Authorization Act changes about the military justice system are not brand new and never conceived of before. In fact, before the Act was signed into law the Joint Chiefs of Staff were asked to look into the proposed changes to see how our allies are handling similar changes to their military justice system. At the reconfirmation hearing of General Martin Dempsey, US Army and current Chairman of the Joint Chiefs of Staff, agreed to speak with his counterparts in other parts of the world. He met with the legal advisors from the United Kingdom, Canada, Australia, New Zealand, the Netherlands, and Germany.

On July 19, 2013, long before these changes were made to our military justice system, the Chairman reported back to Senator Levin.[11] Chairman Dempsey's findings were not only predictable but they were apparently ignored. First, "no allied country changed its system in response to sexual assault crimes or the rights of victims generally."[12] In most cases where the commanders were removed as convening authorities it was because of a desire to better protect the rights of the accused. The European Court of Human Rights has a requirement for an "independent and impartial tribunal" to make those decisions.[13] Note, that in no

[11] CARL LEVIN U.S. SENATOR MICHIGAN, http://www.levin.senate.gov/newsroom/press/release/levin-facts-support-preserving-commanders-prosecution-authority (last visited Mr. 26, 2014).
[12] Id.
[13] European Court of Human Rights, *European Convention on Human Rights*, EUR. CT. H.R. 1, 9 (2010), http://www.echr.coe.int/Documents/Convention_ENG.pdf

case, did the Chairman find any evidence that putting an SJA (a lawyer), at any level, in charge met the "independent and impartial" standard.

Second, there was no evidence that there was a correlation between removing commanders and increased reporting by victims. Neither statistical evidence, nor anecdotal evidence was found that indicated that removing commanders from the process had any effect on victims' likelihood to report crimes. There was no objective evidence that changes made by our allies had any impact on prosecution rates, conviction rates or processing times. What was determined is that generally, without the commanders involved, processing times were longer.[14] In our own civilian system, there are over 400,000 unanalyzed rape kits sitting in evidence lockers. If the civilians cannot fix this, how does slowing down the military system help the victim or the accused?

The conclusions reached by the Chairman after discussions with our allies who have tried similar changes found that the United Kingdom, Canada, Australia and New Zealand maintained a military justice system with independent prosecutors. Germany and the Netherlands use civilian prosecutors and military crimes are tried in civilian courts. Except for Germany, all the allies reported that changes in their systems resulted in longer delays and the whole process taking more time.

There is no question that these same delays will happen with the current set of changes to the Uniform Code of Military Justice. With a third victim's counsel involved and more and more motions; with constant victim input, with disposition determinations having to be worked out one or two levels higher than is currently required, it will be an excruciatingly long process before, during, and after trial. Speedy trial? That fundamental right belongs to the accused, not the victim. How long should the accused wait while NCIS has to conduct a full investigation on every single complaint? How long should the accused wait while SJAs and commanders keep pushing a disposition decision further and further up the chain of command? While witness' memories fade and evidence becomes unavailable, the accused is supposed to see this new system as fair and considerate of his or her due process rights. In what universe would that be?

[14] CARL LEVIN, *supra*.

WHAT IS THE FUNCTION OF THE COUNSEL FOR THE VICTIM?

In the Marine Corps, the Victims' Legal Counsel Organization (VLCO) was established in October 2013.[15] Other Services established similar programs earlier.[16] New changes have added to the VLCO program. Now the idea is that the Victims' Legal Counsel (VLC) will have an attorney-client relationship with the alleged victim.[17] This creates enormous issues including discovery, Brady material, and impeachment, to name just a few.

The first case to test the right of a victim to be heard through counsel was LRM v. Kastenberg,[18] an Air Force case. It went to the United States Court of Appeals of the Armed Forces (CAAF), and back down to the trial level.[19] The accused alleged that the presence of a third counsel at the hearings violated his due process rights. The alleged victim claimed the absence of her counsel would violate her privacy rights under MREs 412 and 513 and the Crime Victims' Right Act.[20] When all of the appeals were heard, the CAAF decided that the SVC had standing but it was limited by the judge's discretion and the counsel could only submit arguments through written submission. There is no third table in the courtroom and the counsel cannot be heard during the trial except if specifically requested by the military judge. At that point the special victims' counsel (SVC), the Air Force equivalent of VLC, was a sounding board for the victim, a person he or she could trust and confide in and who could advise the victim on the many and various resources that were available to him or her. The limitations on cross-examination of the alleged victim were dictated by Military Rules of Evidence 412 and 513.[21]

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[15] *Establishment of the Marine Corps Victims' Legal Counsel Organization (VLCO)*, MARINES, THE OFFICIAL WEBSITE OF THE UNITED STATES MARINE CORPS, (OCT. 10, 2013), http://www.marines.mil/News/Messages/MessagesDisplay/tabid/13286/Article/153620/establishment-of-the-marine-corps-victims-legal-counsel-organization-vlco.asp

[16] *Sexual Assault Prevention and Response Program Frequently Asked Questions*, AIR FORCE PERSONNEL CENTER, U.S. AIR FORCE, http://www.afpc.af.mil/library/sapr/faqs.asp (last visited Mar. 9, 2014)

