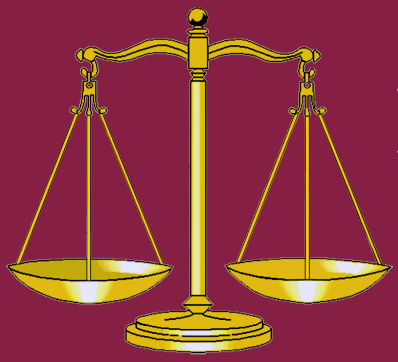
Volume 222 Winter 2014



Military Law Review

Articles

Improving Uniform Code of Military Justice Reform
Major John W. Brooker

Don't Forget the Far East: A Modern Lesson from the Chinese Prosecution of Japanese War Criminals after World War II
Major Nathaniel H. Babb

A Precarious Balance: Managing Stigma, Confidentiality, and Command Awareness in the Mental Health Arena
Major Cara-Ann M. Hamaguchi

A Compensation System for Military Victims of Sexual Assault and Harassment
Julie Dickerson

Department of the Army Pamphlet 27-100-222

U.S. DEP'T OF ARMY PAMPHLET 27-100-222
MILITARY LAW REVIEW
VOLUME 222 • 2014

Military Law Review

Volume 222 **Winter 2014**

CONTENTS

ARTICLES

Improving Uniform Code of Military Justice Reform
Major John W. Brooker 1

Don't Forget the Far East: A Modern Lesson from the Chinese Prosecution of Japanese War Criminals after World War II
Major Nathaniel H. Babb 129

A Precarious Balance: Managing Stigma, Confidentiality, and Command Awareness in the Mental Health Arena
Major Cara-Ann M. Hamaguchi 156

A Compensation System for Military Victims of Sexual Assault and Harassment
Julie Dickerson 211

Headquarters, Department of the Army, Washington, D.C.

Pamphlet No. 27-100-222, Winter 2014

Military Law Review

Volume 222

Board of Editors

Colonel James F. Garrett
Dean, The Judge Advocate General's School

Lieutenant Colonel William E. Mullee
Chair, Administrative and Civil Law Department

Major Elizabeth A. Turner
Director, Professional Communications Program

Captain Justin C. Barnes
Editor

Since its inception in 1958 at The Judge Advocate General's School, U.S. Army, in Charlottesville, Virginia, the *Military Law Review* has encouraged a full and frank discussion of relevant legislative, administrative, and judicial principles through a scholarly examination of the law and emerging legal precepts. In support of that mission, the *Military Law Review* publishes scholarly articles that are relevant to, and materially advance, the practice of law within the military.

The *Military Law Review* does not promulgate official policy. An article's content is the sole responsibility of that article's author, and the opinions and conclusions that are reflected in an article are those of the author and do not necessarily reflect the views of the Department of Defense, the Department of the Army, The Judge Advocate General's Corps, The Judge Advocate General's Legal Center or School, or any other governmental or non-governmental agency.

WEBSITE: The *Military Law Review* is available at http://www.jagcnet.army.mil/MLR.

COPYRIGHT: Unless expressly noted in an article, all articles are works of the United States Government in which no copyright subsists. Where copyright is indicated in an article, all further rights are reserved to the article's author.

SUBSCRIPTIONS: Interested parties may purchase private subscriptions from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402, at (202) 512-1800. An annual subscription is $20 for a domestic subscriber or $28 for an international subscriber.

For Army legal offices, including within the Army National Guard and the U.S. Army Reserve, and other federal agencies, inquiries and address-change requests should be communicated to the *Military Law Review*. Other military services may request distribution through official publication channels. This periodical's postage is paid at Charlottesville, Virginia, and additional mailing offices.

Reprints of published works are not available.

POSTMASTER: Send address-change requests to *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781.

CITATION: This issue of the *Military Law Review* may be cited as 222 MIL. L. REV. (page number) (2014). Each issue is a complete, separately numbered volume.

INDEXING: *Military Law Review* articles are indexed in *A Bibliography of Contents: Political Science and Government*; *Legal Contents (C.C.L.P.)*; *Index to Legal Periodicals*; *Monthly Catalogue of United States Government Publications*; *Index to United States Government Periodicals*; *Legal Resources Index*; four computerized databases—the JAGCNET, the *Public Affairs Information Service*, *The Social Science Citation Index*, and *LEXIS*—and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current United States Government Periodicals on Microfiche* by Infordata International Inc., Suite 4602, 175 East Delaware Place, Chicago, Illinois 60611.

SUBMISSION OF WORKS: The *Military Law Review* accepts submissions of works from military and civilian authors. Any work that is submitted for publication will be evaluated by the *Military Law Review*'s Board of Editors. In determining whether to publish a work,

the Board considers the work in light of the *Military Law Review*'s mission and evaluates the work's argument, research, and style.

No minimum or maximum length requirement exists. Footnotes should be typed double-spaced and numbered consecutively from the beginning to the end of the writing, not section by section. Citations must conform to *The Bluebook: A Uniform System of Citation* (19th ed. 2010) and to the *Military Citation Guide* (TJAGLCS 19th ed. 2014).

A submitted work should include biographical data concerning the author or authors. This information should consist of branch of service, duty title, present and prior positions or duty assignments, all degrees (with names of granting schools and years received), and previous publications. If submitting a lecture or a paper prepared in partial fulfillment of degree requirements, the author should include the date and place of delivery of the lecture or the date and source of the degree.

All submissions must be in Microsoft Word format and should be sent to the Editor, *Military Law Review*, at usarmy.pentagon.hqda-tjaglcs.list.tjaglcs-mlr-editor2@mail.mil. If electronic mail is not available, please forward the submission, double-spaced, to the *Military Law Review*, Administrative and Civil Law Department, The Judge Advocate General's Legal Center and School, U.S. Army, 600 Massie Road, Charlottesville, Virginia 22903-1781.

EDITOR'S NOTE: With deep gratitude for his many years of faithful service to the United States, the *Military Law Review* marks the retirement of its long-time Technical Editor, Mr. Charles Strong, who retired from federal service at the end of January 2015. He will be missed.

INDIVIDUAL PAID SUBSCRIPTIONS TO THE *MILITARY LAW REVIEW*

The Government Printing Office offers a paid subscription service to the *Military Law Review*. To receive an annual individual paid subscription (4 issues), complete and return the order form on the next page.

RENEWALS OF PAID SUBSCRIPTIONS: You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSDUE" on the top line of the mailing label as shown in this example:

When this digit is 7, you will be sent a renewal notice.

MILR SMITH212J ISSDUE007 R1
JOHN SMITH
212 BROADWAY STREET
SAN DIEGO, CA 92101

The numbers following ISSDUE indicate how many issues remain in the subscription. For example, ISSDUE001 indicates a subscriber will receive one more issue. When the number reads ISSDUE000, you have received your last issue and you must renew.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

INQUIRIES AND CHANGE OF ADDRESS INFORMATION: The Superintendent of Documents is solely responsible for the individual paid subscription service, not the Editors of the *Military Law Review*.

For inquires and change of address for individual paid subscriptions, fax your mailing label and new address to (202) 512-2250, or send your mailing label and new address to the following address:

United States Government Printing Office
Superintendent of Documents
ATTN: Chief, Mail List Branch
Mail Stop: SSOM
Washington, DC 20402

MILITARY LAW REVIEW

Volume 222 **Winter 2014**

IMPROVING UNIFORM CODE OF MILITARY JUSTICE REFORM

MAJOR JOHN W. BROOKER*

I. Introduction

With the National Defense Authorization Act of 2014 (2014 NDAA), Congress, for the first time in forty-five years, placed the Uniform Code of Military Justice (UCMJ) under its proverbial spotlight. The 2014 NDAA, which President Barack Obama signed into law on December 26, 2013, included the first major reform of the UCMJ since 1968.[1] The new law includes "over 30 different military justice

---

* Judge Advocate, U.S. Army. M.M.A.S, 2014, U.S. Army Command and General Staff College, Fort Leavenworth, Kansas; LL.M. 2010, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2003, University of North Carolina at Chapel Hill; B.A., 1998, Wake Forest University, Winston-Salem, North Carolina. Major Brooker currently serves as the Chief of International and Operational Law for III Corps and Fort Hood at Fort Hood, Texas. Major Brooker previously served on the faculty of The Judge Advocate General's School, U.S. Army. He has also served in numerous military justice positions, to include Trial Counsel, Senior Defense Counsel, and Chief of Military Justice.

This article was submitted in partial completion of the Master of Military Art and Science requirements of the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas. The author thanks Colonel Celestino Perez, Jr., Colonel (Ret.) Bradley K. Nelson, Lieutenant Colonel Michael Friess, and Major Stoney Portis for their assistance with this project. The author also thanks Mr. Charles J. Strong and Mr. Daniel Lavering for always going above and beyond the call of duty.

[1] Rear Admiral (Rear Adm.) Sean Buck, *Accountability Actions in Sexual Assault Cases*, NAVY LIVE (Feb. 10, 2014), http://navylive.dodlive.mil/2014/02/10/accountability-actions-in-sexual-assault-cases/ ("The FY14 NDAA provided the most sweeping reform to the Uniform Code of Military Justice since 1968. . . ."); *see also* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 531, 652, 1701–1753, 127 Stat. 759, 788, 952–985. The Uniform Code of Military Justice (UCMJ) forms the primary legal foundation for the United States military's justice system. UCMJ (2012). For the purposes of this article, "major reform" is defined as a reform that alters: (1) the fundamental practice of law pursuant to the UCMJ and (2) one or more individual rights

provisions that are intended to enhance victims' rights and improve the military justice process."[2]

Some members of Congress believe that a more major UCMJ reform is necessary. After Senator Kirsten Gillibrand's proposal to remove command prosecutorial discretion in the Military Justice Improvement Act (MJIA) failed to reach the filibuster-proof majority necessary for a floor vote, she stated,

> Without a doubt, with the National Defense bill we passed, and Senator McCaskill's Victim Protection Act, we have taken good steps to stand up for victims, and hold offenders accountable. But we have not taken a step far enough. We know the deck is stacked against victims of sexual assault in the military, and today, we saw the same in the halls of Congress.[3]

Fifty-five senators publicly pledged to support Senator Gillibrand's proposal, and Senator Gillibrand hopes to raise the proposal again.[4]

Most military leaders, however, staunchly oppose the MJIA.[5] Former Secretary of Defense Chuck Hagel believes that the chain of command must maintain its central role in the UCMJ for the system to properly respond to the sexual-misconduct crisis. "I don't think you can fix the problem or have accountability within the structure of the military without the command involved in that. . . . [I]f you don't hold people accountable then you're not going to fix the problem. You can pass all the laws you want and that isn't going to work."[6]

---

of servicemembers. This definition is intentionally imprecise. Reforms to the UCMJ's punitive articles that are not accompanied with procedural reforms are not major reforms.

[2] Buck, *infra* note 1.

[3] Kirsten Gillibrand, *Gillibrand Statement on Senate Vote to Reform Military Justice System*, U.S. SENATE (Mar. 6, 2014), http://www.gillibrand.senate.gov/newsroom/press/release/gillibrand-statement-on-senate-vote-to-reform-military-justice-system.

[4] *Id.*; *see* Jeremy Herb, *Why Gillibrand Bill Faces Midterm Danger*, THE HILL (Mar. 13, 2014), http://thehill.com/blogs/defcon-hill/army/200649-for-gillibrand-its-now-or-never-on-sexual-assault-bill.

[5] Eliott C. McLaughlin, *Military Chiefs Oppose Removing Commanders from Sexual Assault Probes*, CNN (June 5, 2013, 10:31 AM), http://www.cnn.com/2013/06/04/politics/senate-hearing-military-sexual-assault/. For this article the term "military leaders" includes the strategic-level leadership in the Department of Defense and their primary advisors, to include the Secretary of Defense, the service secretaries, the Chairman of the Joint Chiefs of Staff, and their senior legal advisors.

[6] Luis Martinez, *Hagel Opposes Gillibrand's Bill on Sex Assaults in Military*, ABC

While Secretary Hagel advocated for some of the 2014 NDAA changes to the UCMJ,[7] military leaders have expressed concern about others. For example, "the Pentagon has reservations" about a new provision that requires service secretary review of decisions to not refer charged sex-related offenses to trial, as there is a fear that it could have a "chilling effect on majors and captains if they think every decision gets kicked up to the service secretary."[8] Army officials also have manpower concerns about a provision that requires judge advocates to serve as preliminary hearing officers pursuant to Article 32, UCMJ.[9]

Thus, while military leaders and Congress are both taking bold action to eliminate sexual misconduct,[10] they strongly disagree about the UCMJ's role in the problem and how, if at all, the UCMJ should be modified. Military leaders have vehemently resisted what they perceive to be rapidly-drafted, unstudied proposals for change, such as the MJIA. Brigadier General Richard C. Gross, Legal Counsel to the Chairman of the Joint Chiefs of Staff, argues, for instance, that "[d]ramatic changes to the Uniform Code of Military Justice, such as removing commanders from disposition decisions without careful study/consideration of impact, increase the likelihood of unintended consequences. Some of these unintended consequences may harm the very victims that legislation proposing to remove commanders is trying to protect."[11] Brigadier

---

NEWS (June 12, 2013, 2:27 PM), http://abcnews.go.com/blogs/politics/2013/06/hagel-opposes-gillibrands-bill-on-sex-assaults-in-military/.

[7] *See* Claire Boston, *Hagel Endorses McCaskill's Changes to Military Code*, THE MANEATER, Apr. 12, 2013, http://www.themaneater.com/stories/2013/4/12/hagel-endorses-mccaskills-changes-military-code/; News Release, Release No. NR-087-13, U.S. Dep't of Def., Statement of Secretary of Defense Chuck Hagel on Sexual Assault Prevention and Response (Dec. 20, 2013), *available at* http://www.defense.gov/releases/release.aspx?releaseid=16443.

[8] Donna Cassata, *Senate OKs Bill to Combat Military Sexual Assault*, ASSOCIATED PRESS (Mar. 10, 2014, 7:35 PM), http://bigstory.ap.org/article/new-senate-bill-combat-military-sexual-assaults. The 2014 NDAA requires service secretary review of certain determinations to not refer cases to court-martial. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1744, 127 Stat. 980.

[9] *See* David Vergun, Am. Forces Press Serv., *New Law Brings Changes to the Uniform Code of Military Justice*, U.S. DEP'T OF DEF. (Jan. 8, 2014), http://www.defense.gov/news/newsarticle.aspx?id=121444.

[10] *See Hearing to Receive Testimony on Sexual Assaults in the Military: Hearing Before the S. Subcomm. on Personnel, Committee on Armed Services*, 113th Cong. 52 (2013) [hereinafter 2013 *Hearing*] (statement of Lieutenant General Dana K. Chipman, U.S. Army, The Judge Advocate Gen., U.S. Army) ("We actually began the transformation to a special victims' focus in 2008.").

[11] Statement of Brigadier General Richard C. "Rich" Gross, to the Response Systems

General Gross posits, "[T]he military justice system is complex, and major changes require careful, deliberate study."[12]

What Brigadier General Gross and other military leaders fail to realize is that for twenty-one years, Congress and the American public practically begged them to study the relationship between sexual misconduct and the UCMJ. A media report raised this exact issue as early as 1992.[13] That same year, twenty-two members of Congress sponsored a resolution that outlined similar concerns.[14] Along with continued media attention,[15] indications of the UCMJ's potential problem addressing sexual-misconduct cases were outlined in scholarly articles throughout the 1990s.[16] Congress even directed military leaders to study the issue in 2005, whereupon those military leaders undertook a mere cursory, rule-based review that recommended no change.[17] Additionally, the issue of commander involvement in the UCMJ was first raised in 1949, and it has been a constant topic of concern ever since.[18] It appears that, when it comes to reforming the UCMJ, military leaders either do not understand or do not value the signals that the Congress and the American public are sending.[19]

Perhaps military leaders ignored this input because before the sexual-misconduct crisis, the American public and Congress were generally unfamiliar with the UCMJ.[20] Less than one percent of the American

---

Panel 2 (25 Sept. 2013) [hereinafter Gross Statement], *available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/20130924/sr_ja_persp/BG_Gross_USA_CJCS_Statement_RSP_20130925.pdf.

[12] *Id.* at 2.

[13] *See* John Lancaster, *In Military Sex Harassment Cases, His Word Often Outranks Hers*, WASH. POST, Nov. 15, 1992, at A1.

[14] H.R. Con. Res. 359, 102d Congress (1991-1992).

[15] *See infra* notes 314–319, 406–411 and accompanying text.

[16] *See infra* notes 481–492 and accompanying text.

[17] *See infra* notes 208–210 and accompanying text.

[18] *See infra* Part II.A.2 nn. 128–129, 152, 182–183 and accompanying text.

[19] *See* Eugene R. Fidell, *The Culture of Change in Military Law*, *in* EVOLVING MILITARY JUSTICE 163 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002) ("Anyone tracing the path of military law over the last several decades will be struck by two phenomena: the extent of change that has overtaken the system . . . and the resistance to that change.").

[20] *See* John S. Cooke, *Manual for Courts-Martial 20X*, *in* EVOLVING MILITARY JUSTICE, *supra* note 19, at 173, 182 ("Finally, the public's attitude about military justice should be considered. The public's, and more specifically the Congress's and our civilian leadership's, increasing lack of familiarity with our legal system cannot be ignored. . . . This lack of familiarity increases the risk of changes that will do more harm than good.").

public has ever served on active duty,[21] and only twenty percent of the members of the 113th Congress have ever served in the military.[22] In March 2013, Senator Claire McCaskill, a leading figure in this debate and the primary sponsor of the Victim Protection Act of 2014, stated, "After meeting with many of you and many of your colleagues, I have gotten much more familiar with the UCMJ. In fact, on the advice of one of the Army JAGs, I actually downloaded it on my iPad and now I have it as an app."[23]

Military leaders may have also failed to see the signs because they trusted the two enduring institutions that are charged with the mission of continually reviewing the UCMJ.[24] It is reasonable to posit that the most senior military leaders assumed that the experts on these committees, which mostly consist of DoD personnel, appropriately considered the public's input when reviewing the UCMJ's operational performance. Unfortunately, even a cursory review of the events leading to the 2014 NDAA reveals that such an assumption was flawed.