[17] ESTABLISHMENT OF THE MARINE CORPS VICTIMS' LEGAL COUNSEL ORGANIZATION (VLCO), *supra* note 18 at para. 3

[18] *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013)

[19] *Kastenberg*, 72 M.J. at 372

[20] 18 U.S.C.A. § 3771 (West 2009)

[21] Capt. Richard Hanrahan, *Through Her Eyes: The Lessons Learned as a Special Victim's Counsel*, THE REPORTER, Vol. 40, No. 3 at 23-26 (2013), http://www.afjag.af.mil/shared/media/document/AFD-131219-083.pdf

But now we move forward to the present use of the SVC or VLC who now can establish a protected attorney-client relationship with the alleged victim. At this point the ill-considered consequences begin to mount. Both prosecutors and defense counsel can agree that the presence of a third voice in the courtroom is a problem not only to the due process of the accused but also to the effective prosecution of a case.

The alleged victim has always been entitled to a copy of the charges and even a copy of the investigating officer's preliminary hearing report.[22] The accuser has, for years, been entitled to sit in the courtroom with whatever consequences to untainted testimony that may produce. But now defense counsel, and for that matter the trial counsel can no longer call the accuser to the stand during the pretrial investigation. The only person who may interview or even grant consent to an interview by either side is the SVC or VLC. This means that when the accuser comes to the stand, neither side may have obtained a statement from him or her. How does that square with both sides having equal access to evidence as required by Article 46[23] of the UCMJ? Or, worse yet, as suggested by the new rules, a trial counsel would have to be present when the accuser is interviewed by the defense counsel. Case law has prohibited that as a denial of the required equal access. If, in fact, the trial and defense counsel are only "allowed" by the SVC or VLC to interview the accuser once, every counsel is best advised to bring an assistant to the interview so that impeachment is possible since neither the opposing counsel nor the SVC or VLC may be called to the stand.

What material has to be turned over to the SVC? Brady material[24] and other exculpatory evidence goes to the defense. Does it have to go to the SVC or VLC? Why should it? The entitlement to exculpatory material is a matter of due process and the rights of the accused under the Sixth Amendment of the U.S. Constitution,

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[22] Also known as an Article 32.

[23] 10 U.S.C.A. § 846 (West 2013). Opportunity to Obtain Witnesses and Other Evidence
The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court - martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the Unites States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

[24] For an in-depth discussion of Brady material, see David W. Ogden, *Memorandum for Department Prosecutors: Guidance for Prosecutors Regarding Criminal Discovery*, THE UNITED STATES DEPARTMENT OF JUSTICE (Jan 4, 2010), http://www.justice.gov/dag/discovery-guidance.html

not just making the accuser feel better. What about statements collected by NCIS or the full transcript of the Article 32, preliminary hearing? Arguably the new changes suggest that all of that goes to the SVC or VLC. There is no good reason for this. Not only would access to the statements of others allow interference with witnesses set to testify and obstruction of an ongoing criminal investigation, but also the accuser could shift his or her testimony in accordance with this new knowledge of what others have said. And then there is the element of impeachment. Today, defense counsel may seek an interview with the accuser without going through trial counsel. The current Article 32 rules would allow the accuser to be called. His or her testimony can be locked in under oath so that there is ample opportunity for impeachment by prior inconsistent statement of the accuser if his or her testimony at trial materially differs from that at the investigative stage. This all falls away under the new changes. Undermining the witness or his or her testimony IS the purpose of confrontation and cross-examination. The touchstone of fundamental fairness is being blown apart by the presence of the restrictions the SVC or VLC attorney-client relationship imposes.

Then there is the question as to what the SVC or VLC has to turn over to the defense. If the accuser has made one statement to criminal investigators, or another witness, and then makes a different one to the SVC or VLC, is the SVC or VLC obliged to turn that exculpatory evidence over to the defense? The answer is we do not know and that is the problem with these slap-dash changes.

What must be appreciated is that the current military justice system and regulations and directives do not leave an alleged victim out in the cold and never have. There are an ever-expanding number of programs, people and resources available to victims. Whether a victims advocate advises the accuser or the trial counsel (who has a duty to do so) does so, he or she will be advised of those resources and remedies. Further, Military Rules of Evidence 412 (The Rape Shield Law) and Military Rule of Evidence 513 (Psychotherapist-patient privilege) protect the accuser from unnecessarily embarrassing or irrelevant questioning. What the NDAA of 2014 seems to fear is that both MRE's 412 and 513 have exclusions which require release of medical records and certain past sexual history when it is "Constitutionally required" (MRE 412 (a)(1)C and MRE 513 (d)(8)). This means that if the defense can show in a motion that the past of the accuser is relevant to determining who the perpetrator is, such information can be allowed. If the

medical records, after being reviewed *in camera* by the military judge are determined to be relevant, they may be turned over to counsel and they are grist for the cross-examination mill. Under the new changes, the SVC or VLC, upon request of the accuser, can submit third party motions alleging that the privacy interests of the alleged victim are somehow greater than the accused's right to a fair trial.