Military leaders must understand that this country cannot afford for them to miss those signals when the next potential problem with the UCMJ is metastasizing. George Washington stated, "Discipline is the soul of an Army. It makes small numbers formidable; procures success to the weak, and esteem to all."[25] Because the UCMJ is the military's primary tool to "strengthen the national security of the United States" by "promot[ing] justice" and "maintaining good order and discipline,"[26] when Congress makes unsolicited reforms to the UCMJ that are contrary to the nearly unanimous recommendations of military leaders, an examination of the potential causes of those disagreements, as well as potential solutions, is warranted.

---

[21] Sabrina Tavernise, *As Fewer Americans Serve, Growing Gap Is Found Between Civilians and Military*, N.Y. TIMES, Nov. 24, 2011, http://www.nytimes.com/2011/11/25/us/civilian-military-gap-grows-as-fewer-americans-serve.html?_r=0.

[22] JENNIFER E. MANNING, CONG. RESEARCH SERV., R42964, MEMBERSHIP OF THE 114TH CONGRESS: A PROFILE 9 (2014), *available at* http://www.fas.org/sgp/crs/misc/R42964.pdf.

[23] 2013 *Hearing*, *supra* note 10, at 63 (statement of Senator Claire McCaskill).

[24] *See infra* Parts III.A.1, III.A.2 (describing the Code Committee and Joint Service Committee (JSC)).

[25] Letter from George Washington, to Captains of Companies, General Instructions (July 29, 1757), *available at* http://founders.archives.gov/documents/Washington/02-04-02-0223.

[26] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2012) [hereinafter MCM].

Despite the fact that Congress and the President, and not military leaders, have the constitutional authority to amend the UCMJ,[27] the responsibility to shepherd the system remains with those military leaders. This is for practical and ethical reasons. Practically, military leaders are the only ones positioned to perform such a review. Given that Congress has many other concerns and military leaders manage and utilize the system on a daily basis, if military leaders do not continually examine the UCMJ, nobody will. Additionally, an inefficient, unfair, or outdated UCMJ could weaken a military leader's ability to defend the nation, as commanders would not have the requisite tools to punish misconduct. A poorly functioning UCMJ could also negatively impact recruiting and retention. As Representative John Conyers notes, "If the services want to continue to recruit the best people, there must be confidence that the military justice system is fair."[28]

Military leaders also have a professional ethical duty to understand how to properly shepherd the UCMJ. As a 2010 Army white paper on "The Profession of Arms" states, trust with the American people "must be re-earned every day through living our Ethic. . . . A self-policing Ethic is an absolute necessity, especially for the Profession of Arms, given the lethality inherent in what we do."[29] Accordingly, military leaders cannot just be reactive to issues raised in specific legal cases. To properly self-police, military leaders, particularly senior judge advocates,[30] must avoid

---

[27] U.S. CONST. art. I, § 8, cl. 14.

[28] Jack Anderson & Michael Binstein, *Military Injustice*, WASH. POST, Apr. 14, 1994, at C12.

[29] CTR. FOR THE ARMY PROFESSION AND ETHIC, WHITE PAPER, PROFESSION OF ARMS 2 (Dec. 8, 2010), *available at* http://cape.army.mil/repository/ProArms/ProfessionWhite%20Paper%208%20Dec%2010.pdf. Eugene Fidell discusses how the profession of law also impacts UCMJ reform. He states, "Society ought to look to the custodians of military jurisprudence for professionalism. Professionalism, in a legal context, implies an unwillingness to accept circumstances simply because they exist if there is room for improvement in either substance or appearance." Fidell, *supra* note 19, at 168.

[30] *See* Fidell, *supra* note 19, at 167 ("[M]ilitary lawyers, unlike the serjeants-at-law and the civilian advocates of the English tradition, continue to bear unique responsibility for the development of military legal doctrine."); David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990s—A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 10 (1991) ("[I]t is the responsibility of all those within the system, including lawyers, to do all that is within their power to ensure that the system exemplifies all that is right with justice in this country."). While this article uses the term "professional ethical duty," this term is used in relation to the profession of arms, not the profession of law. In no way does this article intend to allege a violation of any legal rules of professional conduct, such as those set forth in Army Regulation 27-26. *See* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

falling into the trappings of the "cases and controversies" mindset of Article III of the Constitution in which advisory opinions are forbidden, and forward-looking, strategic thinking is discouraged.[31] Military leaders need new tools to diagnose and respond to potential problems at earlier stages.

This article is designed to assist military leaders with accomplishing their never-ending mission of shepherding the UCMJ through ever-changing times. To help military leaders break the mold that seems to have discouraged productive study of the UCMJ, this article blends historical data with concepts from law, social science, and medicine to provide military leaders better diagnostic and rehabilitative tools. To use a medical analogy, this article helps military leaders identify the symptoms of a disease at its initial stages so that Congress does not feel compelled to administer a powerful cure, which may prove to be more harmful than the underlying disease. It also provides tools to better understand and treat the disease at the early stages.

This article consists of multiple parts that serve independent, yet related, purposes. Part II gives a brief history of the major revisions of the UCMJ to familiarize the reader with the data set upon which many of the subsequent recommendations are based.[32] Part III then gives an overview of how both the Department of Defense (DoD) and the American people recommend and advocate for UCMJ reform.[33] This part first provides an overview of the various enduring and ad hoc institutions that are charged with the task of updating and modernizing the UCMJ. Comparing the dynamics of these institutions to the events surrounding the three major UCMJ reforms demonstrates that almost all of these institutions were inadequately constituted and have employed incomplete methodologies. This part then describes the two primary ways that the American public voices concerns with the UCMJ—through the media and through Congress.

---

[31] U.S. CONST. art. III, § 2; *see* Letter from John Jay to George Washington (Aug. 8, 1793), *available at* http://press-pubs.uchicago.edu/founders/documents/a3_2_1s34.html (refusing to provide President Washington with an advisory opinion). During a 1991 lecture that is printed in a 1991 *Military Law Review* article, Professor Schlueter argued: "Those participating in any legal system have a professional and moral responsibility for policing the system. Those within the system should be the first to step forward and make changes where needed. In military jargon, those within the system must be 'proactive,' not simply 'reactive.'" Schlueter, *supra* note 30, at 10.

[32] *See infra* Part II.

[33] *See infra* Part III.

Armed with this information, Part IV sets forth a six-variable framework designed to accomplish two things.[34] First, military leaders can use it to determine what might constitute a problem with the UCMJ. Using the medical analogy, unlike biological diseases, the UCMJ does not harbor tangible, objectively quantifiable pathogens. Congress, therefore, is the arbiter of whether a disease actually exists. Second, military leaders can use this framework to better understand when Congress is likely to pass major UCMJ reform. This knowledge can be used either offensively or defensively. If military leaders are trying to prevent major UCMJ reform, the framework's variables and the intelligence contained therein can inform the defense. Contrarily, if military leaders are trying to enact UCMJ reform of any type, they can use this framework to inform their lines of effort to seek statutory reform.

Part V provides four tools that military leaders can use to understand when a potential problem with the UCMJ exists at a much earlier stage than when Congress either directs a review of the UCMJ or makes unsolicited reform.[35] Using the medical analogy, this part gives military leaders the diagnostic tools to identify symptoms of a disease that inflicts the UCMJ at a much earlier stage. Luckily, these early diagnostic tools, which include media reports, legislative and judicial information, and scholarship, are readily available and easy to understand.

Part VI then consolidates all of the information into a social science-informed four-step process that military leaders can use to better shepherd the UCMJ.[36] This process challenges military leaders to fundamentally change their approach to reviewing and reforming the UCMJ. The four-step process calls for military leaders to embrace complexity, research causation, develop a broad, interdisciplinary, and team-oriented dialogue, and implement experimental actions. Using the medical analogy, this part shows military leaders how to better understand the symptoms of diseases even if those diseases are not completely understood. It also helps them perform pseudo-biopsies of the information learned after applying the framework in Part IV and diagnostic tools in Part V.

---

[34] *See infra* Part IV.
[35] *See infra* Part V.
[36] *See infra* Part VI.

Military leaders have almost infinite choices when determining how to review the UCMJ and when recommending changes. This article provides just one approach. The ultimate measure of effectiveness of the chosen course of action is whether or not Congress subsequently implements unsolicited UCMJ reform.

II. A History of Change

Because this article proposes a framework, a list of tools, and a process designed to assist military leaders in securing an effective, efficient, just, and widely-respected UCMJ, examining the previous major changes helps to unlock a treasure trove of information that current military leaders can use to better understand what variables indicate change might be necessary or imminent.[37] Additionally, understanding the roles, procedures, and constraints of the institutions designed to facilitate such change, as well as their roles in prior UCMJ changes, provides insight into how to effectively change the UCMJ and prevent the unintended consequences of unsolicited congressional reform.

Counting the 2014 NDAA as a major reform, the UCMJ has undergone only three major reforms in its history. Because the 2014 NDAA is discussed at length in the introduction above and throughout Parts III, IV, V, and VI below, it will not be discussed in this part.[38] The other two major reforms are the creation of the UCMJ itself and the Military Justice Act of 1968. A brief overview of what was actually changed, along with a brief description of the motivations for these major changes, is a prerequisite to a more comprehensive unpacking of the commonalities and differences between these major UCMJ changes and a host of minor ones.[39]

---

[37] For a thorough history of the UCMJ up to 1973, see WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE (1973).

[38] *See infra* Part I; *see also supra* Parts III, IV, V, and VI.

[39] This is not intended to be a complete history of the UCMJ. Those familiar with the UCMJ's history will note significant omissions. While such events were considered in this analysis, this overview is designed to orient the reader who is less familiar with the UCMJ's history with the major events so that the remainder of this article is more understandable.

A. Major Reforms to the UCMJ

1. Creation of the UCMJ: Due Process, Command Authority, and Jurisdiction[40]

The birth of the UCMJ itself was the first major change. When combined with "a greater public awareness of the war through advances in communication," the actions of the (largely unrestrained) World War II military justice system under the Articles of War resulted in "severe criticism of the military justice system. . . ."[41] By the end of the war in 1945, at least 12 million people had served in the American military.[42] Over 1.7 million courts-martial were tried during the war, resulting in over 100 executions and 45,000 confined servicemembers.[43] In 1945, a panel led by Federal District Court Judge Matthew F. McGuire concluded, "It may be said categorically that the present system of military justice is not only antiquated, but outmoded."[44] Judge McGuire opined that "the present system fails" for its failure to protect individual rights.[45] Judge McGuire also stated, "Certain basic rights vital in our viewpoint as a people, and by virtue of that fact inherent in, and essentially a part of any system, naval or otherwise that purports to do justice, must be accepted and safeguarded."[46]

Abuses of the military justice system during World War II included punishment of court-members for unpopular verdicts, unduly harsh sentences on convicted servicemembers, and unqualified defense counsel.[47] Furthermore, Congress was "deluged with complaints of autocracy in the handling of these courts martial throughout the armed

---

[40] Large sections of the first two historically-focused paragraphs of this part are taken verbatim from Part III.A.1 of one of my prior publications. Major John W. Brooker, *Target Analysis: How to Properly Strike a Deployed Servicemember's Right to Civilian Defense Counsel*, ARMY LAW., Nov. 2010, at 7, 13. To prevent confusion and ease readability, I have purposefully chosen to not use quotation marks for my own previous work and to leave the citations in their original form.

[41] JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775–1980, at 77 (2001).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 79 (quoting Matthew F. McGuire Panel reports).

[45] *Id.* (quoting Matthew F. McGuire Panel reports).

[46] *Id.* (quoting Matthew F. McGuire Panel reports).

[47] S. SIDNEY ULMER, MILITARY JUSTICE AND THE RIGHT TO COUNSEL 57 (1970).

forces."[48] Congress responded dramatically by overhauling the entire system with the Elston Act and, ultimately, the UCMJ.[49]

Remarkably, the congressional debates about how to properly address due process and individual rights concerns sound strikingly similar to those today. For example, much like Senator Gillibrand and her colleagues, some influential advocates, members of the public, and members of Congress following World War II evinced a lack of trust in the chain of command.[50] While some debate on the role of the chain of command would arise occasionally in the intervening six decades, a keen observer would see that the seeds of mistrust, although largely dormant for sixty years, have always been present.

2. Vietnam, the Military Justice Act of 1968, and O'Callahan v. Parker*: Jurisdiction, Due Process, and the Role of Commanders*

The Military Justice Act of 1968 and the Supreme Court decision *O'Callahan v. Parker*[51] were the seminal culminating acts of over a decade of both public and congressional concern about individual rights protection and the UCMJ. The Military Justice Act of 1968 guaranteed additional due process and protections for accused servicemembers, while *O'Callahan v. Parker* severely restricted the UCMJ's subject matter jurisdiction for nearly two decades.[52] While one response was congressional and the other was judicial, the same concerns about due process and the role of commanders drove both decisions.[53]

---

[48] *See id.* at 51–52 (quoting the *Congressional Record*).

[49] Military Selective Service Act of 1948, Pub. L. No. 80-759, §§ 201–246, 62 Stat. 604, 627-44 (1948) (commonly known as the "Elston Act"); UCMJ (1951). For an overview of the Elston Act's legacy, see Andrew S. Effron, *The Fiftieth Anniversary of the UCMJ: The Legacy of the 1948 Amendments*, *in* EVOLVING MILITARY JUSTICE, *supra* note 19, at 169–72.

[50] 95 CONG. REC. pt. 5, 5718, 10 (May 5, 1949) [hereinafter 1949 DEB.] (statement of Rep. Overton Brooks), *available at* http://www.loc.gov/rr/frd/Military_Law/UCMJ_1950.html.

[51] O'Callahan v. Parker, 395 U.S. 258 (1969).

[52] *Id. Solorio v. United States* overturned *O'Callahan v. Parker* in 1987. Solorio v. United States, 483 U.S. 435 (1987).

[53] While *O'Callahan v. Parker* had a large impact on the military justice system, this article does not address it in detail, as the dynamics of *stare decisis* and judicial interpretative reform are beyond its scope.

In 1962, Congress began to hold hearings to review allegations that the UCMJ, as designed and practiced, was violating the due process rights guaranteed by the Fifth and Sixth Amendments of the Constitution.[54] Again, "complaints of command control" were raised.[55] In 1963, Congress continued to discuss and debate the very same concerns and complaints in relation to the UCMJ.[56] In addition to a plethora of specific concerns about individual liberties, "[a]mong the most insistent complaints giving rise to the Uniform Code of Military Justice was that of command influence on courts-martial."[57] In 1966, lengthy hearings to debate twenty congressional bills took place.[58] The six days of hearings were to discuss UCMJ amendments that would "insure that military personnel appearing before such courts and boards receive all the rights, privileges and safeguards guaranteed to every American citizen under the Constitution."[59] Congress saw the UCMJ as an improvement over the Articles of War but "was greatly disturbed by claims that abuses persisted which the code was designed to eliminate."[60]

As a result, with the Military Justice Act of 1968, Congress amended the UCMJ to include new due process protections, such as new rights to defense counsel, the creation of the military judiciary, and new rights at special courts-martial.[61] "The Military Justice Act of 1968 was the product of several years of study, debate, compromise, within the Department of Defense and in Congress."[62]

---

[54] *Constitutional Rights of Military Personnel: Hearing on S. Res. 260 Before the Subcomm. on Const. Rts. of the Comm. on the Judiciary*, 87th CONG. 4–5 (1962) [hereinafter 1962 *Hearings*] (statement of Senator Sam J. Ervin) ("And there have been instances where the safeguards of 'due process' which Congress provided in the Uniform Code of Military Justice have not been effective.").

[55] *Id.* at 4 (statement of Senator Sam J. Ervin).

[56] *Constitutional Rights of Military Personnel: Summary-Report of Hearings on S. Res. 58 Before the Subcomm. on Const. Rts. of the Comm. on the Judiciary*, 88th CONG. (1963) [hereinafter 1963 *Hearings*].

[57] *Id.* at 15.

[58] *Bills to Improve the Administration of Justice in the Armed Forces, Joint Hearings Before the Subcomm. on Const. Rts. and a Special Subcomm. of the Comm. on Armed Services*, 89th CONG. (1966) [hereinafter 1966 *Hearings*].

[59] *Id.* at 1 (statement of Senator Sam Ervin).

[60] *Id.* at 2 (statement of Senator Sam Ervin).

[61] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968); Francis T. McCoy, *Due Process for Servicemen – The Military Justice Act of 1968*, 11 WM. & MARY L. REV. 66 (1969).

[62] Brigadier General (Retired) John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 14 (2000).

In *O'Callahan v. Parker*, which was later overruled by the Court in *Solorio v. United States*,[63] the Supreme Court of the United States held that only "service connected" crimes could be tried under the UCMJ.[64] This decision greatly reduced the scope of offenses triable under the UCMJ. In justifying this reduction of the UCMJ's breadth, the Court found, "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[65] In commenting about command authority, the Court also stated, "[T]he suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger."[66]

Interestingly, in *Solorio*, the Court does not address concerns about due process or the chain of command. Instead, it uses a "plain meaning" analysis of the Constitution,[67] as well as a deference to Congress in military matters,[68] to return to a status-based jurisdictional scheme.