Is all of this potential for tainted testimony, inability to cross, hidden evidence and a third counsel to be heard in the courtroom really what the military justice needs in sexual assault cases? Though Congress has spoken, the appellate courts have not, and much of this attack on the rights of the accused to a fair trial and equal access to evidence will be in litigation for years and years to come.

RESTITUTION FOR VICTIMS OF SEXUAL ABUSE

Section 1731 of the NDAA[25] contains additional duties for the Sexual Assault Prevention and Response Office for the Department of Defense Sexual Assault Prevention and Response Program set up in sections 1725 and 1726. Among its long list of other duties and responsibilities the Program members will perform various "additional assessments" with regard to the Uniform Code of Military Justice.[26] This section[27] discusses restitution for sexual assault victims, which may include forfeited wages of incarcerated service members, and potential restitution as directed by a court-martial.

First, it is important to note that each service is already required to provide assistance to victims and witnesses of crime.[28] Each service also has a Victim and Witness Assistance Council[29] as well as a central repository[30] for tracking the status of offenders confined in military correctional facilities. This is in addition to family advocacy programs, equal opportunity programs, and the Navy's Sexual Assault Victim Intervention Program (SAVI).[31] Transitional compensation is also provided for dependents who are the victims of abuse.[32] The current rate is $811 dollars for an abused spouse and $120 dollars for each child in the abusers home.

Second, USC Title 10 section 1408(H) authorizes payment of portion of retired pay to help alleviate the financial hardship to victims of abuse. This applies when service member is separated either by a court or administratively and is retirement eligible. This provision is even broader than the current proposal which does not address administrative separation.

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[25] Short title. This Act may be cited as the "National Defense Authorization Act for Fiscal Year 2014." The Act will be cited as "NDAA" in this article.

[26] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1731(b)(1)(D) (2013)

[27] *Id*.

[28] *See*, *Victim and Witness Assistance*, DEPARTMENT OF DEFENSE DIRECTIVE, 1030.01 (Apr. 13, 2004), http://www.dtic.mil/whs/directives/corres/pdf/103001p.pdf

[29] *Id*. at 5.1.3.

[30] *Id*. at 5.3.3.

[31] *See*, Chief of Naval Operations, *OPNAV 1752.1B: Sexual Assault Victim Intervention (SAVI) Program*, DEPARTMENT OF THE NAVY, (Dec. 6, 2006), http://doni.daps.dla.mil/Directives/01000%20Military%20Personnel%20Support/01-700%20Morale,%20Community%20and%20Religious%20Services/1752.1B.PDF

[32] See, *Department of Defense Instruction Number 1342.24: Transitional Compensation for Abused Dependents*, DEPARTMENT OF DEFENSE, (May 23, 1995), http://www.dtic.mil/whs/directives/corres/pdf/134224p.pdf

While the Uniform Code of Military Justice did not authorize restitution as a form of court-martial punishment, prosecutors, in appropriate cases, include a requirement to pay restitution to victims as a condition to a pretrial agreement. State compensation programs also exist for victims of crimes that cause mental, physical or financial hardship. These programs vary from state to state.

The point of this is not to render the reader unconscious; but to suggest that avenues of compensation for victims of many types of crimes, including sexual assault, already exist. But the NDAA demands more. Restitution under the new law would include broadening the avenues for compensation solely for victims of sexual assault. It is suggested that this money come from forfeited wages of incarcerated members of the Armed Forces, and requiring restitution by members of the Armed Forces to victims upon the direction of a court-martial. There is no mention of how much or how long this goes on. If the mandatory minimum for sexual assault is a dismissal or a dishonorable discharge, where does an incarcerated member obtain money for restitution? The failure to recognize this simple issue takes us back to debtors' prisons that existed hundreds of years ago.

The problem is determining what guidelines a judge uses to determine under what circumstances and the amount of compensation a victim of sexual assault should receive. The Manual for Courts-Martial recognizes the generally accepted sentencing philosophies,[33] which include "rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution." These generally accepted sentencing philosophies must be kept in mind when considering restitution for sexual assault victims.

If the victim is a service member, medical and mental health expenses are taken care of. An allowance for housing already exists. There is no [financial?] windfall in sexual assault unless there is pimping involved, so what is the measuring stick? Normally, when an accused is sentenced for a serious offense such as rape, sodomy, or sexual assault on a child, the member receives a punitive discharge and forfeiture of all pay and allowances. Depending on the time in service, this could result in the forfeiture of hundreds of thousands of dollars over the member's lifetime. Is that meant to teach the offender a lesson, through specific deterrence?

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[33] *See*, Joint Service Committee on Military Justice, MANUAL FOR COURTS-MARITAL UNITED STATES, at II-125 (2012 Edition), http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf

Is it to send a message to others, known as general deterrence? This kind of extreme and often unnecessary punishment has little effect in discouraging others from committing similar offenses. The military already has extremely severe punishments for drug use and distribution; yet drugs continue to pour into military installations. The death penalty is also intended to serve as a general deterrent; yet murders still occur within the military and everywhere else where the death penalty exists. What is the purpose of the restitution? Is it a form of social retribution? Or, is it just to say, "We care"? Why are sexual assault victims entitled to this special restitution and other victims of vicious crimes not?

Beyond this desire to provide restitution directly to the victim as part of punishment upon conviction, 10 USC section 2772 creates the Armed Forces Retirement Home Trust Fund. Forfeitures and fines from convicted service members fund almost 60 percent of these two homes. This money does not go back to the general treasury so it can be redistributed to other programs. The funds support these homes where the average age of the veterans living in them is 80. So, the Act simply robs Peter to pay Paul.

Making personal, directed, restitution to a particular victim a provision in a pretrial agreement seems to be an easy idea to implement. However, in sexual assault cases, the process of negotiating a pretrial agreement under Article 60 is confounding. As discussed in this article, the convening authority has his or her hands tied in sexual assault cases and the incentive for an accused to enter into a pretrial agreement is near zero, since the mandatory minimum cannot be taken off the table and no lesser forum other than a general court martial is possible. In the past these possibilities were strong negotiating points for both the government and the defense. These "restitution" provisions are both unworkable and unnecessary.

THE CHANGES TO THE UCMJ MAY BE UNLAWFUL COMMAND INFLUENCE AT THE HIGHEST LEVEL

Congress is a hammer. When you are a hammer, everything else looks like a nail. Instead of recognizing the very fine balance between dealing with sexual assault or any other serious crimes involving victims, and the profound and fundamental Constitutional rights of an accused, Congress used their hammer. For at least the last few years or more, they have hammered the last two Secretaries of Defense,[34] the Service Secretaries and the Military Service Chiefs.[35] Their head banging simply said "fix it or else." The "or else" included, throwing out the military justice system and letting civilians handle it, doing away with the role of commanders within the military justice system and other heavy-handed threats. All of this because "victims" were not believed and their identified perpetrators were not being punished enough, or often enough, or commanders thought there was a lack of probable cause, or the prosecutors could not prove the victims were telling the truth and unable to prove establish the elements of the alleged crimes beyond a reasonable doubt. Serious sexual assault, murder, treason, espionage, maiming, are all vicious and horrible crimes that hurt the service, its members, and the victims. This is a fact.

But not every victim is credible. That too is a fact. In San Diego, California, the eighth[36] largest city in the United States, the District Attorney receives more than 600 complaints of sexual assault.[37] Of those over 600 complaints, only 70 are actually charged and something less than 50% of those proceed to sentencing. So, should we remove the District Attorney from the system, or remove the assistant district attorneys who have the discretion about whether to take a case?

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[34] Secretary Leon Panetta, 1 July 2011 through 27 February 2013

Secretary Chuck Hagel, 27 February 2013 through present.

[35] The Military Service Chiefs are composed of the Chief of Staff of the United States Army, the Chief of Naval Operations, the Chief of Staff of the Air Force, the Commandant of the Marine Corps, and the Chief of the National Guard Bureau. 10 U.S.C. §151 (2012)

[36] Annual Estimates of the Resident Population for Incorporated Places Over 50,000, Ranked by July 1, 2012 Population: April 1, 2010 to July 1, 2012 - United States -- Places Over 50,000 Population, (Mar. 4, 2014, 8:37 PM), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

[37] Gretchen Means, former Senior Assistant District Attorney and Highly Qualified Expert West for the USMC prosecution at the Thomas Jefferson School of Law Women in the Law Conference. (Feb. 21, 2014)

Congress has nothing to say about this problem, which occurs just as commonly or more so throughout the United States. Police sexual misconduct also occurs within its small ranks and complaints are constantly made that these victims are ignored. But Congress says and does nothing about this. The system is allowed to correct itself and put new leaders in when the current ones do not respond to the problem.[38]

Instead, the United States Armed Services Committee kept pressing and pressing. There was no time allowed to remove irresponsible commanders and replace them with more responsible ones. No, the whole system had to be changed and only for one type of case, specifically, sexual assaults. The question is, by making their crusade so public, exerting so much pressure on commanders, has Congress shaken the delicate balance, overstepped their authority, trampled the rights of the accused, tainted the potential jury pools, and precluded good commanders from acting in good conscience? Instead of improving the system, has sexual assault and how it is handled become nothing more than a political football where every victim MUST be believed and every accused must be guilty...or else?

Unlawful Command Influence (UCI) is prohibited by Article 37 of the Uniform Code of Military Justice. It has been since 1949 when Senator Kafauver, Chairman of the Senate Armed Services Committee proposed the Uniform Code of Military Justice. It is considered by appellate courts to be the "mortal enemy of the military justice system"[39] Article 37 of the UCMJ says in part:

> No authority convening a general, special or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter my attempt to coerce or, by any unauthorized means, influence the action of a

[38] Andrew Tilghman & Joe Gould, Prosecutor's Departure Fuels Debate Over Command Influence in Sexual Assault Cases, ARMYTIMES, (Feb. 26, 2014, 7:07 PM), http://www.armytimes.com/article/20140226/NEWS06/302260006/Prosecutor-s-departure-fuels-debate-over-command-influence-sexual-assault-cases.