B. Minor Revisions: Post Vietnam Through 2006

1. Post-Vietnam and the 1980s: Collaboration and Debate

Two notable changes to the UCMJ took place between the end of the Vietnam War and the start of Operation Desert Storm/Desert Shield. The first, which was discussed above, was the 1987 Supreme Court case of *Solorio v. United States*, which brought back the status-based jurisdictional scheme in place today. The second was the passage of the Military Justice Act of 1983.[69] At least one military leader views this reform as a model of collaboration between DoD and Congress. Brigadier General Gross stated, "The considerable deliberation that went

---

[63] Solorio v. United States, 483 U.S. 435 (1987).

[64] O'Callahan v. Parker, 395 U.S. 258, 272–74 (1969). The court listed several factors that could be used to justify a service connection, to include location of the offense, the connection with military duties, and the military status of the victim. *Id*. In *O'Callahan*, a sexual assault against a civilian that occurred off of a military installation and within the United States was found to lack that service connection and, therefore, could not be prosecuted under the UCMJ. *Id.*

[65] *Id.* at 265.

[66] *Id.* at 264.

[67] *Id.* at 450.

[68] *Id.* at 447–48.

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

into the Military Justice Act of 1983, the last bill to provide comprehensive UCMJ reform, proves the potential for successful reform through a measured approach."[70] The most significant changes included more efficient pre-trial and post-trial processing procedures, independent (non-command) detailing of military judges and counsel, and an avenue, albeit limited, of Supreme Court review of Court of Military Appeals (now known as the Court of Appeals for the Armed Forces, or CAAF) decisions on grants of certiorari.[71]

More importantly, this era began the proliferation of scholarship that studied the UCMJ and its effectiveness and efficiency. One example of such scholarship is the seminal article by General (Retired) William Westmoreland, U.S. Army, former U.S. Army Chief of Staff and Commander, Military Assistance Command Vietnam, and Major General George S. Prugh, former The Judge Advocate General, U.S. Army.[72] Westmoreland and Prugh believed that the military justice system at the time of the Vietnam War was not "combat tested."[73] They argued that the military justice system in Vietnam was "particularly inept" during contingency operations, as it is "too slow, too cumbersome, too uncertain, indecisive, and lacking in the power to reinforce accomplishment of the military missions, to deter misconduct, or even to rehabilitate."[74]

Despite the superb nature of the Vietnam War experience-informed research and scholarship, many of their recommendations did not result in significant changes. For example, both Westmoreland and Prugh and the Wartime Legislation Team (WALT) recommended reducing a servicemember's unfettered statutory right to civilian counsel in a theater of operations.[75] This recommendation sat dormant until rediscovered by Iraq War experience-informed research and scholarship in 2010.[76]

---

[70] Gross Statement, *supra* note 11, at 2.
[71] Pub. L. No. 98-209, 97 Stat. 1393; *see* Cooke, *supra* note 62, at 15.
[72] General William C. Westmoreland & Major General George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL'Y 1 (1980).
[73] *See id.* at 53–55.
[74] *Id.* at 52–53.
[75] *See id.* at 88–89; Lieutenant Colonel E. A. Gates & Major Gary v. Casida, *Report to the Judge Advocate General by the Wartime Legislation Team*, 104 MIL. L. REV. 139, 155–57 (1984).
[76] *See* Brooker, *supra* note 40.

Despite this, servicemembers still have an unlimited right to hire civilian counsel for any case.[77]

While this time period did not see major statutory changes to the UCMJ, and *Solorio* demonstrated an explicit attitude of judicial deference to Congress in military matters, the ongoing scholarship, along with continued and increased congressional attention on certain issues, set the stage for future challenges to the UCMJ. Some of the cries for change, such as for change to laws regarding homosexuality and the prosecution of sex-related misconduct offenses, reached a fever pitch in the 1990s.

2. The 1990s: Homosexuality, the Birth of the Sexual Misconduct Crisis, and the Role of Commanders

Throughout the 1990s, most military leaders agreed that the UCMJ and military justice system "enjoyed a period of stability and incremental change."[78] If stability is measured by a lack of congressional amendments to the UCMJ, such a view is correct. This article will argue, however, that such a myopic, inward-focused view has, in part, contributed to the existential crisis that the UCMJ faces today. The seeds of today's sexual misconduct-motivated existential threat to the UCMJ were sprouting throughout the 1990s. The fact that such sprouts were ignored or not seen is partly attributable to the structures and constraints of the institutions designed to keep the UCMJ current.

III. Recommendations and Calls for Change

When creating the UCMJ, Congress anticipated that the UCMJ would be a living document in need of revision. During the 1950 Senate debates, Senator Wayne Morse introduced into the *Congressional Record* an article by Arthur John Keeffe, a law professor, and Morton Moskin, a legal scholar, that argued, "Wasn't it Roscoe Pound who long ago pointed out that codes are rigid, codify errors, and make changes

---

[77] UCMJ art. 38 (2012).

[78] Cooke, *supra* note 62, at 16–17; *see* Vergun, *supra* note 9 (stating that recent changes to the UCMJ are the most in thirty years).

more difficult? The only hope for improvement is to condition passage of the Code upon the appointment of an advisory council. . . ."[79]

Congress followed this advice and created a formal enduring institution to recommend UCMJ reform, which is discussed below. In addition, members of the executive branch, to include the President of the United States, the Secretary of Defense, and various service secretaries and judge advocates general have commissioned both enduring and ad hoc formal institutions to study and recommend appropriate changes to the UCMJ and the military justice system. These institutions are discussed below in Part III.A.[80]

Despite civilian representation on many of these institutions for change, over the past three decades, the American public made separate and distinct calls for UCMJ reform on which the formal institutions largely took no action. The more informal, yet substantially more powerful methods in which the American public makes more direct calls for change are outlined in Part III.B.[81]

A. Formal Institutions for Change

Two standing institutions are ostensibly responsible for recommending changes to the UCMJ and military justice system. Additionally, military leaders often appoint ad hoc panels or committees to review portions or all of the UCMJ or military justice system. This section explains the roles, responsibilities, structures, constraints, and, when possible, philosophies, successes, and failures of each institution. An examination of the very structure of these organizations, to include their composition, stated missions, and problem-solving methodologies demonstrates a propensity towards an inward-focused, experience-based, case-specific analysis of the UCMJ that, when performed at all, has proven inadequate.

---

[79] 1949 DEB., *supra* note 50, at 287 (statement of Senator Wayne Morse, placing Arthur John Keeffe & Martin Moskin, *Codified Military Injustice—An Analysis of the Defects in The New Uniform Code of Military Justice*, 35 CORNELL L.Q. 151 (1949) into the *Congressional Record*).

[80] *See infra* Part III.A.

[81] *See infra* Part III.B.

1. The Code Committee

Article 146, UCMJ, charges that "[a] committee shall meet at least annually and shall make an annual comprehensive survey of the operation of this chapter."[82] This committee, known colloquially as the "Code Committee," is composed of CAAF's five civilian judges, the senior attorney of each military service, and two members of the public who the Secretary of Defense chooses.[83] The members of the public are not citizens from other disciplines. They must be "a recognized authority in military justice or criminal law."[84]

The Code Committee must submit an annual report to the House and Senate Armed Services Committees (HASC and SASC) and to the Secretary of Defense.[85] The reports must contain statistics and recommendations, to include recommended changes to the UCMJ, and "any other matter the committee considers appropriate."[86] Understandably, the nature of what these reports contain, as well as the nature of the matters that "the committee considers appropriate,"[87] has changed dramatically over the years. The degree of change has impacted the UCMJ.

Although its initial efforts were vigorous, the Code Committee no longer performs its statutorily mandated mission to recommend changes to the UCMJ. Between 1953 and 1968, the Code Committee reports focused on substantive issues, such as public confidence in the new UCMJ,[88] the role of commanders in the military justice system,[89] and due

---

[82] UCMJ art. 146(a) (2012).
[83] *Id.* art. 146(b).
[84] *Id.* art. 146(d).
[85] *Id.* art. 146(c).
[86] *Id.* art. 146(c)(2).
[87] *Id.* art. 146(c)(2)(B)(iii).
[88] *See* U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE *passim* (Jan. 1, 1960–Dec. 31, 1960) [hereinafter 1960 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1960.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 7 (Jan. 1, 1969–Dec. 31, 1969) [hereinafter 1969 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1969.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 20 (Jan. 1, 1970–Dec. 31, 1970), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1970.pdf.
[89] *See, e.g.*, U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 3 (May 31, 1951–May 31, 1952), *available at* http://

process concerns.[90] In recent decades, though, the Code Committee has been completely dormant in terms of specific recommendations for UCMJ reform. In justifying the Code Committee's failure to make a single recommendation for UCMJ reform since 1983, civilian CAAF judges and CAAF senior staff have reasoned "that [they] should not intermix the legislative role of recommending statutory changes with [their] judicial duties. . . ."[91]

Some widely respected scholars are convinced that this hands-off approach is unwise and untenable. In an March 11, 2014 letter to the Code Committee, Charles J. Dunlap, a professor at Duke Law School and retired Major General in the Air Force Judge Advocate General's Corps, noted that "[i]t is a melancholy fact that despite its statutory mandate, the Code Committee has not furnished any recommendations to Congress in several decades."[92] Further Major General Dunlap (Ret.) persuasively argues,

> That the CAAF judges are not producing *any* recommendations as to "revising substantive and procedural law and improving criminal . . . justice" in the armed forces deprives Congress and the American

---

www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-May1951-May1952.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 34, 42 (Jan. 1, 1956–Dec. 31, 1956) [hereinafter 1956 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1956.pdf; 1960 Report, *supra* note 88; U.S. COURT OF MILITARY APPEALS ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE *passim* (Jan. 1, 1962 – Dec. 31, 1962) [hereinafter 1962 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1962.pdf.

[90] *E.g.* 1962 CODE COMMITTEE REPORT, *supra* note 89, *passim*; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE *passim* (Jan. 1, 1964–Dec. 31, 1964) [hereinafter 1964 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1964.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE *passim* (Jan. 1, 1965–Dec. 31, 1965) [hereinafter 1965 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1965.pdf.

[91] Major Frank D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, ARMY LAW., Sept. 2010, at 12, 31 (summarizing conversations with "two CAAF judges and CAAF senior staff. . . .). Interestingly, the Court of Appeals of the Armed Forces (CAAF) judges wear their robes to Code Committee meetings despite the fact that "it is not a judicial proceeding of any kind." Letter of Charles J. Dunlap to Code Committee 6 (Mar. 11, 2014) [hereinafter Dunlap Letter], *available at* http://www.caaflog.com/wp-content/uploads/Dunlap-Memorandum.pdf.

[92] Dunlap Letter, *supra* note 91, at 6.

> people of wisdom extant in an exceptionally talented group of jurists who are, as the commentary puts it, "specially learned" in military law. This is a profound tragedy as today we face an unparalleled array of challenges to the military justice system writ large.[93]

In addition, the five judges, who are civilians, could represent interests outside of those in DoD. Such has happened before, as in 1955 when the judges disagreed with the service judge advocates general about proposed UCMJ reforms that would reduce a servicemember's due process rights.[94] In 1960, similarly motivated disagreements were so profound that the Code Committee could not reach a consensus and was therefore not able to produce a joint report.[95]

The value of civilian input and a broad perspective was evident in the earlier days of the UCMJ. In the 1963 Code Committee Report, Major General Charles Decker, The Judge Advocate General, U.S. Army, a member of the Code Committee, indicated that a broader approach would be more advisable. Major General Decker stated, "[I]n my opinion only one truly outstanding inquiry has been made by persons outside of the service into the administration of justice during over 32 years of service."[96] Major General Decker saw the value in an older, more experienced civilian-led review panel that possessed a "wealth of judicial experience" and was "remote from recent connection with the administration of military justice."[97] He specifically saw the benefit of a review panel that "covered all sources of information, those charged with the administration of justice, the commanders, community leaders who had lived in close proximity to the troops, those who had been tried by military courts, and those who had complaints."[98] Major General Decker

---

[93] *Id.* at 7.

[94] U.S. COURT OF MILITARY APPEALS ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 10 (Jan. 1, 1955–Dec. 31, 1955) [hereinafter 1955 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1955.pdf; *Reforming Military Justice*, WASH. POST, June 5, 1955, at E4.

[95] *See* 1960 CODE COMMITTEE REPORT, *supra* note 88, Contents, at 3–5.

[96] U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 73 (Jan. 1, 1963–Dec. 31, 1963) [hereinafter 1963 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1963.pdf (statement of Major General Decker).

[97] *Id.*

[98] *Id.* at 73–74.

argued that this perspective provided "a scope that gave a balanced base from which to draw conclusions."[99]

During its initial years, the Code Committee raised valid concerns and made both broad-based and reasoned recommendations for change when a particular suboptimal result arose in or impacted appellate litigation. Between 1953 and 1959, the Code Committee persisted with seventeen different recommendations for UCMJ reform, fourteen of which impacted the due process rights of an accused.[100] In fact, starting in 1956, the Code Committee provided Congress with actual draft legislation.[101] Many of these recommendations, along with at least six more additional protections for accused servicemembers that were recommended between 1962 and 1967,[102] formed the basis for the Military Justice Act of 1968.[103] In its 1969 report, the Code Committee proudly stated that the Military Justice Act of 1968 "represented

---

[99] *Id.*

[100] U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 4–11 (Jan. 1, 1953–Dec. 31, 1953), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1953.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 5–10 (Jan. 1, 1954–Dec. 31, 1954), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1954.pdf; 1955 CODE COMMITTEE REPORT, *supra* note 94, at 10; 1956 CODE COMMITTEE REPORT, *supra* note 89, at 7–21; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 5–21 (Jan. 1, 1957–Dec. 31, 1957), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1957.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 4–24 (Jan. 1, 1958–Dec. 31, 1958), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1958.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 4–22 (Jan. 1, 1959–Dec. 31, 1959), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1959.pdf.

[101] 1956 CODE COMMITTEE REPORT, *supra* note 89, at 7–21. This continued until 1964. 1964 CODE COMMITTEE REPORT, *supra* note 90, at 7–39.

[102] 1962 CODE COMMITTEE REPORT, *supra* note 89, *passim*; 1963 CODE COMMITTEE REPORT, *supra* note 96, *passim*; 1964 CODE COMMITTEE REPORT, *supra* note 90, at *passim*; 1965 CODE COMMITTEE REPORT, *supra* note 90, *passim*; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE *passim* (Jan. 1, 1966–Dec. 31, 1966) [hereinafter 1966 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1966.pdf; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE *passim* (Jan. 1, 1967–Dec. 31, 1967) [hereinafter 1967 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1967.pdf.

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

improvements in military justice long advocated by the Code Committee."[104]

Things changed following the Military Justice Act of 1968. Between 1969 and 1983, the Code Committee made approximately one dozen relatively minor recommendations for legislative reform.[105] Four of these recommendations dealt specifically with somewhat narrow appellate-review concerns,[106] while two recommendations were in response to a fear that the Supreme Court would find Article 134 unconstitutional.[107] The era of Code Committee recommendations for the UCMJ ended completely starting in 1984.[108]

The Code Committee is not the only enduring institution charged with making UCMJ reform recommendations. One possible reason for the Code Committee's decision to abdicate its responsibility to make

---

[104] 1969 CODE COMMITTEE REPORT, *supra* note 88, at 2.

[105] The precise number of recommendations is difficult to determine because of confusing language regarding the nature of the recommendations contained in some of the reports. *See infra* note 106 (discussing the CODE COMMITTEE REPORT in 1978).

[106] In 1971, the Code Committee requested that Congress "consider legislation that would [] specify the extent to which the Court of Military Appeals, the Courts of Military Review, and military judges may entertain certain petitions for extraordinary relief." U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 1 (Jan. 1, 1971–Dec. 31, 1971) [hereinafter 1971 CODE COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1971.pdf. In 1976, the *Code Committee Report* was not clear to whom their recommendation was directed but nonetheless stated that they "recommended consideration of other legislation which would implement a concept of continuing jurisdiction for military trial courts." U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 2 (Jan. 1, 1976–Dec. 31, 1976), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1976.pdf. In 1977, the Code Committee passively promoted the continuing jurisdiction concept and an increase in the number of judges on the Court of Military Appeals, but the judges took "no formal position on the legislation." U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 1 (Oct. 1, 1977–Sept. 30, 1977), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1977.pdf. In 1978, the Code Committee considered recommending legislation to allow en banc appellate review. U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 1 (Oct. 1, 1978–Sept. 30, 1978), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1978.pdf.

[107] *See* 1971 CODE COMMITTEE REPORT, *supra* note 106, at 2; U.S. COURT OF MILITARY APPEALS, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 2 (Jan. 1, 1972–Dec. 31, 1972), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1972.pdf.

[108] Rosenblatt, *supra* note 91.

recommendations is because another enduring institution, which is somewhat nested within the Code Committee, has the same mission. Then again, this second institution is also surrounded by mystery. Whereas the Code Committee's reasons for ignoring a statutory mandate for over 30 years are puzzling, the Joint Service Committee's recommendations for UCMJ reform are typically not widely available to the public.[109]

2. The Joint Service Committee on Military Justice

Another institution designed to help DoD make UCMJ change recommendations to Congress is the Joint Service Committee on Military Justice (JSC). The JSC, which was formed in 1972 and operates under the supervision of the General Counsel of the Department of Defense,[110] has the following mission:

> To prepare and evaluate such proposed amendments and changes as may from time to time appear necessary or desirable in the interest of keeping the Uniform Code of Military Justice (UCMJ) and Manual for Courts-Martial (MCM) current with the decisions of the U.S. Supreme Court, the U.S. Court of Appeals for the Armed Forces, and established principles of law and judicial administration applicable to military justice, as well as with the changing needs of the military services.[111]

The JSC has two other missions. First, it recommends and guides non-statutory changes to the Manual for Courts-Martial (MCM).[112] Second, it functions as an advisory body to the Code Committee.[113]

---

[109] U.S. DEP'T OF DEF., DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE encl. 2, para. E2.4.1 (3 May 2003) [hereinafter DoDD 5500.17], *available at* http://www.dtic.mil/whs/directives/corres/pdf/550017p.pdf (certified current as of 31 Oct. 2006).