[39] See, United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

> court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or action of any convening authority, approving, or reviewing authority with respect to his judicial acts.

The second part of Article 37 prevents any type of reprisals against those who agree to participate as a witness or any other party to a court-martial. Any such interference, described in Article 37 of the Uniform Code of Military Justice, may be punished under Article 98, part 4 of the Manual for Courts-Martial (2008 Ed.). Initially, the defense must provide "some evidence"[40] of actual or apparent unlawful command influence, then the government must demonstrate, beyond a reasonable doubt, that there is no unlawful command influence either actual or apparent.[41]

The discussion of unlawful command influence is critical to understanding the negative impact that these thoughtless changes to the Uniform Code of Military Justice will, and do, have. Congress years pressuring the Service Secretaries, who in turn pressure the Military Service Chiefs and they start pressuring field generals who are expected to be "accountable" about sexual assaults or risk losing their jobs.[42] Something like this was seen when the present Commandant of the Marine Corps, General James Amos, decided that he wanted to "crush"[43] Marines who were involved with a video of snipers urinating on Afghani corpses. He told the 3-star convening authority, LtGen Thomas Waldhauser, then the commanding general of I MEF and MARCENT to "crush" the Marines. Seven of the nine men are now out of the service as a result of the Commandant's remarks. That is unlawful command influence as described to the letter in Article 37. When the Convening Authority did not agree that the offenses warranted the type of punishment the Commandant wanted (notice there was no presumption of innocence at the highest level) the lieutenant general was relieved of his duties[44] as

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[40] See, United States v. Biagase, 50 M.J. 143, 151 (C.A.A.F. 1999).
[44] *Id*.
[42] US Air Force General Who Overturned Rape Conviction to Retire (Jan. 8, 2014, 12:42 PM), http://www.theguardian.com/world/2014/jan/08/us-air-force-general-rape-conviction-retire.
[43] Andrew deGrandpré, 3-star: Commandant Wanted Marines 'Crushed' for Urination Video (Jul. 25, 2013, 6:00 AM), http://www.marinecorpstimes.com/article/20130725/NEWS/307250040/3-star-Commandant-wanted-Marines-crushed-urination-video.
[44] Declaration of Lieutenant General Thomas D. Waldhauser, U.S. Marine Corps (July 23, 2013), http://timeswampland.files.wordpress.com/2013/11/waldhauser.pdf. United States v. Stonemen, 57 M.J. 35, 41

convening authority and the cases were sent to another convening authority that would more closely follow the Commandant's wishes. The new changes effectively do the same thing.

Convening authorities are to assume that when any sexual assault complaint is made, no matter what the likely credibility or possibility, that the accuser is a "victim." The accuser is automatically entitled to all resources, recommendations and attention available now and in the future, despite the fact that no investigation was completed to substantiate the claim. The purported perpetrator is moved from his or her unit, creating an obvious signal to all those who work with him or her that there is a presumption of guilt. The commander is aware of what is going on. There has been an accusation.

From there, the victim appears to control the whole process. The convening authority is directed what to do without the exercise of command discretion. The commander must send the case to a general court martial and the sentence is practically predetermined since the mandatory minimum includes a dismissal or dishonorable discharge. Pretrial agreements are controlled and the convening authority is again told what to do with regard to post trial processing. The commander is not allowed to even consider the caliber and character of the service member who is in question. Again, there is no presumption of innocence. This system creates a conveyor belt of guilt where the end is predetermined and due process and the Fifth and Sixth Amendment to the United States Constitution is buried.

To provide an example of how this railroad to guilt works we have the Commandant of the Marine Corps, who is subject to Article 37 of the Uniform Code of Military Justice going worldwide to all Marines in his Heritage Brief and then his Reawakening campaign telling Marines that sexual assault is an ugly mark on our proud reputation. The problem worsens as Marines at all levels begin to equate justice with convictions. Potential panel members at court-martial feel they have to convict to protect themselves and hold the accused accountable. The military judges also attend these briefings. Witnesses hear the call to conviction

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(C.A.A.F. 2002).asked me [LtGen Waldhauser] specifically something to the effect of why not or will you give all of them General Courts-Martial? I [LtGen Waldhauser] responded, 'No, I am not going to do that,' or words to that effect, stating that I did not believe any of the cases warranted General Court-Martial. The CMC told me that he could change the Convening Authority on the cases and I responded that would be his prerogative."

whenever there is a sexual assault. Memories change and witnesses are hesitant to come forward. The entire system and all within it are tainted. The political football in Congress has become unlawful command influence within the military system. A convening authority who is supposed to be neutral and detached is pressured in exercising his or her post-trial discretion again is told what to do and who has to tell him what to do. This is the definition of Article 37 in action.