[110] *Id.* para. 3.

[111] U.S. DEP'T OF DEF., OFFICE OF THE GEN. COUNSEL, MILITARY JUSTICE FACT SHEETS 4, http://www.dod.gov/dodgc/images/mj_fact_sheet.pdf (last visited May 17, 2014) [hereinafter FACT SHEETS].

[112] DoDD 5500.17, *supra* note 109, para. 3.

[113] FACT SHEETS, *supra* note 111, at 4; *see* DoDD 5500.17, *supra* note 109, encl. 2, para. E2.1.3, E2.3.

Unlike the Code Committee, which includes two legally-trained members of the public, almost all of the members of the JSC are military personnel. The JSC is composed of a Voting Group and a Working Group. A member from each of the five military services composes the five-member Voting Group. The Working Group includes non-voting members from the five military services, and may include one representative each from the U.S. Court of Appeals for the Armed Forces (CAAF) and the Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff.[114]

Unfortunately, while the JSC's recommendations for reform to the MCM are a matter of public record via the *Federal Register*,[115] its recommendations regarding changes to the UCMJ are not.[116] Although some recommendations for change to the UCMJ may be presented to the Code Committee, and others are released or discovered,[117] the General Counsel for the Department of Defense makes the election of how and to whom such recommendations should be made, if they are to be made at all.[118] Except for those summarized in a Code Committee report or otherwise released or discovered, there is no public record of JSC-initiated and reviewed UCMJ-change recommendations. While such confidentiality may serve some purposes, it makes an evaluation of the JSC's effectiveness, as well as the perspective it takes in making UCMJ-reform recommendations, difficult to judge.

---

[114] DoDD 5500.17, *supra* note 109, paras. 4.3–4.4.
[115] *Id.* encl. 2, para. E2.2.2.
[116] *Id.* encl. 2, para. E2.4.1.
[117] For an example of released or discovered JSC recommendation information, see Letter from Daniel J. Dell'Orto, Principal Deputy Gen. Counsel, U.S. Dep't of Def., to The Honorable John W. Warner, Chairman, Comm. on Armed Services, United States Senate (Apr. 7, 2005), *available at* http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf; Letter from Daniel J. Dell'Orto, Principal Deputy Gen. Counsel, U.S. Dep't of Def., to The Honorable Duncan Hunter, Chairman, Comm. on Armed Services, U.S. House of Representatives (Apr. 7, 2005), *available at* http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf; Memorandum from Colonel (COL) Michael J. Child, Exec. Chair, Joint Serv. Comm. on Military Justice, to Office of General Counsel, DoD, ATTN: Mr. Robert E. Reed (Feb. 18, 2005), *available at* http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf; Letter from Colonel Mark W. Harvey, Chair, Subcomm. to the Joint Serv. Comm., to Chair, Joint Serv. Comm. (Jan. 13, 2005), *available at* http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf.
[118] DoDD 5500.17, *supra* note 109, encl. 2, para. E2.3.

As was the case with Senator Ervin asking for Chief Judge Quinn's input in 1960,[119] Congress has reversed the flow of UCMJ recommendations by seeking, rather than receiving, information from the JSC. For example, the JSC satisfied a congressional requirement, pursuant to the 2005 NDAA, for DoD to provide

> a report for Congress with the objective of determining what changes are required to improve the ability of the military justice system to address issues relating to sexual assault and to conform the Uniform Code of Military Justice and the Manual for Courts-Martial more closely to other Federal laws and regulations that address such issues.[120]

In addition to or in conjunction with the JSC, such reports are often produced by ad hoc review panels. Fortunately for those looking to better understand UCMJ reform, numerous ad hoc review panels have published their findings, which typically demonstrate an inward-focused analytical approach.

3. Ad Hoc Review Panels

Numerous ad hoc review panels have studied the military justice system. Each has had a different sponsor, purpose, and methodology. Some of the reviews have examined a particular issue, such as sexual misconduct or the ability of the military justice system to function in a deployed environment, while others are more holistic in purpose. The simple fact that so many ad hoc review panels have been formed in recent years could be attributed to the Code Committee's refusal to recommend UCMJ reform and the JSC's relatively sheltered nature of conducting business. Regardless of the motivations for constituting each ad hoc review panel, an examination of a sampling of them demonstrates that to date, each has implemented a comfortable yet narrow-minded and legalistic method of UCMJ review.

---

[119] 1962 CODE COMMITTEE REPORT, *supra* note 89, at 49–64.

[120] U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE §§ 3, 4 (Oct. 1, 2004–Sept.. 30, 2005) [hereinafter 2005 CODE COMMITTEE REPORT] (Report of The Judge Advocate General of the U.S. Army), *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY05AnnualReport.pdf; National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1920–1921 (2004).

i. Powell Report

One of the first purportedly comprehensive reviews, commonly known as the "*Powell Report*," was finalized in 1960.[121] The *Powell Report* perceived three potential problems with the UCMJ that required study. First, it examined "the effectiveness of the Uniform Code of Military Justice and its bearing on good order and discipline within the Army."[122] Second, it sought "[t]o analyze any inequities or injustices that accrue to the Government or to individuals from the application of the Code and judicial decisions stemming therefrom."[123] Third, it looked "[t]o inquire into improvements that should be made in the Code by legislation or otherwise."[124]

The methodology for collecting data against which to evaluate these potential problems and upon which to recommend solutions was focused inwardly on DoD. Despite the stated assumption that "[a]n effective system of military justice should promote the confidence of military personnel and the general public in the overall fairness of the system," the only surveys conducted were of military personnel, not people outside of the DoD establishment.[125] This disconnect can also be seen in some of the other assumptions under which this review operated.

A prime example of an operating assumption that clouded the *Powell Report*'s findings was its assumption that commanders must play a central role in the military justice system. The *Powell Report* states, "If we start with the truism, 'discipline is a function of command', we are at once at the core of one of the chief reasons for misunderstanding between civilians and servicemen concerning the needs and requirements of an effective system of military justice."[126] The *Powell Report* then

---

[121] COMM. ON THE UNIFORM CODE OF MILITARY JUSTICE GOOD ORDER AND DISCIPLINE IN THE ARMY, REPORT TO HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY (Jan. 18, 1960) [hereinafter POWELL REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Powell_report.pdf.
[122] *Id.* at 1.
[123] *Id.*
[124] *Id.*
[125] *Id.* at 2–3 (describing the methodology, which included an extensive survey of a variety of military officers, yet no consideration of input from outside of the military).
[126] *Id.* at 11.

ably explains the exact justification that military leaders give today for command control of the military justice system, stating,

> Development of [discipline] among Soldiers is a command responsibility and a necessity. . . . Correction and discipline are command responsibilities in the broadest sense, but some types of corrective action are so severe that under time honored principles they are not entrusted solely to the discretion of a commander. At some point he must bring into play the judicial processes. . . . When the judicial process has concluded, a further opportunity is given the commander to exert his influence and leadership toward the establishment of discipline.[127]

The problem is that civilians have never viewed the phrase "discipline is a command function" as the same type of truism that military members have viewed it. During the 1949 congressional floor debate on the UCMJ, Representative Overton Brooks stated,

> Perhaps the most troublesome question which we have considered is the question of command control. . . . Able and sincere witnesses urged our committee to remove the authority to convene courts martial from command and place that authority in judge advocates or legal officers, or at least in a superior command.[128]

Similarly, in 2014, a *New York Times* editorial following the sexual assault-related court-martial of Brigadier General Jeffrey Sinclair, argued,

> The episode offers a textbook example of justice gone awry, providing yet another reason to overhaul the existing military justice system, which gives commanding officers built-in conflicts of interest—rather than trained and independent military prosecutors

---

[127] *Id.* at 11–12.

[128] 1949 DEB., *supra* note 50. In 1991, Professor Schlueter wisely stated, "The process of scrutinizing the role of the commander must continue." Schlueter, *supra* note 30, at 23.

> outside the chain of command—the power to decide which sexual assault cases to try.[129]

Accordingly, the *Powell Report* did not properly examine the validity of this underlying assumption, thereby deepening the potential mistrust of the UCMJ. Other ad hoc reports have fallen prey to the same fallacies.

ii. Westmoreland Committee

In 1971, General William Westmoreland, Chief of Staff, U.S. Army, convened "The Committee for the Evaluation of the Effectiveness of the Administration of Military Justice."[130] Unlike the Powell Report, this review was more narrowly focused: "to assess the role of the administration of military justice as it pertains to the maintenance of morale and discipline at the small unit level, identifying problem areas encountered by the small unit commander, and suggest means of resolving or diminishing them."[131] This constrained, inward focus never once overtly considered congressional or public perception. Additionally, the "Method of Analysis" again focused completely on military personnel.[132]

In fact, the Westmoreland Committee was patently hostile to civilian input and thought even when it came from some of the most respected and revered legal minds in the world. In boldly and disrespectfully criticizing the Supreme Court's decision in *O'Callahan v. Parker*,[133] the Westmoreland Committee stated: "Comments such as these [referring to the majority opinion in *O'Callahan v. Parker*] indicate a lack of appreciation not only for the system of military justice but also for the

---

[129] Editorial Board, *A Broken Military Justice System*, N.Y. TIMES, Mar. 18, 2014, at A22, *available at* http://www.nytimes.com/2014/03/18/opinion/a-broken-military-justice-system.html?_r=1.

[130] THE COMM. FOR EVALUATION OF THE EFFECTIVENESS OF THE ADMIN. OF MILITARY JUSTICE, REPORT TO GENERAL WILLIAM C. WESTMORELAND, CHIEF OF STAFF, U.S. ARMY (June 1, 1971) [hereinafter WESTMORELAND COMMITTEE REPORT], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Report_General-Westmoreland.pdf. Interestingly, then-Major General Westmoreland, as Commander of the 101st Airborne Division, was a member of the 1960 Powell Committee. POWELL REPORT, *supra* note 121, at iii.

[131] WESTMORELAND COMMITTEE REPORT, *supra* note 130, at 3.

[132] *Id.* at 5.

[133] *See supra* notes 51–52 (briefly discussing *O'Callahan v. Parker*).

true meaning of the term 'discipline.'"[134] The Westmoreland Committee then cites the Powell Committee's discussion about the role of commanders to justify its position about discipline and the UCMJ.[135] After disrespecting the Supreme Court, the Westmoreland Committee simply stated, "To add to [the Powell Committee] would be a mere superfluity."[136]

The Westmoreland Committee made numerous recommendations for reform that were ultimately implemented, such as a "massive concerted effort on education and training in military justice. . . ."[137] The problem, nevertheless, was not the recommendations but rather how the committee arrived at them. While later reviews would not overtly exhibit disgust and contempt for the Supreme Court, they would continue the same inward orientation.

iii. Wartime Legislation Team (WALT)

In 1982, Major General Hugh J. Clausen, The Judge Advocate General, U.S. Army, commissioned WALT "to evaluate the military justice system and to make recommendations for improving its effectiveness in wartime."[138] Its main goal was to "ensure that the military justice system in an armed conflict would be able to function fairly and efficiently, without unduly burdening commanders, or unnecessarily utilizing resources."[139] It therefore decided to eschew the "thought-provoking concepts" that have arisen in recent years, such as "centralizing referral of cases in legal services agencies."[140]

The WALT's research methodology was, as was the case with the Westmoreland Committee, almost entirely military-focused. Most of the findings were based on historical analysis, interviews of military personnel, and data from a questionnaire provided to select current and

---

[134] WESTMORELAND COMMITTEE REPORT, *supra* note 130, at 7.
[135] *Id.* at 7–8; *see supra* notes 126–127 and accompanying text.
[136] WESTMORELAND COMMITTEE REPORT, *supra* note 130, at 8.
[137] *Id.* at 56–59.
[138] Lieutenant Colonel E.A. Gates & Major Gary V. Casida, *Report to the Judge Advocate General by the Wartime Legislation Team*, 104 MIL. L. REV. 139, 141 (1984).
[139] *Id.*
[140] *Id.* at 142 (indicating that the commander's role in referring cases was yet again in question).

former military members.[141] As was also the case with prior reviews, the findings and recommendations were oriented towards minor, experience-based frustrations and issues, such as jurisdiction over civilians, non-judicial punishment, ministerial and procedural concerns, investigation of cases, and appellate review.[142] Although such modifications are critical to an effective UCMJ, subsequent reviews show that this approach is not enough.

iv. Process Action Team Joint Council For Sexual Misconduct Initiatives (PAT)

In 2000, Secretary of the Army Louis Caldera "established a multidisciplinary Process Action Team (PAT) Joint Council for Sexual Misconduct Initiatives to recommend improvements for investigating and prosecuting sexual offenses and for providing services to sexual offense victims."[143] Tellingly, this diverse group of "military and civilian experts from a variety of fields" was assembled "[a]t the request of Senator Paul Sarbanes," not at the request of one of the aforementioned institutions for UCMJ reform.[144] Many of PAT's recommendations, such as increased training and better victim care, were later implemented in some fashion, but none of the recommendations appear to have involved substantive UCMJ reform.[145] Additionally, this multi-disciplinary review of the UCMJ and military justice system, albeit an issue-focused review, would not be copied for over a decade.

v. 2004 Army Committee

In 2004, Major General Thomas Romig, The Judge Advocate General, U.S. Army, ordered senior Army judge advocates "to take a fresh look at the Uniform Code, the Manual for Courts-Martial, and military justice regulations and practices and to determine how the military justice system might be transformed to better serve the needs of

---

[141] *Id.* at 144–46.
[142] *See id.* at 146–69.
[143] U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE §§ 3, 4 (Oct. 1, 2000–Sept. 30, 2000) [hereinafter 2000 CODE COMMITTEE REPORT], *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY00Rept.htm (Report of The Judge Advocate General of the U.S. Army).
[144] *Id.*
[145] *Id.*

soldiers and commanders in a transformed Army."[146] The methodology that this committee, known as the Military Justice Review Committee, or "2004 Army Committee," used to accomplish this broad mission is all too familiar.

Yet again, it appears that this review panel did not incorporate a multi-disciplinary approach that included a variety of non-military perspectives. To be sure, in describing its "Background and Methodology," the 2004 Army Committee stated, "While the fairness of our system is paramount, the perception of fairness in the eyes of the public, Congress, and the military itself, was also a critical consideration."[147] Nonetheless, it does not appear that substantial public input was sought. It seems that the committee believed that "input from military justice practitioners from across the Army" would be adequate.[148] The 2004 Army Committee "read scholarly articles, studied court decisions, and reviewed proposals previously submitted to the Joint Service Committee."[149] They also looked at procedure rules for federal civilian courts and interviewed military justice practitioners.[150]

This review panel addressed many critical issues that are still debated today. Although the 2004 Army Committee made a variety of recommendations for minor modifications to procedure and punitive articles, to include updating "sexual assault statutes,"[151] it reaffirmed the central role of commanders, stating, "The commander must retain a high level of control over what charges a servicemember faces, how those charges are disposed of, and how and why clemency must be granted."[152] In so doing, the 2004 Army Committee's logic appears to be subject to the same tautologous formula that a commander's central role in enforcing discipline and his or her central role in the UCMJ are one and the same.[153]

---

[146] ARMY MILITARY JUSTICE REVIEW COMM., MILITARY JUSTICE REVIEW EXECUTIVE SUMMARY 1 (2004), *available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140312_ROC/Materials/02_Army_MilJusticeReview2004_ExecutiveSummary.pdf.
[147] *Id.* at 2.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.* at 8.
[152] *Id.* at 3.
[153] *Id.* at 2.

While focusing internally on history, case law, and expertise is critical to a properly functioning UCMJ, it is not sufficient, as the best place to understand how to secure "fairness in the eyes of the public"[154] is from members of the public itself. The most recent ad hoc review panels are evidence that a broader approach is necessary.

vi. Response Systems to Adult Sexual Crimes Panel and Military Justice Review Group

In 2013, Congress yet again directed a review of the UCMJ.[155] In the 2013 NDAA, Congress ordered the Secretary of Defense to "establish a panel to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses. . . ."[156] This review explicitly included an examination of the UCMJ.[157]

In addition to instituting reviews of its own concerns and potential legislative changes, Congress again indicated that the practice of soliciting input primarily from military justice experts was not sufficient. As was the case with the congressionally-requested PAT in 2000, the membership of this new panel, known as the Response Systems to Adult Sexual Crimes Panel,[158] includes both military and civilian experts from multifarious backgrounds.[159]

---

[154] *Id.*

[155] In 2009, the Defense Task Force on Sexual Assault in the Military Services recommended SVC-type representation for victims and expressed concern that the 2007 version of Article 120, UCMJ was "cumbersome and confusing," and potentially unconstitutional. *See* DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVS., REPORT OF THE DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES ES-5 69–70 (Dec. 2009), *available at* http://www.ncdsv.org/images/SAPR_DTFSAMS_Report_Dec_2009.pdf. The scope of this Task Force, however, was much broader than UCMJ reform, and it is therefore not included in this article as a separate ad hoc review.

[156] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112–213, § 576(a)(1), 127 Stat. 1758, *available at* http://responsesystemspanel.whs.mil/public/docs/FY13%20NDAA%20(Subtitle%20H,%20sec%20576).pdf.

[157] *Id.* The statute also directs a "review and assessment of judicial proceedings under the Uniform Code of Military Justice involving adult sexual assault and related offenses" since the 2012 NDAA. *Id.* § 576(a)(2).

[158] *Id.* § 576(b)(1)(A); *Home*, RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, http://responsesystemspanel.whs.mil/ (last visited May 14, 2014).