But will all of this pressure backfire? It is possible that members, knowing of the mandatory minimum for sexual assault may be less likely to convict. Convening authorities and Staff Judge Advocates may be less likely to fashion charges as sexual assault to avoid the deprivation of discretion. Finally, commanders who know their service members the best may be unable to simply put aside what they know about a good man or woman who has been accused. All of this may happen simply because evil flourishes where good men fear to go. Despite many commanders being relieved for not making the "right" decisions about sexual assault, a few strong and independent commanders remain. But it is at the risk of their careers as higher headquarter bow to the pressure from Congress and the Departmental level heavies who are trying to infuse the notion that the accuser is always right and always a victim.

The most recent example of unlawful command influence has become a national spectacle and embarrassment to the uniformed services. A junior officer accused a brigadier general of sexual assault. Not only did she not report immediately but she also told a different story to friends and on her social media site. She talked about loving sex with the general. The accuser's complaint came to light after she found out that the general was sleeping with other women. The prosecutor, in good conscience, after reviewing the evidence, went to the convening authority to plead with him to dismiss the charges because the accuser was not credible. The convening authority caved to pressure from above and denied the request. The lieutenant colonel who was the prosecutor resigned his commission. Still, the trial went forward. A pretrial agreement was proposed that allowed the general to plead to adultery and fraud that would still carry a maximum punishment of 15 years. During the trial, emails were discovered and presented to the court. The emails showed that the new prosecutor and the convening authority were told to reject the pretrial offer by the defense by LAWYERS at the Department level. This was adjudged to be the appearance of unlawful command influence and the trial was

stopped. The general and his lawyer are now back at the table trying to negotiate a new pretrial agreement. This is all thanks to pressure from Congress to believe the victim. They have corrupted the fundamental fairness of the military justice system. One other note is that when Congress decided that commanders should be removed from important decisions in the pretrial, trial and post trial process, they wanted to substitute LAWYERS who were specially trained to make the "correct" decisions. The original special prosecutor resigned because he saw the injustice. The person who advised the new trial counsel to reject the pretrial agreement was also a lawyer. Maybe lawyers should be removed from the system too.

What we have is a pack of wolves or wolverines that have singled out a target group of offenses and called for blood. The method will cripple the military justice system and create a backlog of appellate cases that will be so bogged down that the accuser and the accused will have long passed away until these decisions are made.

THE GOOD SOLDIER'S CHARACTER CANNOT BE DISCUSSED OR CONSIDERED

For nearly a century, a staple of military justice has been a service member's good character. This is often introduced on the merits of the defense case. This serves to show the judge or the panel of members that a good service member is less likely to have performed the acts alleged. The panel then, by law, gets instructed that "good military character" in and of itself is enough to create a reasonable doubt and require an acquittal. It is often the only defense introduced in some cases, for example where drug use is the only charge. The accused does not even have to testify to allow both live and external evidence of good military character, be it in the form of documents from family and the opinions and reputation from other service members. In sentencing, the same thing can happen. Under RCM 1003, the defense may introduce fitness reports, commendations, ribbons and badges, live testimony and affidavits to present good military character as factor to consider during sentencing. The prosecution too has an opportunity to bring in evidence of aggravation regarding the accused and evidence directly relating to the offense, which makes it more serious. The military judge will instruct a panel as a matter of law that the panel should consider all of this while deliberating on a sentence.

Now we have the changes introduced by section 1708 of the Defense Authorization Act of 2014. It completely changes the discussion of Rule 306 of the Manual for Courts-Martial. Currently, a commander may consider, along with other evidence, the good character of the accused before he or she makes the decision regarding which forum to which to send the charges. The commander wants to know if the member is a chronic offender or a leader and a war hero. The commander wants to know if the accused is suffering from verified PTSD or has other relevant problems in his or background that could contribute to a decision regarding forum selection. Of course, now that sexual assault has been fenced off in the UCMJ, the commander has to make a decision with blinders on. Essentially ignoring everything he or she knows about the service members who work for the commander.

The issue that is of concern is that consideration of forum and an accused's background is not the only thing a commander considers but one of the things considered. The seriousness of the offense is always primary. Again, taking just sexual assault out of the commanders' hands creates an impossible situation if there are other charges on the charge sheet. What if there is a separate battery on the charge sheet. According to the new changes, the commander can consider the character of the accused for the battery but not for the alleged sexual assault. The members would be able to hear character evidence on one offense but have to ignore it on the other. How is that even possible? No one can compartmentalize that well.

But the worst of Senators Claire McCaskill, Kelly Ayotte and Deb Fisher's plan was yet to come. On March 10, 2014 it landed like a bombshell in the middle of the military justice system. The Senate passed a bill by a vote of 97-0 to remove consideration of a service member's good character from consideration at trial as well as pretrial. Senator McCaskill described it as "the ridiculous notion that how well one flies a plane should have anything to do with whether they committed a crime."[45] Maybe the Senate should check the Federal Rules of Evidence, which allow exactly that kind of evidence. Maybe, before they execute their plan to change the Military Rules of Evidence to eliminate this defense they should check the rules of evidence of almost every state and most of the democratic nations of the world.