[159] For example, Ms. Mai Fernandez, the Executive Director of the National Center for

In October 2013, Secretary Hagel also created a panel known as the "Military Justice Review Group" to "conduct a comprehensive review of the Uniform Code of Military Justice (UCMJ) and the military justice system."[160] When discussing this new committee, Lieutenant Colonel J. Todd Breasseale, a DoD spokesman, confirmed the incomplete nature of the dozens of Code Committee, JSC, and ad hoc reviews by stating, "It's been over 30 years since the military code of justice was reviewed. It's simply time."[161] The Military Justice Review Group will consist of numerous military officials, but it will also be advised by a federal civilian appellate judge and former DoD General Counsel.[162] It will have 12 months to submit proposed UCMJ amendments, and another 6 months to submit non-statutory MCM amendments. It will study the entire UCMJ and military justice system, to include the manner in which sexual assaults are prosecuted.[163]

Yet again, though, these panels are reactive to congressional pressure. They are not proactive, internally-motivated, DoD-created institutions designed to properly shepherd the UCMJ and military justice system to greater fairness, efficiency, and effectiveness.[164] Senator Gillibrand is skeptical of the Military Justice Review Group, stating, "We can do review after review after review – and I have no doubt they are well-intentioned. But according to DOD's latest available numbers, 18 months is another estimated 39,000 cases of unwanted sexual contact that will occur."[165] How tolerant Congress will be for such reviews, particularly if the reviews are performed in the manner of dozens of prior

---

Victims of Crime, is on the panel. Ms. Meg Garvin, Executive Director of the National Crime Victim Law Institute, is on the Panel's Victim Services Subcommittee. Ms. Joye Frost, Director of the Office for Victim's Counsel of the U.S. Department of Justice, is on the Panel's Role of the Commander Subcommittee. *Home*, RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, http://responsesystemspanel.whs.mil/ (last visited May 14, 2014) (follow "About" tab to find links to the Panel member biographies).

[160] Memorandum from Sec'y of Defense Chuck Hagel for Sec'ys of the Military Dep'ts et al., Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013) [hereinafter Hagel Memorandum], *available at* http://www.caaflog.com/wp-content/uploads/SECDEF-Memo-Comprehensive-Review-of-UCMJ.pdf.

[161] Timothy M. Phelps, *Pentagon Plans Major Review of the Military Justice System*, L.A. TIMES, April 15, 2014, http://www.latimes.com/nation/la-na-military-justice-20140416,0,2320223.story#axzz2zjgY68et.

[162] *Id.*

[163] *See* Hagel Memorandum, *supra* note 160.

[164] Phelps, *supra* note 161.

[165] *Id.*

annual and ad hoc reviews that failed to identify the sexual misconduct problem within the military as a challenge to the UCMJ, remains to be seen.

Accordingly, military leadership must supplement the method in which it reviews and recommends change to the UCMJ. While these ad hoc institutions are very good at recommending changes founded upon perceived suboptimal outcomes in individual cases or the frustrations of military justice practitioners, the perspectives of both Congress and the American public are missing from the current analytical method. The mere fact that Congress has repeatedly solicited rather than received information from the formal institutions for UCMJ reform indicates that those institutions are missing the mark. If military leaders want to better reform the UCMJ to ensure that it is fair and widely respected, the leaders must first understand the public's perceptions of it.

B. Public Calls for Change

Although many of the institutions outlined above include civilian representation, almost all of those civilians are either formally affiliated with the UCMJ or are experts in a particular field of study.[166] While the general public can be represented by such individuals, many citizens who are dissatisfied with the UCMJ may not have access to such institutions,[167] may not know about such institutions,[168] or may simply

---

[166] For example, the five judges of the U.S. Army Court of Appeals for the Armed Forces are technically civilians, but their entire practice centers around military law. The two civilians on the Code Committee are also required to be experts in "military justice or criminal law." *See supra* notes 83–84 and accompanying text.

[167] The Code Committee meetings are generally open to the public. Surprisingly, Major General (Ret.) Dunlap has lodged "a continuing objection to the Code Committee adjourning the meeting before all members could finish their comments." He also has criticized the summaries of the meeting, which included a mischaracterization of a civilian committee member's comment, "I wasn't able to finish my comments." Major General Dunlap advocates for independent verbatim transcription of Code Committee meetings. The civilian committee member was cut off despite the fact that the meeting was barely an hour old. Dunlap Letter, *supra* note 91, at 5.

[168] Salty Policy, Comment to *The Joint Service Committee on Military Justice (JSC)—Part I*, NIMJBLOG-CAAFLOG (June 23, 2012, 1:49 PM), http://www.caaflog.com/2012/06/19/the-joint-service-committee-on-military-justice-jsc-part-i/ ("No one is interested. At our public meeting last November to vet the current EO (MRE amendments), NOT ONE person showed up. At the Annual Code meeting, NOT ONE member of the public showed up. The JSC could probably be more transparent, but it seems to me that it would matter little. Only perception, or notions of perception, might

prefer to raise their issues directly to a member of Congress.[169] To date, the formal institutions outlined above have rarely addressed the public calls for change that members of Congress likely see on a regular basis.

A study of both media reports and congressional hearings demonstrates that the American public is most likely to voice displeasure in one of two ways. The first and most visible is voicing concern through media outlets. While articles raising concerns with the UCMJ are present in media of all forms, to include television,[170] radio,[171] internet,[172] and newsprint,[173] this article uses a comprehensive study of newsprint articles from the *Washington Post* and *New York Times* to demonstrate that the media has repeatedly voiced the public's concerns about the UCMJ.[174] The second vehicle through which the public voices displeasure is through members of Congress. This displeasure will sometimes result in congressional hearings[175] but may also be evident through formal inquiries,[176] requests for assistance,[177] or media stories.[178]

---

be affected.").

[169] *See, e.g.*, David McCumber, *Military Sex Assault Survivors Speak Out for Gillibrand Reform Bill*, ALBANY TIMES UNION, Feb. 6, 2014, http://www.timesunion.com/news/article/Military-sex-assault-survivors-speak-out-for-5212624.php (describing a joint news conference with Senator Gillibrand and military sexual assault victims).

[170] *See, e.g.*, *Nightly News: Army's Top Sexual Assault Lawyer Suspended for Sexual Assault Claim* (NBC television broadcast Mar. 6, 2014), *available at* http://www.nbcnews.com/video/nightly-news/54599385#54599385.

[171] *See, e.g.*, Marisa Peñaloza & Quil Lawrence, *Morning Edition: For Veterans, 'Bad Paper' is a Catch-22* (NPR radio broadcast Dec. 10, 2013), *available at* http://www.npr.org/2013/12/10/249739845/for-veterans-bad-paper-is-a-catch-22-for-treatment.

[172] *See, e.g.*, *Statement, Protect Our Defenders, Protect Our Defenders Calls UCMJ Proposed Article 60 Reform Insufficient*, PROTECT OUR DEFENDERS (Apr. 9, 2013), http://www.protectourdefenders.com/statement-protect-our-defenders-calls-ucmj-proposed-article-60-reform-insufficient/ (last visited May 18, 2014).

[173] *See, e.g.*, David McCumber, *Political Victory Despite Demise of Bill; Gillibrand Took On Military Sex Crimes*, SAN ANTONIO EXPRESS-NEWS, Mar. 10, 2014, at 1.

[174] This article uses the *New York Times* and *Washington Post* as a primary representative data set because of the enduring nature of the printed medium, the ease of accessibility to archived articles, and their large readership.

[175] *See, e.g.*, 2013 *Hearing*, *supra* note 10.

[176] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1920–1921.

[177] *See supra* Part III.A.3.iv.

[178] *See, e.g.*, *Newshour: Gillibrand Calls to Remove Sexual Assault Cases from Chain of Command* (PBS television broadcast July 30, 2013), *available at* http://www.pbs.org/newshour/bb/politics-july-dec13-military_07-30/.

1. Through the Media

From before World War II through today, news media reports have outlined the public's concerns about the UCMJ. As famed playwright Arthur Miller stated in 1961, "A good newspaper, I suppose, is a nation talking to itself."[179] Surprisingly to many, the nation has had much internal dialogue about the UCMJ and military justice system. A small sampling of media criticisms demonstrates that calls for examination of or change to the UCMJ do not originate solely from the institutions designed to recommend such changes.

As an initial matter, print media criticism of the Articles of War likely contributed to the UCMJ's creation. Following World War II, many news articles were critical of the Articles of War and how commanders were able to squash due process rights. For example, a *Washington Post* article from August 14, 1946, addressed concerns about the speed with which soldiers in pretrial confinement were brought to trial. It stated, "Neither the seriousness of contemplated charges nor the difficulty of investigation justifies the denial of fundamental rights due every American citizen."[180] Another article from January 3, 1949 minces no words in asserting,

> The trouble with military justice, as it is viewed by many civilians, is that it has been more concerned with the military aspects of offenses than with dispassionate justice. The term "military justice" is in itself a contradiction, since true justice admits of no qualification. Nevertheless, the nature of the military service requires that some concession be made in the legal system to the needs of discipline.[181]

During the Vietnam War, the American public's continued concern about the UCMJ and military justice system's sensitivity to command influence and due process were also expressed through news media. The preferral of court-martial charges against First Lieutenant William L. Calley Jr. prompted a *Washington Post* article, which argued "the chief complaint made about military justice" is "the role of the commanding

---

[179] OXFORD DICTIONARY OF QUOTATIONS BY SUBJECT 336 (2010) (quoting Arthur Miller, in *Observer* (Nov. 26, 1961)).
[180] *Trial Delay*, WASH. POST, Aug. 14, 1946, at 6.
[181] *Military Justice*, WASH. POST, Jan. 3, 1949, at 6.

officer."[182] Law professors quoted in the article praise the procedural rights that accused servicemembers enjoy, but they also stated, "To be sure, weaknesses still persist in the military justice system. Command influence, for example, continues to be a problem."[183] In 1971, the *Washington Post* reported on a case in which the 7th Army commander, General Michael S. Davison, dismissed charges against 29 black soldiers charged with disobedience.[184] The article used interviews and statistical evidence to set forth the widespread concerns that the military justice system did not treat black soldiers fairly.[185] General Davison summed up his perception of these concerns, stating, "[A black man] feels it's a white man's system. He sees very few black lawyers around to defend him. He sees the Uniform Code of Military Justice as an example of laws written by white men to serve the white system in language that only whites understand."[186]

The public's use of the media to voice concern with the UCMJ and military justice system saw a dramatic uptick during the 1990s. Unlike prior decades in which the due process rights of accused servicemembers was the primary concern, the focus in the 1990s switched to the issues of sexual assault, sexual harassment, and the homosexual-conduct policy. In 1992, a *Washington Post* article entitled *In Military Sex Harassment Cases, His Word Often Outranks Hers* outlines three stories in which sexual assault and harassment victims complained about the military justice system. The story stated, "The circumstances differ, but each case contains a common thread. All three women described themselves as victims twice over: first of individual male colleagues, second of a military justice system that they and many other women in uniform believe is heavily weighted against them."[187]

A 1994 *Washington Post* article entitled *Military Injustice* also indicated public displeasure with the UCMJ and military justice system. After first describing a case in which an Air Force officer was sentenced to six months confinement for taking expired prescription medicine, the

---

[182] Richard Homan, *Army Seeking to Improve Its Court-Martial Image*, WASH. POST, Dec. 26, 1969, at A9.
[183] *Id.* (quoting Grant S. Nelson & James E. Westbrook, law professors at the University of Missouri).
[184] John M. Goshko, *Black Troops Distrust U.S. Military Justice*, WASH. POST, Oct. 31, 1971, at A1, A3.
[185] *Id.*
[186] *Id.* at A3.
[187] Lancaster, *supra* note 1313.

article stated, "Many families who have had a taste of the system charge that it gives military commanders czar-like power." The article also cited Carolyn Dock, executive director of a group named "Members Opposed to the Maltreatment of Service Members," who stated that each day, up to six servicemember families relate "miscarriages of justice under military law" to her. The article finally quoted a retired U.S. Navy judge, who stated, "The problem is that the system is susceptible to abuse. I sat on a number of cases where [the commander's influence] was painfully obvious to me . . . improper command influence is possible and occurs with disturbing frequency when the commander gets interested in a case."[188]

After an eight-month investigation, a 1995 *Dayton Daily News* article reported that the newspaper "found that hundreds of people accused of rape, child molestation and other sexual assaults were allowed to resign and avoid trial, sent to misdemeanor courts or to administrative proceedings offering no possibility of prison."[189] This indicator is eerily prophetic given the mandatory minimums and sentencing rules enacted in the 2014 NDAA.[190]

A 1998 *New York Times* op-ed article again focused on sexual assault and sexual harassment, disparate punishment among ranks, and command influence, and it explicitly advocated for UCMJ reform. Author Joseph Finder argued,

> All these cases—and their resulting unfairness—can be traced to one larger problem. The Uniform Code of Military Justice, last overhauled in 1983, is outdated. In that time, many more women have joined the military, and yet the code doesn't even mention sexual harassment. Military prosecutors must improvise to fit sexual offenses into pre-existing rules.[191]

The news media's coverage of public concerns about the UCMJ and military justice system has continued. A March 2014 *Washington Post*

---

[188] Anderson & Binstein, *supra* note 28.

[189] Russell Carollo, *Navy to Deny Public News of Courts-Martial*, DAYTON DAILY NEWS, Oct. 22, 1995, at 1A, *available at* http://nl.newsbank.com/nl-search/we/archives?p_action=doc&p_docid=0F51AECBA3FA23E8&p_docnum=1.

[190] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1705, 127 Stat. 959–60.

[191] Joseph Finder, Op-Ed., *The Army on Trial*, N.Y. TIMES, Feb. 17, 1998, at A19.

editorial discussing the intersection of the UCMJ and sexual assault stated,

> No one, as Ms. Gillibrand argued in support of her legislation, wants to see an innocent soldier going to jail or [a] . . . perpetrator going free. Sexual assault cases—be they in the military or civilian world—are often difficult to investigate and try. Lack of public confidence in how justice is dispensed compounds the problem, making victims fearful to come forward and others reluctant to cooperate. Congress needs to revisit this issue.[192]

As the next section demonstrates, Congress has often listened to the public and news media, and it has reflected the public's concerns in a variety of different ways.

2. Through Congress

Despite the formal institutions for UCMJ reform outlined above, Congress has frequently cited public criticism as the reason for initiating review of, and changes to, the UCMJ. For the entire existence of the UCMJ, Congress has held hearings, directed reviews, and changed statutes almost entirely as a response to public opinion, which, as shown above, is frequently reflected in media reports. A sample of such instances shows the ever-present power that public concern has over congressional opinion and action.

In 1946, the House Military Affairs Subcommittee reported "widespread miscarriages of justice" under the Articles of War.[193] The report (1946 Report) was based on a congressional investigation that, according to Representative Carl T. Durham, was undertaken because of "wide-spread complaints against both Army and Navy court martial proceedings."[194] The Army overtly resisted and disputed the results of

---

[192] Editorial, *Justice, Maybe*, WASH. POST, Mar. 25, 2014, at A14.

[193] United Press, *Army Asserts Report on Courts-Martial Is 'Grossly Unfair'*, WASH. POST, Apr. 21, 1946, at M1; *see* H. COMM. ON MILITARY AFFAIRS, 79TH CONG., REP. ON H. RES. 20, A RESOLUTION AUTHORIZING THE COMMITTEE ON MILITARY AFFAIRS TO STUDY THE PROGRESS OF THE NATIONAL WAR EFFORT (Comm. Print 1946) [hereinafter 1946 REPORT].

[194] United Press, *supra* note 193, at M4.

the investigation before the final report was issued, but despite these objections, the report was finalized in June 1946.[195] These findings laid a portion of the foundation for the Elston Act of 1948 and the UCMJ's passage in 1950.[196]

Public opinion also motivated UCMJ reform-related congressional hearings during the Vietnam War. In 1962, Senator Sam Ervin initiated congressional studies and hearings about "the protection of the constitutional rights of service personnel" because he perceived "an enhanced recognition of the constitutional rights of the serviceman . . . ."[197] Senator Ervin also believed that an increase in the military's size "signifies that the rights of service personnel will have great importance to an ever-growing number of American citizens."[198] Based on these initial concerns, congressional discussion, debate, and hearings ensued for the following six years, ultimately leading to the passage of the Military Justice Act of 1968.[199]

Congressional concerns about the military justice system's ability to handle sexual assault cases dates as far back as the early 1990s and the Tailhook scandal.[200] In 1992, after the *Washington Post* reported that many sexual assault victims believed that the military justice system victimized them a second time and is "heavily weighted against them,"[201] military leaders "scrambled . . . to reassure Congress and the public that it takes these matters seriously, and there is ample evidence that, at least at senior levels, 'We get it,' as acting Navy Secretary Sean C. O'Keefe put it recently."[202] Military leaders even stated that they were "considering revisions to the Uniform Code of Military Justice that would tighten definitions of sexual harassment and would modernize military rape laws."[203]

---

[195] 1946 REPORT, *supra* note 193.
[196] Military Selective Service Act of 1948, Pub. L. No. 80-759, §§ 201-46, 62 Stat. 604, 627–44 (1948); UCMJ (1951).
[197] 1962 CODE COMMITTEE REPORT, *supra* note 89, at 50.
[198] *Id.*
[199] *See, e.g.*, 1962 *Hearings*, *supra* note 54; 1963 *Hearings*, *supra* note 56; 1966 *Hearings*, *supra* note 58; Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).
[200] For a detailed discussion of the 1991 Tailhook scandal, see WILLIAM H. MCMICHAEL, THE MOTHER OF ALL HOOKS: THE STORY OF THE U.S. NAVY'S TAILHOOK SCANDAL (1997).
[201] Lancaster, *supra* note 13.
[202] *Id.*
[203] *Id.*

Congress's subsequent actions, however, indicate that military leaders did not "get it" to a degree that satisfied Congress. As discussed above, PAT, which formed in 2000, was assembled "[a]t the request of Senator Paul Sarbanes."[204] Additionally, in 2004, a member of the House of Representatives again took action that indicated a dissatisfaction with how the UCMJ handles sexual assault cases. A 2004 *Washington Post* article states,

> Although the Pentagon said it has initiated reforms, House Democrats led by Rep. Loretta Sanchez (Calif.) have been pushing for an update of sexual assault provisions in the Uniform Code of Military Justice, enacted by Congress in 1950. Their aim is to bring the code in line with a law adopted at the federal level and by 38 states, which expands the definition of sexual abuse and gives added protection for victims' rights.[205]

Additionally, Representative Ellen Tauscher also requested an oversight hearing,[206] and Representative Louise Slaughter, Co-Chairwoman of the Congressional Caucus for Women's Issues, stated,

> [DoD] report[s] that they don't have this and that in place, but they never create things. Not only have they not come to terms with simple definitions, they have not come to terms with what to do, period. This calls out for legislation and that is what we have to do.[207]

The amendments to Article 120, UCMJ, that took effect in October, 2007 can be attributed to public interest expressed through Congress. The 2005 NDAA ordered the Secretary of Defense to

> review the Uniform Code of Military Justice and the Manual for Courts-Martial with the objective of determining what changes are required to improve the

---

[204] *See* 2000 CODE COMMITTEE REPORT, *supra* note 143, §§ 3, 4 (Report of The Judge Advocate General of the U.S. Army).

[205] R. Jeffrey Smith, *Sexual Assaults In Army On Rise; Report Blames Poor Oversight and Training*, WASH. POST, June 3, 2004, at A1.

[206] *Id.*

[207] Lynette Clemetson, *Report Calls for Accountability and Services to Deal With Sexual Assaults in Military*, N.Y. TIMES, May 14, 2004, at A23.

> ability of the military justice system to address issues relating to sexual assault and to conform the Uniform Code of Military Justice and Manual for Courts-Martial more closely to other Federal laws and regulations that address such issues.[208]

The JSC formed a subcommittee to complete this mission.[209] Despite over a decade's worth of congressional concern about how the UCMJ handles sexual assault, to include the specific mandate in the 2005 NDAA, a JSC subcommittee recommended "no change," arguing, "The subcommittee members were unable to identify any sexual conduct (that the military had an interest in prosecuting) that cannot be prosecuted under the current UCMJ and MCM."[210]

Contrary to the JSC subcommittee's recommendation, the 2006 NDAA enacted a completely new Article 120, UCMJ, to handle sexual assault cases in the military.[211] This new law was not only "cumbersome and confusing,"[212] but a major tenet of the law, which was to shift the burden of proving consent to the accused, was found to be unconstitutional.[213] While some military leaders point to unsolicited "rapid changes" as potentially troublesome,[214] Congress's willingness to enact them despite the JSC's explicit recommendations against doing so evinces a troubling disconnect between the UCMJ's formal institutions

---

[208] National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571(a), 118 Stat. 1920–21.

[209] Patrick D. Pflaum, *The Continuous Evolution of Military Sexual Assault Law*, A.B.A. L. & TRENDS PRACTICE AREA NEWSLETTER, vol. 7, no. 2 (Winter 2011) (quoting Letter from Colonel Mark W. Harvey, *supra* note 117). The JSC suggested several changes, which are outlined, but not discussed in depth, in letters from the DoD Principal Deputy General Counsel to the HASC and SASC. Letter from Daniel J. Dell'Orto, to The Honorable John W. Warner, *supra* note 117; Letter from Daniel J. Dell'Orto, to The Honorable Duncan Hunter, *supra* note 117.

[210] Letter from Colonel Mark W. Harvey, *supra* note 117. The JSC ultimately included six options for UCMJ reform. "Option 5" of those six options was "the basis for the new legislation." Lieutenant Colonel Mark L. Johnson, *Forks in the Road: Recent Developments in Substantive Criminal Law*, ARMY LAW., June 2006, at 23, 27.

[211] National Defense Authorization Act for Fiscal Year 2006 (NDAA), Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256–63 (codified at 10 U.S.C. § 920 (2006)). For a good summary of the history of this legislation, see Johnson, *supra* note 210, at 26–29.

[212] DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES, *supra* note 155, at ES-5.

[213] United States v. Prather, 69 M.J. 338, 340 (C.A.A.F. 2011).

[214] Gross Statement, *supra* note 11, at 2.

for change and other voices to which Congress often listens and upon whose advice Congress has demonstrated a willingness to act.

IV. A Congressional Action Framework

With the 2014 NDAA, Congress passed a major reform of the UCMJ for the first time since the Military Justice Act of 1968. Unlike the Military Justice Act of 1968, the Code Committee and DoD were not a driving force for that change. Using the medical analogy, if these leaders, the "expert physicians," were prescribing the conventionally acceptable medicine, why did their patient—the UCMJ—get so sick and need major surgery, at least in the eyes of the Congress? Unfortunately, military leaders did not listen to the advice of others that the UCMJ was sick. Military leaders also failed to remember that Congress determines both whether a disease exists and when that disease has progressed to a point where it must prescribe powerful drugs.

Since Congress is a political institution whose members are elected by the American voters, an objectively perfect military justice system is subject to change if Congress and the American public do not perceive it to be effective. A major problem with the UCMJ is whatever Congress says it is. The standard is subjective. Congress has demonstrated that it will not hesitate to exercise its constitutional authority to reform the UCMJ, even if military leaders believe that the UCMJ is adequately serving its stated purposes.[215] The failure of institutions such as the Code Committee, JSC, and the many ad hoc review panels to factor in the outward appearance of the UCMJ when recommending reforms likely explains why Congress and the American public, rather than DoD, has been the driving force behind the reforms in the 2014 NDAA.

This article focuses on major problems with the UCMJ and major reforms to cure those problems. Military leaders could also use this framework "off-label,"[216] borrowing a medical term, to inform them

---

[215] While the purpose of the UCMJ is not set forth in statutory law, the Preamble to the Rules for Court-Martial states, "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." MCM, *supra* note 26, pt. I, ¶ 3.

[216] "Off-label" use of medicine means that "it is being used in a manner not specified in the [Federal Drug Administration's] packaging label, or insert." Kelli Miller, *Off-Label Drug Use: What You Need to Know*, WEB MD, http://www.webmd.com/a-to-z-

when an issue might present a minor change to the UCMJ. Typically, minor changes can be fixed by the approaches to reform already in place.[217]

In every case, understanding the picture of the UCMJ that Congress sees can help military leaders better identify both actual and perceived flaws with the UCMJ. What motivates Congress to make unsolicited major UCMJ reform is ripe for study, and luckily, a detailed understanding of politics, psychology, and law is not required. This article employs a comparative, epidemiological analysis of multiple quantitative and qualitative inputs to identify six variables that are typically present when Congress makes unsolicited UCMJ reform.[218]

The simultaneous presence of six different, yet interrelated, variables appear to be predictive of what constitutes a major disease with the UCMJ that, if left untreated, will lead to unsolicited major UCMJ reform. The six variables are: (1) a large victim group; (2) victim links with a well-established advocacy institution; (3) media coverage; (4) criticism that is contemporaneous with or immediately following a protracted conflict; (5) prolonged congressional attention and advocacy; and (6) a strategic case. Despite decades of effort to identify specific flaws with the UCMJ's punitive articles,[219] when it comes to major changes, Congress does not appear concerned with objective analyses of whether the UCMJ's rules serve the stated purposes. This makes sense given that Congress literally makes the rules and determines the objectives for the UCMJ, and members of Congress are not required to explain their beliefs or motives when they act. Military leaders must understand these six variables in order to better understand what might constitute a problem with the UCMJ, as well as when Congress may take unsolicited action.

---

guides/features/off-label-drug-use-what-you-need-to-know (last visited May 12, 2014).

[217] *See supra* Part III.A.

[218] Dr. John Snow, a British physician, is widely considered the founder of modern epidemiology because of his work on cholera. Even though medical science did not yet understand how microbes caused disease, Dr. Snow, through a comparative analysis of a variety of available evidence, was able to convincingly prove that tainted water was the cause for the spread of cholera. By studying the patterns of historical and newly-contracted cases of cholera, Dr. Snow was able to pinpoint the primary source of the cholera to a single water pump on London's Broad Street. SANDRA HEMPEL, THE STRANGE CASE OF THE BROAD STREET PUMP (2007). This article employs a similar methodology by comparing available historical and newly-emerging evidence to identify critical variables, even if the underlying causes of those variables, like the microbial cause of cholera, are not yet completely understood.

[219] *See supra* Part III.A.

Each variable is explained in the subsections below. Comparing the cases in which Congress made unsolicited UCMJ changes helps to identify the six variables. Contrasting these cases with other times in which Congress did not change the UCMJ, when possible, helps to prove that these six variables are each relatively equal in power.

A. Large Victim Group

The first variable in this framework is that Congress must perceive a sufficiently large victim group. For the purposes of this part, "victim" is defined as a person who is actually, potentially, or perceived to be actually or potentially aggrieved because of flaws with the UCMJ. At first glance, one may think that this variable is subsumed within the category of "major reform," as any reform that affected a small victim group would be, almost by definition, a "minor reform." The size of a victim group and the magnitude of reform, however, are separate and distinct variables.

Legislatures often enact major reforms regardless of the size of the perceived victim group. For example, Florida's stand-your-ground statute, which was a major revision to the Florida law of self-defense and criminal procedure, was based on the Florida legislature's desire to protect a largely theoretical and unidentified group of people who, the legislature believed, needed the explicit right to not retreat if confronted by deadly force.[220] Florida legislators repeatedly pointed to and distorted one anecdotal case to justify the law's passage.[221] Another example is the reform of eyewitness identification statutes. North Carolina's Eyewitness Identification Reform Act sets forth suspect lineup

---

[220] Florida's stand-your-ground statute is found at FLA. STAT. § 776.013(3) (2013).

[221] *See* Ben Montgomery, *Florida's 'Stand Your Ground Law' Was Born of 2004 Case, But Story Has Been Distorted*, TAMPA BAY TIMES, Apr. 14, 2012, http://www.tampabay.com/news/publicsafety/floridas-stand-your-ground-law-was-born-of-2004-case-but-story-has-been/1225164. For a good discussion of additional data used to justify and refute stand-your-ground statutes, see Andrew Jay McClurg, *Firearms Policy and the Black Community: Rejecting the "Wouldn't You Want A Gun If Attacked?" Argument*, 45 CONN. L. REV. 1773, 1790–98 (2013). While flawed studies may inflate the number of perceived victims who would benefit from stand-your-ground statutes, such inflated numbers are controversial. *Id.* In the first roughly seven years of the law's existence, it was successfully invoked 74 times. *See* Ben Montgomery & Connie Humburg, *Shaky Ground*, TAMPA BAY TIMES, Mar. 23, 2012, at 1A.

identification procedures designed to prevent misidentifications.[222] The motivation for this law, in large measure, was the case of Ronald Cotton, who served over a decade in prison because of a rape victim's well-intentioned, but mistaken, identification of Ronald Cotton as the perpetrator.[223] This major reform to criminal investigations is designed to protect a relatively small, yet understandably vulnerable number of citizens.

While it is likely impossible to quantifiably and definitively determine what size of group creates a critical mass for major UCMJ reform, Congress has demonstrated that it is less likely to pass major UCMJ reform if only a small number of people are aggrieved. This is for two reasons. First and foremost, despite the numerous calls for change during the sixty-three year history of the UCMJ, Congress has never made a major change without a large victim group. Second, an issue that satisfied all the other variables of this framework for over twenty-two years never generated unsolicited UCMJ reform.

All three major UCMJ reforms were passed to protect a quantifiably large victim group. In 1950, the UCMJ's very creation was designed to protect individual servicemembers, a group that between 1945 and 1955 ranged in size from approximately 1,500,000 to approximately 12,000,000.[224] While not all servicemembers committed crimes during World War II, over 1.7 million courts-martial were tried during the war, resulting in over 100 executions and 45,000 confined servicemembers.[225] The Military Justice Act of 1968 was also designed to protect the due process rights of all servicemembers.[226] While the number of courts-martial was reduced with the advent of non-judicial punishment and administrative action,[227] 73,169 courts-martial were held between July 1,

---

[222] N.C. GEN. STAT. 15A-284.52 (2007).

[223] The Ronald Cotton case is fascinating and has been turned into a *New York Times* best-seller. Ronald Cotton and Jennifer Thompson-Cannino, the rape victim who misidentified Ronald Cotton, are now close friends and tour the country discussing their case and the dynamics of misidentification. For a detailed account, see JENNIFER THOMPSON-CANNINO, RONALD COTTON, & ERIN TORNEO, PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION (2010).

[224] *Active Duty Military Personnel, 1940-2011,* http://www.infoplease.com/ipa/A0004598.html (last visited May 14, 2014) (quoting U.S. Department of Defense).

[225] *See supra* note 43 and accompanying text.

[226] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968); McCoy, *supra* note 61.

[227] UCMJ art. 15 (1951); 1962 *Hearings*, *supra* note 54, at 2 ("The unusual increase in the use of the administrative discharge since the code became a fixture has led to the

1964 and June 30, 1965.[228] By 1967, the last year for which Congress had court-martial data prior to passing the Military Justice Act of 1968, the number of courts-martial had increased to 84,764.[229] In the third major UCMJ reform, Congress passed the 2014 NDAA to protect victims of sexual misconduct. Estimates place the number of unwanted sexual contact victims at 34,200 for 2006, 19,300 for 2010, and 26,000 for 2012.[230] Senator Gillibrand posited that waiting 18 months for the Military Justice Review Group to conduct its comprehensive review of the UCMJ "is another estimated 39,000 cases of unwanted sexual contact."[231] Accordingly, each of the three major UCMJ reforms had tens of thousands of perceived victims.

Congress's long-time refusal to repeal the prohibition against consensual sodomy in Article 125, UCMJ, indicates that a large victim group is typically required for unsolicited statutory reform.[232] Although the repeal of a rarely enforced punitive article would typically be a minor change, making this an imperfect comparison, the repeal of the consensual sodomy provisions in Article 125 is unique, as it was interlaced with the large policy issue of homosexual service in the military. As such, the data is worthy of analysis.

Whether homosexual servicemembers, heterosexual servicemembers, or both are perceived as the victim group, the numbers

---

suspicion that the services were resorting to that means of circumventing the requirements of the code."); *see* LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 134–35 (2010) (describing the proliferation of nonjudicial punishment and administrative actions).

[228] 1965 CODE COMMITTEE REPORT, *supra* note 90, at 7. In the Army, there were 43,456 courts-martial, with an average Army strength of 1,016,832 soldiers. *Id* at 25.

[229] 1967 CODE COMMITTEE REPORT, *supra* note 102, at 4. In the Army, there were 49,943 courts-martial, with an average Army strength of 1,430,000 soldiers. *Id.* In contrast, in 2013, the entire U.S. military tried 2,600 courts-martial. U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE (Oct. 1, 2012–Sept. 30, 2013), *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY13AnnualReport.pdf (adding the total number of courts-martial for each service).

[230] U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 13 (2012), *available at* http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.n

[231] Phelps, *supra* note 161.

[232] UCMJ art. 125 (2012). The 2003 Supreme Court case of *Lawrence v. Texas* barred the prosecution of most acts of consensual sodomy. *See* Lawrence v. Texas, 539 U.S. 558 (2003). But the Congress did not repeal the Article 125, UCMJ statutory prohibition against consensual sodomy until December 2013. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1707, 127 Stat. 961.

of servicemembers prosecuted under Article 125 for consensual sodomy was very small. While yearly specific data for Article 125 cases is not available, "there were only four" prosecutions for heterosexual sodomy during Operation Desert Storm/Desert Shield, three of which involved consenting adults.[233] In 1992, there were 276 prosecutions military-wide prosecutions for sodomy-related offenses, although this data does not give specifics regarding the nature of the offenses charged.[234] Since the 2003 Supreme Court case of *Lawrence v. Texas*,[235] the number has fallen to almost nothing.[236] In other words, there were simply not enough victims, as all five other variables in this framework were present.

First, advocacy groups from every angle have been calling for the repeal of the laws against consensual sodomy for decades. Gay rights advocacy organizations have openly and continually campaigned against the law since at least 1993.[237] In 2001, the Cox Commission, a UCMJ review and reform effort by the National Institute on Military Justice,[238] stated, "The commission concurs . . . in recommending that consensual sodomy . . . be eliminated as separate offenses in the UCMJ and Manual for Courts-Martial."[239] A second Cox Commission iterated this recommendation in 2009.[240] The American Civil Liberties Union

---

[233] Jeff Stein, *Gays in the Gulf; They Were Far Better Behaved Than the Straights*, WASH. POST, Nov. 22, 1992, at C1.

[234] Eric Schmitt, *Military's Zeal Decried in Sodomy Case*, N.Y. TIMES, June 21, 1993, at A15. This data does not distinguish whether the charge involved forcible or consensual sodomy, nor does it distinguish whether or not it was between homosexuals or heterosexuals. *Id.*

[235] *Lawrence*, 539 U.S. 558.

[236] This assertion is based on the author's professional experiences as a U.S. Army judge advocate since 2003 [hereinafter Professional Experiences].

[237] *See* Joyce Murdoch, *Laws Against Sodomy Survive in 24 States; As District Attempts Repeal, Maryland and Virginia Statutes Remain on the Books*, WASH. POST, Apr. 11, 1993, at A20; Servicemembers Legal Defense Network (SLDN), *Cox Commission Recommends Repeal of Military Sodomy Statute; Military Watchdog Group Hails Recommendation to Pentagon*, GAY & LESBIAN ARCHIVES OF THE PAC. NW., http://www.glapn.org/sodomylaws/usa/military/milnewsm08.htm (last visited May 14, 2014).

[238] COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (THE COX COMMISSION), REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001) [hereinafter 2001 COX COMMISSION], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Cox-Commission-Report-2001.pdf. The National Institute on Military Justice (NIMJ) is "a private non-profit organization dedicated to the fair administration of military justice. . . ." *Id.* at 2.