Why is this defense allowed? It is relevant and allowed because what a person may do at one point in his or her life does not dictate who the person is. A person's character and reputation tells the world what kind of a human being he or she is. It is like the difference between climate and weather. Weather comes and goes but the climate is what is predictable. Is it "ridiculous" to assume that others who have known the accused for years and seen him or her everyday under many conditions would know if the accused is a truthful, respectful, peaceful person? Is it "ridiculous" to draw some inference from years of performance evaluations that a person might be less likely to commit a violent sexual act or any other serious crime? What is "ridiculous" is to have people who know nothing about a system to

[45] Donna Cassata, Senators Rally Behind Military Sexual Assault Bill, ASSOCIATED PRESS 1, 6, (Mar. 11, 2014, 12:12 AM) http://www.utsandiego.com/news/2014/Mar/11/senators-rally-behind-military-sexual-assault-bill/.

not just tinker with it but also destroy it. And what about the alleged victim's character? Is it also "ridiculous" to draw a conclusion that if the victim has lied before that he or she might be lying now?

Of course there is also the problem with the Constitution and the Fifth and Sixth Amendment. Removing the character defense chills the right of the accused to remain silent. It forces the accused to testify. When the changes in what can be asked of the alleged victim are combined with the inability to present character evidence, no longer is justice blind, there is no justice. Why is it that not only can the panel not know of the character of the accused but the defense cannot inquire at to the truthfulness of the alleged victim and other motives other than the truth that he or she may have for claiming sexual assault? What about the alleged victim's reputation for truthfulness or good military character. The government is allowed to present that information. How is that a fair trial? Perhaps the simplest answer to all of these questions is to just assume the accused is guilty, give him or her a dishonorable discharge and then let, not the immediate commander, but one higher up decide if all went well.

The question may arise why the military has folded its tents and silently succumbed to this nonsense. Where is the hue and cry from the military's top leadership? The answer is that the military is completely beholden to the Senate and the House for their money. It is all about money. Why are men and women expected to lead in battle for this country and then allowed no opportunity to talk about leadership among the troops that were injured and fought for the country? There is no answer to this question but there is an answer to the question Senator McCaskill asks about what character had to do with being a criminal. Consider the Honorable Justice Clarence Thomas. Was it relevant during his confirmation hearings to the United States Supreme Court to hear not only from Anita Hill but also from many others who described his good character and demeaned Ms. Hill? Apparently the Congress thought so. Was it important to consider former President William Clinton's character when Monica Lewinski came forward and claimed she had sex with him? When former President Clinton claimed he did not have sex, it was important to consider his entire presidency and character in determining if Congress should impeach him. It is also interesting to note that Congress has justified some of its actions because victims fear retaliation or disbelief because of the seniority of the alleged perpetrator. Monica Lewinski was

making her allegations against the President of the United States and her allegations were still heard and investigated. She successfully accused the most powerful man in the free world and was heard even though she was a mere Congressional intern. When Senator Ted Kennedy drove his car into Chappaquiddick Creek and left Mary Jo Kopechne to die, was it relevant to consider the entire character and reputation of the Senator? It was and he became one of the most respected senior senators in Congress. How can character not reflect on an event? It must.

There are a couple of explanations for the conundrum that this most recent decision by Congress creates. One is that Congress never understood or thought about what might happen if more than one offense was charged besides the sexual assault. The other possibility is that Congress' belief is that there is no such thing as a commander who has a fair and reasoned sense of justice. There are commanders who can exercise appropriate discretion when a sexual assault is involved. While not personally advocating removing commanders from all violations of the UCMJ, it certainly would make the situation of multiple charges more comprehensible and credible.

When the charges go to an Article 32 investigation, now a preliminary hearing, the investigating officer is likely to see all the service records of the accused and all of the good military character. There are no rules of evidence in an Article 32. That character evidence is required to be considered in the investigating officer's report to the Staff Judge Advocate. The Staff Judge Advocate then writes an Article 34 letter to the convening authority. That letter is required to report the accused's good character if it was included with the investigating officer's report (Article 33 of the UCMJ). At that moment, what, according to Section 1708, is the commander supposed to do? Is the commander just supposed to rip those pages he or she is required to read out of the preliminary hearing? Should the IO and the SJA just not pass on this information which has been the cause for appellate reversal in the past? Again, no thought has been given to the entire process, just a motivation to believe and protect all accusers of sexual assault. Will these rules be changed too in light of the March 10, 2014 decision of the Senate?

The problems continue post trial as well. This latest set of changes says that good character of the accused may be considered *after* conviction and during sentencing.

What if, when the fact finder hears the good character they vote to reconsider the findings? They are authorized to do that in the Manual for Courts Martial. The panel could well go back into deliberations and find the accused not guilty or guilty of a less serious offense. What happens to good character evidence then? After the trial, the commander has a verbatim copy of the transcript with all the good character transcribed. At that point good military character is nearly irrelevant because the commander cannot lower the sentence on his own based on that good character. Again we have a situation where the interworking of the whole system is not given more than a passing thought. What about administrative discharge boards? There are no rules of evidence at these proceedings. That must mean that if a commander wants to know about an accused, he or she could find out all about the person by using an administrative remedy or a formal pretrial investigation.