[239] *Id.* at 11.

[240] COMMISSION ON MILITARY JUSTICE (THE COX COMMISSION), REPORT OF THE COMMISSION ON MILITARY JUSTICE 4 (2009) [hereinafter 2009 COX COMMISSION],

(ACLU) also advocated for the repeal, evidenced in part by its letter to the JSC in 2003.[241] In 2004, the JSC even recommended revision of Article 125.[242]

Much of the support for repealing the prohibition against consensual sodomy was also contemporaneous with either the conflict in Iraq or Afghanistan, or both. The ACLU advocated for reform in 2003.[243] In 2004, the JSC recommended revision of Article 125. And finally, the 2009 Cox Commission report was released at the height of the Operation Iraqi Freedom and Operation Enduring Freedom.[244]

There was also significant media attention on this issue since 1992. A representative sampling from the *Washington Post* and *New York Times* illustrates this. During the heart of the "Don't Ask, Don't Tell" debate between 1990 and 1994, at least twenty articles discussed the UCMJ's ban against consensual sodomy.[245] The coverage continued into the next decade. A 2003 *Washington Post* article provided a detailed account of the arguments against the ban on consensual sodomy.[246] A 2004 *Washington Post* article rehashed the issue when the Army Court of Criminal Appeals issued a ruling that "is believed to be the first time that a military court has upheld the right of consenting adults to engage in oral sex in private."[247] A 2005 *New York Times* article discussed the DoD General Counsel's proposal to repeal the ban on consensual sodomy.[248]

---

available at http://responsesystemspanel.whs.mil/public/docs/meetings/20140130/Materials_To_Members/24_CoxCommissionReport_2009.pdf.

[241] Letter from American Civil Liberties Union et al. for Captain Kenneth R. Bryant, JAGC, USN, Chairman, Joint Services Committee on Military Justice (Oct. 31, 2003), *available at* https://www.aclu.org/lgbt-rights-hiv-aids/coalition-letter-joint-services-committee-military-justice-urging-revision-arti.

[242] U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE § 1, 1 (Oct. 1, 2003–Sept. 30, 2004), *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY04AnnualReport.pdf.

[243] *See* Letter from American Civil Liberties Union, *supra* note 241.

[244] 2009 Cox Commission, *supra* note 240.

[245] *See, e.g.*, John Lancaster, *Navy Presses Relentless Search for Gays; Tough Tactics Cause Sailors to Acknowledge Sexual Encounters*, WASH. POST, June 14, 1992, at A1. This statistic was obtained using a Westlaw Search using the terms "military justice" and "sodomy."

[246] Charles Lane, *Sodomy Ruling Spurs Challenges to Military's Policy on Gays*, WASH. POST, Aug. 4, 2003, at A1.

[247] Michael Dobbs, *Some Believe Ruling Undercuts 'Don't Ask'; Military Appeals Court Overturned Conviction of Soldier on Sodomy Charge*, WASH. POST, Dec. 8, 2004, at A11.

[248] John Files, *Pentagon Considers Changing The Legal Definition of Sodomy*, N.Y.

The issue also had a history of congressional attention. Following President Bill Clinton's assumption of office in 1992, the issue of the UCMJ's ban against consensual sodomy was a facet of the congressional debates on the military's homosexual conduct policy.[249] During a Senate debate that brought laughter from the gallery, Senator Strom Thurmond stated, "Heterosexuals don't practice sodomy."[250] Senator John Kerry disagreed, and asked Senator Thurmond if he would want homosexuals working in Congress arrested for sodomy.[251] Senator Thurmond replied, "Sodomy is against the law. Why shouldn't they be arrested?"[252] Congressional debate again flared in 2010, with the repeal of the "Don't Ask, Don't Tell" policy.[253]

While the concept of a strategic case is discussed in greater detail below,[254] the repeal of the "Don't Ask, Don't Tell" policy was a strategic case for the repeal of the prohibition on consensual sodomy. The national attention was already squarely focused on the issue of homosexual conduct in the military, which by its very nature includes the prohibition on consensual sodomy. Nonetheless, Article 125's ban on consensual sodomy remained unchanged until the 2014 NDAA.

The consistent presence of a large victim group in all major UCMJ reforms, along with a high-profile case of where the lack of a large victim group may have stifled UCMJ reform, indicate that Congress is more likely to act if a victim group is large. Victims, nonetheless, often have difficulty finding a platform on which to be heard, or a voice to persuade Congress and the public to act. Accordingly, the presence of established advocacy groups appears to be another requisite element for major UCMJ reform.

TIMES, Apr. 21, 2005, at A18.

[249] *See* 139 CONG. REC. S11157-04, 11182-184 (1994).

[250] *Senators Loudly Debate Gay Ban*, N.Y. TIMES, May 8, 1993, at 19 (quoting Sen. Strom Thurmond).

[251] *Id.* (quoting Sen. John Kerry).

[252] *Id.* (quoting Sen. Strom Thurmond).

[253] For a good summary of the congressional debates surrounding this issue, see Adam Serwer, *Why the Military Still Bans Sodomy*, MSNBC (Sep. 13, 2013, 8:47AM), http://www.msnbc.com/msnbc/why-the-military-still-bans-sodomy.

[254] *See infra* Part IV.F.

B. The Presence of Established Advocacy Groups

An advocacy group provides the organization, resources, and, therefore, voice that a large victim group needs to motivate congressional change in "collective action problems."[255] For this article, an advocacy group is defined as "[a] group of people who work to support an issue or protect and defend a group of people."[256] While defining what makes an advocacy group "established" is imprecise, the hallmarks are name recognition, organizational structure, historical success, and access to both media and decision-makers. Although a congressional-lobbying campaign is often a part of an established advocacy group's strategy, such groups may engage in other efforts, such as public awareness campaigns, providing legal advice to individual servicemembers, or representing individual servicemembers' or the victim group's interests at various proceedings.[257]

For a myriad of reasons, advocacy groups are powerful advocates for legislative reform, to include access, experience, and expertise. Lanny Davis, who served in both the Bill Clinton and George W. Bush administrations, explains, "[L]obbyists spend much of their time with members of Congress and their staffs providing factual and expert information about legislation that affects their clients. Their clients are companies that employ people, real people, sometimes hundreds of thousands of people who deserve to be considered when laws are made."[258]

As is the case with many other statutory reforms, advocacy groups have played a significant role during all three major changes to the UCMJ. Some evidence of their impact is located in the *Congressional Record*. During the five-week long congressional floor debates on the UCMJ in 1949, twenty-eight witnesses testified, including

---

[255] A "collective action problem," also known as a "collective action situation," "occurs whenever a desired joint outcome requires the input of several individuals." CLARK C. GIBSON ET AL., THE SAMARITAN'S DILEMMA: THE POLITICAL ECONOMY OF DEVELOPMENT AID 15 (2005).

[256] *Advocacy group*, MACMILLAN DICTIONARY http://www.macmillandictionary.com/us/dictionary/american/advocacy-group (last visited May 14, 2014).

[257] Out-Serve-SLDN is an advocacy group that provides a variety of advocacy services for "actively serving LGBT military personnel and veterans. OUTSERVE-SLDN, http://www.sldn.org/pages/about-sldn (last visited May 18, 2014).

[258] Lanny Davis, *Lobbyists are Good People, Too*, WASH. TIMES, Nov. 17, 2008, at A4, *available at* http://www.washingtontimes.com/news/2008/nov/17/lobbyists-are-good-people-too/?page=all.

"representatives from the four major veterans' organizations, four bar associations, including the American Bar Association (ABA), the Reserve Officers Association, the National Guard Bureau and the National Guard Association. . . ."[259] At a congressional hearing in 1962 the American Legion stated, "The membership of The American Legion can take great pride in the fact that it was greatly instrumental in the drafting and in securing the enactment of the Code which has contributed substantially to the elimination of many former vicious practices."[260] Prior to the passage of the Military Justice Act of 1968, many advocacy groups, to include the ACLU and the ABA, testified before Congress in support of most of the protections ultimately included in the Military Justice Act of 1968.[261] The power of advocacy groups within the halls of Congress continued with the 2014 NDAA. In March 2013, representatives from Protect Our Defenders and the Service Women's Action Network, two advocacy groups for victims of military sexual trauma, testified at the same Senate hearing as the service Judge Advocates General.[262]

Advocacy groups may now have an even greater voice. With the growth of the continuous news cycle, internet, and social media networks, advocacy groups have increased their effectiveness by diversifying their methods to include a variety of public-relations tactics.[263] This is evident in the powerful impact that advocacy groups have had in shaping the 2014 NDAA and advocating for the proposed Military Justice Improvement Act.[264] A list of groups that continue to advocate for the Military Justice Improvement Act and advocated for many of the major UCMJ reforms found in the 2014 NDAA include Protect our Defenders, Service Women's Action Network, Iraq and Afghanistan Veterans of America, and Vietnam Veterans of America.[265] Senator Gillibrand has created a separate page that lists the support she

---

[259] 95 CONG. REC. pt. 3, 4120 (Apr. 7, 1949), at 4–5. Scholars also tout the role that advocacy groups played in the UCMJ's creation. Powerful "organized pressure groups," such as bar associations and veteran's groups, were a significant driving force for change. GENEROUS, *supra* note 37, at 23–24.

[260] 1962 *Hearings*, *supra* note 54, at 412.

[261] 1966 *Hearings*, *supra* note 58, *passim*.

[262] 2013 *Hearing*, *supra* note 10, *passim*.

[263] *See, e.g.*, Jonathan A. Obar et al., *Advocacy 2.0: An Analysis of How Advocacy Groups in the United States Perceive and Use Social Media as Tools for Facilitating Civic Engagement and Collective Action*, 2 J. OF INFO. POL'Y 1 (2012).

[264] Military Justice Improvement Act, S. 1752, 113th Cong. (2013).

[265] Letter from Anu Bhagwati et al. for Senators, *available at* http://www.vva.org/MJIA/Documents/MJIA-Open-Letter.pdf.

has received on this issue from dozens of advocacy groups.[266] The newer tactics were evident in the lead up to the filibuster against the MJIA.[267] One news report indicated, "Protect our Defenders, a group of such victims that backs Gillibrand's approach, is targeting McCaskill as part of a pressure campaign—including social media and newspaper ads—to recruit senators to its side before the full Senate votes on the issue, probably in September."[268]

It is evident that Congress values the expertise, perspective, and assistance that advocacy groups can provide, particularly when they represent a large victim group. Without more, however, Congress is unlikely to enact major reform of the UCMJ. Another required element is that the calls for reform must be contemporaneous with or immediately following a protracted armed conflict.

C. Following a Period of Protracted Armed Conflict

In a 1994 *Washington Post* article that discusses the UCMJ and unlawful command influence, lighter sentences for officers, and sexual misconduct, Carolyn Dock, Executive Director of Members Opposed to Maltreatment of Service Members, stated, "Congress does nothing. I cannot quite figure it out."[269] Unbeknownst to Ms. Dock, one factor that appears to account for her confusion is the timing of her calls for major UCMJ reform. Regardless of the objective need for major UCMJ reform, Congress appears to be much more willing to enact it following a period of protracted armed conflict.

Congress passed and the President signed all three major UCMJ reforms following periods of protracted armed conflict. Professor David A. Schlueter noted this phenomenon in 1991, noting, "It is important to remember that the greatest time of change in the military justice system

---

[266] *Veteran & Women's Groups Supporting the Military Justice Improvement Act*, U.S. SENATE, http://www.gillibrand.senate.gov/mjia/veteran-and-womens-groups (last visited May 18, 2014).

[267] *See* Helene Cooper, *Senate Rejects Blocking Military Commanders from Sex Assault Cases*, N.Y. TIMES, Mar. 7, 2014, at A18 (discussing the filibuster of the MJIA).

[268] Robert Koenig, *McCaskill Takes Issue with Rival Approach to Deter Military Sexual Assaults*, ST. LOUIS BEACON, July 26, 2013, https://www.stlbeacon.org/#!/content/32065/mccaskill_military_assault_072513.

[269] Anderson & Binstein, *supra* note 28.

usually has occurred immediately following a major war or conflict."[270] As discussed above, the UCMJ, which was passed in 1950 just prior to the Korean War and enacted in 1951, was Congress's remedy for the failures of the Articles of War during World War II.[271] The Military Justice Act of 1968 was passed and signed into law at the height of the Vietnam War in 1968, after thirteen years of American presence in the country and over 20,000 American servicemember deaths.[272] The 2014 NDAA was also debated, passed, and signed into law shortly following the end of Operation Iraqi Freedom and after over twelve years of Operation Enduring Freedom (OEF).[273] Since its enactment, Congress has never passed a major UCMJ reform during peacetime or following a shorter conflict, such as Grenada, Panama, or Operation Desert Storm/Desert Shield. This congressional inaction, however, was not due to a lack of contemporaneous calls for UCMJ reform.

Congress's failure to enact UCMJ reform is as telling as the timing of the major reforms. Calls for UCMJ reform regarding sexual assault and sexual harassment began over a decade prior to the 2006 major modification of Article 120.[274] In 1988, the Pentagon commissioned a study of servicemembers that provided troubling statistics regarding sexual harassment in the military.[275] Five percent of the respondents reported being victims of "actual or attempted rape or sexual assault over the past year alone," and sixty-four percent reported being victims of sexual harassment.[276] The U.S. Navy's Tailhook scandal and its relationship with military justice was mentioned or discussed in at least forty-two *Washington Post* and *New York Times* articles prior to

---

[270] Schlueter, *supra* note 30, at 9. Lawrence J. Morris, a noted military justice scholar and retired Army judge advocate, notes, "Both of the two great changes to the military justice system of the last half of the 20th century occurred just before or during periods of great operational stress for the military." MORRIS, *supra* note 227, at 122.

[271] While the UCMJ took effect on May 31, 1951, President Truman signed it into law on June 25, 1950, over one month prior to the outbreak of the Korean War. *See id.* Accordingly, the potential Korean conflict was, at most, a tertiary consideration for the UCMJ's passage.

[272] The Military Justice Act of 1968 was enacted on October 24, 1968. Pub. L. No. 90-632, 82 Stat. 1335 (1968); *Statistical Information About Casualties of the Vietnam War*, U.S. NAT'L ARCHIVES, http://www.archives.gov/research/military/vietnam-war/casualty-statistics.html (last visited May 18, 2014).

[273] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, §§ 531, 652, 1701–1753, 127 Stat. 759, 788, 952–85.

[274] *See, e.g.*, Lancaster, *supra* note 13.

[275] *Id.*

[276] *Id.*

September 11, 2001.[277] And as noted above, in 1992, the *Washington Post* highlighted a perceived failure of the UCMJ to handle these cases in an article entitled *In Military Sex Harassment Cases, His Word Often Outranks Hers*.[278] In other words, during the 1990s, the military justice system's ability to handle sexual assault cases was already being called into question. Why, then, did Congress not reform the UCMJ?

By applying this framework to the issue of military sexual assault in the 1990s, the lack of a protracted conflict appears to explain Congress's inaction. Sexual assault victims were a large victim group that was aligned with an established advocacy group.[279] There was significant media attention,[280] a history, albeit short, of congressional attention,[281] and multiple precursor strategic cases.[282] Then, again, members of Congress surely do not intentionally ignore or choose not to act on potentially legitimate concerns simply because there has not been a sufficiently protracted armed conflict. If one accepts this assumption, there is a causal mechanism that this framework does not explain. Why does it appear that some form of protracted conflict is required to motivate change?

Unfortunately, a host of reasons are possible. For instance, some argue that Congress defers to the military in certain situations. After *Operation Desert Storm/Desert Shield*, "[t]here was a great deference among lawmakers from that point for senior uniformed leaders. You hadn't seen it to that extent before."[283] Following this logic, because the UCMJ reviews in the 1990s never once mentioned sexual assault as a potential crisis, statutory UCMJ reform to address the sexual assault-related complaints of the 1990s was not likely. While such may be true, how do we explain the lack of congressional action during the first parts of a conflict?

---

[277] This statistic was obtained by a Westlaw searching articles between 1990 and September 10, 2001, using the terms "tailhook" & "military justice."

[278] Lancaster, *supra* note 13.

[279] *See supra* notes 264–268 and accompanying text.

[280] *See supra* note 277 and accompanying text; *infra* notes 381, 382, 407 and accompanying text.

[281] H. Con. Res. 359, 102d Congress (1991-1992).

[282] *See, e.g.*, Lancaster, *supra* note 13.

[283] John T. Bennett, *20 Years After Desert Storm, Congress Defers to the Pentagon on Budgets*, THE HILL (Jan. 24, 2011), http://thehill.com/news-by-subject/defense-homeland-security/139551-in-20-years-since-desert-storm-congress-defers-to-the-pentagon (quoting Nathan Freier, Senior Fellow, Center for Strategic and International Studies).

Congressional deference to military leaders may continue during conflict. Mackenzie Eaglen, a Heritage Foundation analyst and former Senate defense aide states, "For many years after 2001, Congress was absent conducting oversight and mostly took the Pentagon at its word even when analysis was grossly lacking to justify strategy, budget or even base closure decisions."[284] In an article supporting the MJIA, Yale Law School lecturer and noted military justice expert Eugene R. Fidell stated that the MJIA's opponents are relying on "an insistence that 'we'—the military—'know best.' This reflects an assumption that Congress should defer to the military, rather than the other way around."[285] Mr. Fidell's observation appears keen given the insular nature of prior DoD-initiated studies and reviews of the UCMJ.[286] Why Congress may defer to the military presents yet another difficult and so far unanswered causation question.[287] The fact that Article 120, UCMJ, was not reformed until five years following the start of OEF supports this theory of congressional deference to the military during times of conflict.[288] Regardless of the cause, protracted armed conflict is a precursor to major congressional UCMJ reform. Such has proven true even when military leaders, civilians, and some members of Congress form a united front on proposed UCMJ reform.