All of this restriction on consideration of character makes each accused an identical drone before the commander. He or she has an investigation and no background info on the accused or the accuser. Men and women accused of crimes are not identical. Identical justice is not justice. It is tyranny. It will make more and more trials a complex mess of "he said, she said."

This piecemeal effort to supposedly change the military justice system for the better by depriving the accused of rights that even Federal defendants have is nothing more than the creation of a kangaroo court. This is where it is all heading. Commanders do not command, due process is not due and all victims always tell the truth. Congress has taken a purebred greyhound of a system, made it into a mutt and will not be able to figure out in a few years why it cannot run.

CONCLUSION

The military justice system is not perfect. It never has been. Nothing made by humans is ever perfect. But in the last six decades or so minor tweaks have made it one of the most fair and balanced system on the federal or state level.[46] Rape and aggravated sexual assault are some of the most vicious and violent crimes covered by the Uniform Code of Military Justice and the maximum punishment reflect that without mandatory minimums. Victims need access to resources and support at all stages of a trial once an investigation by NCIS, OSI, or CID substantiates the accusation.

However, commanders, good commanders, know their people the best and therefore are the most qualified to make discretionary decisions about what charges to bring and the forum in which to send them, be that a general court-martial or administrative hearing. The Staff Judge Advocate is always available to assist battalion or group commanders and provide expert legal advice. The chaplains, Staff Judge Advocates, and professional investigative agencies are available for accusers to go to when the chain of command is frightening, intimidating or unresponsive. Everyone in the military has a boss and there are numerous mechanisms in place to reach over the head of the immediate supervisor or commander when an accuser fears deaf ears. Each major command, each service and the Department of Defense all have Inspectors General (IG), to hear unanswered complaints. Article 138 of the Uniform Code of Military Justice specifically exists when a person in command is not responsive or abusive in any way. The system is not broken. Might it need to be tweaked? Yes, probably, but not for a particular kind of case, to the exclusion of all others. What is happening now is like the old civil engineer adage, "If it doesn't fit, force it. If it breaks then it needed to be replaced anyway. To hell with the pieces that still don't fit". Commanders who are not accountable to their people need to be replaced with commanders who do listen. Politics should not be any part of the decision process of the commander when determining if criminal charges should be brought against a service member. But Congress has injected itself in such a heavy-handed way

[46] Robinson O. Everett, The New Look in Military Justice, 1973 Duke L.J. 649 (1973).

that commanders are frightened to do what they believe is right. As discussed above, even prosecutors struggle with the new changes.[47]

Perhaps the answer is to put more women into billets where they hear complaints. Maybe female IG's should be appointed to help investigated complaints. Are women a kinder and gentler sex who will identify with the victims more closely? Increasingly we are seeing the Judge Advocate Generals of the Services are women. The current Navy JAG is a woman for the first time and the Army just appointed its first female Judge Advocate General. Perhaps that will help. Service commanders who are females might bring a different set of tools and experiences to the issue of victims of any crime. That kind of a stereotyping is the same thing as assuming all defendants are guilty and all victims tell the truth. There are so many solutions to the issue of whether sexual assault victims are being heard other than forcing the whole system into disarray, slowing it down, demoralizing commanders in front of their troops, and creating an environment of unlawful command influence. Sexual assault, no matter how awful, is part of the human condition and torturing a system to pretend that it can be eliminated is naïve. Even now, two of the highest-ranking sexual assault prosecutors are facing investigations for their own alleged sexual assault. So this alternate system just recently designed has already proved itself a failure.

Finally, Congress never seemed to even cast a sideward glance at the rights of the accused or even the possibility that an accuser may have some motive other than the truth to allege sexual assault. We have acknowledged, over the years, that children who complain of assault have many of reasons to fabricate their stories. Adults are subject to the same pressures and motives. Assuming that every person is a victim because he or she claims to be, crushes the rights of the accused and no system can do that without depriving the accused of due process. These changes scar the face of the Fifth and Sixth Amendments to the U.S. Constitution forever, or at least until hundreds, if not thousands of appeals are resolved. Forced prosecution is not a reason to reject commanders in the military justice system. What we need is keep men and women in Congress who do not know the first thing about military justice out of the system.

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[47] David Zucchino, Judge Refuses to Dismiss Sexual Assault Charges Against General (Mar. 4, 2014, 8:29 PM), http://www.latimes.com/nation/nationnow/la-na-nn-sinclair-sexual-assault-court-martial-20140304,0,619438.story#axzz2vEZQsIfG.

Every day Congress tries something else to solve what may be an unsolvable problem. It is like preventing suicide. That cannot completely be stopped. Human beings have free will and some things will never deter some people. Even as recently as March 7, 2013, Senator Kristen Gellibrand's attempt to remove commanders from the entire military justice system failed to pass the Senate. Some things should just be left alone. Statistics mean nothing or everything. Such is the nature of statistics. Higher numbers of reports may mean victims have greater confidence in the system. Lower numbers may mean that there is less confidence in the system.

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