Despite many fundamental differences from the other major UCMJ reforms and the fact that the Vietnam War produced "in midconflict a reaction that America's earlier wars have generated only after the

---

[284] *Id.*

[285] Eugene R. Fidell, *Goodbye to George III: The Fight Over Prosecuting Sexual Assault in the Military is Really Over an Antiquated Model of Commander Control*, SLATE (Dec. 6, 2013, 11:46AM), http://www.slate.com/artilces/news_and_politics/jurisprudence/2013/12/sexual_assault_in_the_military_commanders_shouldn_t_be_the_prosecutors.html.

[286] *See infra* Part III.A.3.

[287] There appears to be very little to no scholarship that focuses on congressional deference to the military, particularly as it pertains to the UCMJ. When it comes to technological innovation, some argue, "[w]hen the threat level is high, Congress tends to defer to the military's professional expertise. . . . When the nation is under serious external threat, no politician wants to face the argument that he undercut the military's ability to provide for the common defense by ignoring expert military advice." PETER DOMBROWSKI & EUGENE GOLS, BUYING MILITARY TRAN$FORMATION: TECHNOLOGICAL INNOVATION AND THE DEFENSE INDUSTRY 22 (2006). For a good explanation of the judicial military deference doctrine, see John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000).

[288] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256–63 (codified at 10 U.S.C. § 920 (2006)).

shooting stopped—a reform in military justice,"[289] the Military Justice Act of 1968 was also not passed until a period of protracted armed conflict had elapsed. In the 1960s, Senator Sam Ervin began crusading for UCMJ reform in 1962, six full years prior to the Military Justice Act of 1968.[290] Unlike the 2006 modification to Article 120 and the 2014 NDAA reforms, the due process-related reforms of the Military Justice Act of 1968 enjoyed widespread public, congressional, and Code Committee support.[291] During the period from 1962 to 1968, Congress did not defer to the military and its views on the UCMJ, as military leaders had been recommending many of the statutory changes since 1962.[292]

As was the case with sexual assault in the 1990s, all other elements of this framework appear to have been present from 1962 to 1968. The large victim group was aligned with large, established advocacy groups.[293] There was media attention[294] and a history of congressional attention.[295] There was also a "strategic case."[296] Nonetheless, Congress did not take action until 1968.

In addition to research and scholarship on congressional deference to the military, a more detailed comparative analysis between public support for a protracted conflict and UCMJ reform may be warranted, as it appears that there may be a link between the popularity of a conflict and Congress's willingness to enact major reform to the UCMJ. Upon enactment of the Military Justice Act of 1968, public support for the Vietnam War had fallen to thirty-seven percent.[297] In December 2013,

---

[289] Fred P. Graham, *Reforms Sought in Military Code, Senators Push for Further Safeguards at Trials*, N.Y. TIMES, May 18, 1967, at 3.

[290] 1962 *Hearings*, *supra* note 54.

[291] *See supra* notes 90, 104. The senior judge advocates from each service are members of the Code Committee. UCMJ art. 146(b) (2012).

[292] For a sampling of some of the recommendations, see *supra* notes 88–90 and accompanying text.

[293] *Supra* notes 260–261 and accompanying text.

[294] *Infra* notes 309–313 and accompanying text.

[295] 1962 CODE COMMITTEE REPORT, *supra* note 89, at 49–64; *infra* notes 331–333 and accompanying text.

[296] *Infra* notes 377–379 and accompanying text.

[297] *Digital History, Public Opinion and the Vietnam War*, UNIV. OF HOUSTON, http://www.digitalhistory.uh.edu/active_learning/explorations/vietnam/vietnam_pubopinion.cfm (last visited May 18, 2014).

the month in which the 2014 NDAA was signed into law, American public support for OEF had fallen to 17%.[298]

The fact that every major UCMJ reform has followed a protracted armed conflict, despite fundamental differences in the reasons for and nature of each major UCMJ reform, indicates that protracted armed conflict has an impact on Congress's willingness to modify the UCMJ. While this article does not research the underlying causal mechanisms for such behavior, understanding this consistent phenomenon will serve to assist military leaders in better shepherding the UCMJ, and it may motivate additional research to provide a clearer picture of why Congress acts.

D. Media Attention

Each of the three major UCMJ reforms has also been precipitated by media attention. While the "information era" and "24-hour news cycle" have only served to magnify the amount of information available on almost every topic imaginable, the consistent presence of media attention prior to all three major UCMJ reforms and the nature of the attention indicate two things about the impact that the media has on UCMJ reform. First, as discussed above, the American public voices its concerns about the UCMJ through the media.[299] Second, when the media persistently reports and comments about a perceived problem with the UCMJ, members of Congress listen.

Prior to the UCMJ's passage in 1950, the print media focused on the issue of improving due process rights under the Articles of War. For instance, between the end of World War II and the UCMJ's enactment, over fifty articles in the *Washington Post* and over 100 in the *New York Times* were related, in varying degrees, to military justice.[300] While some articles were news reports about specific cases,[301] others were

---

[298] CNN Political Unit, *CNN Poll: Afghanistan War Arguably Most Unpopular in U.S. History*, CNN (Dec. 30, 2013), http://politicalticker.blogs.cnn.com/2013/12/30/cnn-poll-afghanistan-war-most-unpopular-in-u-s-history/.

[299] *See supra* Part II.B.1.

[300] This figure was obtained by entering the dates August 9, 1945 and May 31, 1951 and the term "military justice" into a *Washington Post* Archives search function. *ProQuest Archiver*, WASH. POST (Apr. 29, 2014), https://secure.pqarchiver.com/washingtonpost_historical/advancedsearch.html. The same terms and dates were entered into a *New York Times* Archives search function. *Search*, N.Y. TIMES (Apr. 29, 2014), http://query.nytimes.com/search/sitesearch/#//.

[301] *See, e.g.*, *2 U.S. Officers Face Trial for Misconduct*, WASH. POST, Oct. 25, 1946, at 4

highly critical of the Articles of War. As early as 1946, the *Washington Post* stated,

> We are glad to hear that Senator McCarran intends to demand a congressional investigation into the Army's administration of martial law and into its conduct of courts-martial throughout the war just ended. We have heard a great many stories indicating that in more than a few instances Army officers grossly abused the powers placed in their hands, exercising them with arrogance and without discretion and sometimes without the slightest respect for the most elementary conceptions of justice.[302]

The *Washington Post* persisted with additional critical articles in 1946.[303]

The criticism continued until the UCMJ was enacted. As an example, a 1949 *Washington Post* article began, "The trouble with military justice, as it is viewed by many civilians, is that it has been more concerned with the military aspects of offenses than with dispassionate justice."[304]

Reports on specific cases and the criticisms of the system as a whole made an impact on Congress. As far as reports about specific cases, a 1946 house report openly advocated for the news media's role in the court-martial process. When discussing public trials, the report stated,

> Sometimes [the details of cases] are printed in the newspapers; the details are not always elevating, but the fact that decisions are openly arrived at and openly rendered is more than wholesome; it is vital. The experience of mankind has shown that it is a necessary element of justice. It is one of the freedoms for which we fought. Army justice is not fashioned on this model."[305]

(describing the trials of two officers for "misconduct in office").

[302] *Military Justice Again*, WASH. POST, Jan. 5, 1946, at 6.

[303] *See, e.g.*, United Press, *supra* note 193, at M1, M4; *Trial Delay*, *supra* note 180.

[304] *Military Justice*, *supra* note 181, at 6.

[305] 1946 REPORT, *supra* note 193, at 39.

The report also mentioned four separate cases where the news media had a positive impact on the case, including one that was "so fortunate as to get correction by means of newspaper publicity."[306]

Members of Congress plainly admitted the impact of media coverage had on creation of the UCMJ. During a 1947 congressional hearing (1947 Hearings), a survey of news reports and editorials from newspapers across the United States that were critical of the Articles of War and military justice system were simply inserted into the *Congressional Record*.[307] During the 1949 congressional floor debate on the UCMJ (1949 Debates), Representative Durham explicitly outlined the impact of media criticism by discussing the genesis of the Vanderbilt Committee, the 1946 ad hoc committee whose military justice reform recommendations served as a foundation for the UCMJ's enactment.[308] Representative Durham stated that criticism of the military justice system, "both through the press and over the radio . . . became so bad that we had to pay some attention to it, and General Eisenhower himself appointed the first committee to go into this matter, and later Secretary Patterson, and later Secretary Royall." In other words, but for the media criticism of the military justice system, the UCMJ may have been fundamentally different.

Media criticism also played a role, albeit much more limited, in the lead-up to the Military Justice Act of 1968. Between November 1, 1955 and October 24, 1968,[309] approximately seventy articles in the *Washington Post* and 200 articles in the *New York Times* were related, in varying degrees, to military justice.[310] Only a handful, however, voiced

---

[306] *Id.* at 47.

[307] *Subcommittee Hearings on H.R. 2575 Before the H. Comm. on Armed Services, Subcomm. No 11 Legal*, 80th Cong. 1903, 2166–175 (1947) [hereinafter 1947 *Hearings*]. Reports or editorials from the *Pittsburgh Post-Gazette*, *Shreveport Times*, *Mobile Register* (Ala.), *Kansas City Star*, *Philadelphia Bulletin*, *New York Times*, *St. Louis Post-Dispatch*, *El Paso Times*, *Johnstown Tribune* (Pa.), *Tampa Tribune*, *Lynchburg News* (Va.), *Lancaster Intelligence Journal* (Pa.), *Chicago Tribune*, *Los Angeles News*, *Grand Junction Sentinel* (Colo.), and *Brooklyn Eagle* were all included. *Id.*

[308] 1949 DEB., *supra* note 50, 21–22 (statement of Rep. Carl T. Durham).

[309] These are the official U.S.-Government recognized dates of the Vietnam War. *See* U.S. Dep't of Def., *Name of Technical Sergeant Richard B. Fitzgibbon to be Added to the Vietnam Veterans Memorial*, Release No. 581-98 (Nov. 6, 1998), *available at* http://www.defense.gov/releases/release.aspx?releaseid=1902.

[310] This figure was obtained by entering the dates November 1, 1955 and October 24, 1968 and the terms "military justice" and "Uniform Code of Military Justice" into a *Washington Post* Archives search function. *ProQuest Archiver*, WASH. POST, (Apr. 29, 2014), https://secure.pqarchiver.com/washingtonpost_historical/advancedsearch.html.

any true, pointed criticism, such as that from dissents of the Court of Military Appeals.[311] The reduction in media vitriol could be explained by many things. For instance, the increased due process protections that the UCMJ afforded compared to the Articles of War and the unified and repeated calls for due process reform for which the Code Committee advocated in the 1960s[312] could both explain why the media did not target military justice reform as it had following World War II. In addition, the relatively few military casualties between the end of the Korean War in 1953 and the ramp-up of the Vietnam War in 1964 could also play a role. Nonetheless, a May 18, 1967 *New York Times* article outlines most positions leading up to the passage of the Military Justice Act of 1968.[313]

Compared to the prior major UCMJ reforms, the media attention surrounding the 2014 NDAA reforms has been staggering. Since September 11, 2001, the *Washington Post* and *New York Times* have published approximately seventy articles each that discuss military justice and sexual misconduct.[314] All but nine of these articles were published after the 2005 NDAA modified Article 120, UCMJ,[315] indicating that punitive article reform, which appears to be the sole focus of the JSC, is not enough.

Similar to the calls for change prior to the UCMJ's enactment, prior to the 2014 NDAA, the news media overtly called for major changes to the UCMJ. In addition to detailed coverage about specific cases,[316] since

---

The same terms and dates were entered into a *New York Times* Archives search function. *Search*, N.Y. TIMES (Apr. 29, 2014), http://query.nytimes.com/search/sitesearch/#//.

[311] *See, e.g.*, *Military Justice Said to Disregard Rights of Accused*, WASH. POST, June 3, 1967, at A5.

[312] *See supra* notes 90, 104 and accompanying text.

[313] Graham, *supra* note 289.

[314] This figure was obtained by entering the terms "military justice" and ("sexual assault" or "sexual harassment") into a Westlaw search function.

[315] President Bush signed the 2005 NDAA into law on October 28, 2004. National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1920–1921.

[316] *E.g.* Craig Whitlock, *Air Force General To Retire After Criticism For Handling of Sexual-Assault Case*, WASH. POST, Jan. 9, 2014, http://www.washingtonpost.com/world/national-security/air-force-general-criticized-for-handling-of-sexual-assault-cases-to-retire/2014/01/08/9942df96-787d-11e3-b1c5-739e63e9c9a7_story.html (discussing Lieutenant General Craig Franklin's decision to overturn a sexual assault conviction); Annys Shin, *Academy Rape Case Hearing Concludes*, WASH. POST, Sept. 4, 2013, at B1 (discussing sexual assault charges against Naval Academy midshipmen); Craig Whitlock, *Disgraced Army General Gets Fine, No Jail Time*, WASH. POST, Mar. 21, 2014, at A3

May 2013, both the *Washington Post* and *New York Times* have dedicated at least eight editorials to the topic.[317] In a July 30, 2013 editorial entitled *An Escalating Fight Over Military Justice*, the *New York Times* Editorial Board openly advocates for the MJIA, stating, "Americans . . . [who are] fed up with the broken promises of zero tolerance for such behavior over way too many years should be rooting for Ms. Gillibrand and her bipartisan coalition to succeed."[318] Following shortly thereafter, an October 9, 2013 editorial entitled *Broken Military Justice* argues that Senator Carl Levin and opponents of the MJIA "look increasingly behind the curve."[319]

This media coverage has made a tangible impact on Congress in three ways. First, the increased amount of media attention itself has an effect. During a discussion with Senator Tim Kaine during the March 2013 congressional hearings on sexual assault in the military, Ms. Rebekah Havrilla, a former Army noncommissioned officer, stated,

> One of the things that really has made a huge impact over the last 2 years is the constant media attention around these issues. . . . There has been a shift in momentum over the last 2 years. There has been a shift forward. There have been many baby steps made through legislation in the NDAA. There has been some positive progress. That's what I want to hold onto.[320]

Second, the increased reporting on specific cases can shape policy maker's opinions. During 2013 congressional hearings on sexual assault in the military, Senator Mazie Hirono pointed to a newspaper article she read about the case in Aviano, Italy, in which Lieutenant General Craig Franklin overturned a sexual assault conviction as a reason to support the MJIA's proposal to remove the chain of command from prosecutorial decisions.[321] Third, the power of the specific calls for change impact

---

(discussing the Brigadier General Jeffrey Sinclair case).

[317] These editorials began on May 10, 2013. Editorial, *Disorder in the Ranks*, WASH. POST, May 10, 2013, at A24. The last one was published on October 9, 2013. Editorial, *Broken Military Justice*, N.Y. TIMES, Oct. 9, 2013, at A28. This statistic was obtained using a Westlaw search for the relevant time period using the terms "military justice" and "editorial."

[318] Editorial, *An Escalating Fight Over Military Justice*, N.Y. TIMES, Oct. 9, 2013, at A18.

[319] Editorial, *Broken Military Justice*, *supra* note 317, at A28.

[320] 2013 *Hearing*, *supra* note 10, at 36.

[321] *Id.* at 27–28.

individual congressional members. On her website, Senator Gillibrand has a page dedicated to listing "Editorials and Op-Eds in Support of the Military Justice Improvement Act."[322] Senator Claire McCaskill's website also lists media reports and editorials that support her position on UCMJ reform.[323] Additionally, the mere fact that both senators have authored opinion pieces to advocate their positions on UCMJ reform indicates the value and impact of the media on Congress.[324]

Nonetheless, understanding that media attention appears to be a prerequisite to UCMJ reform is only half of the picture. Military leaders who wish to better shepherd the UCMJ and military justice system must understand how to read and act upon information in the media. Part V.A below explains how to use media reports to more accurately diagnose and treat actual and potential UCMJ problems. There are, however, two more variables that must be present for Congress to enact major UCMJ reform. The next, which is prolonged congressional attention and advocacy, is often interconnected to the media attention variable but is separate and distinct.

E. Prolonged Congressional Attention and Advocacy

In addition to the four variables set forth above, each of the three major UCMJ reforms has been preceded by a prolonged history of congressional attention and advocacy. For this article, the term "congressional attention and advocacy" means either formal or informal action by at least one member of Congress that either explores an issue or specifically calls for change. These actions often take the form, but are not limited to, congressional hearings, news interviews, or other forms of issue-specific advocacy. In each case, a specific member of Congress has identified the potential problem with the UCMJ or military justice system and has doggedly advocated for change for several years

---

[322] *Editorials & OpEds In Support of the Military Justice Improvement Act*, U.S. SENATE, http://www.gillibrand.senate.gov/mjia/editorials/ (last visited May 15, 2014).

[323] *Curbing Sexual Assaults in the Military*, U.S. SENATE http://www.mccaskill.senate.gov/MilitaryJustice/ (last visted May 14, 2014).

[324] *See* Kirsten Gillibrand, *Sexual Assaults and American Betrayal: The Fight for Fundamental Reform Continues*, N.Y. DAILY NEWS, Mar. 14, 2014, http://www.nydailynews.com/opinion/sexual-assaults-american-betrayal-article-1.1721007; Claire McCaskill & Loretta Sanchez, *Military Commanders Must Fight Sexual Assault in Military*, USA TODAY, Aug. 29, 2013, http://www.usatoday.com/story/opinion/2013/08/29/women-congress-sexual-assault-column/2725081/.

prior to reform. Other variables in this framework may motivate this intra-congressional advocate, but his or her advocacy itself appears to be an essential prerequisite for UCMJ reform.

Following World War II, Representatives Charles H. Elston and Carl T. Durham were staunch advocates for military justice reform. During the 1947 Hearings, as chair of a Legal Subcommittee of the House Committee on Armed Services, Representative Elston conducted a detailed investigation of the military justice system.[325] Military leaders, advocacy group representatives, and other congressmen, to include Representative Durham, either testified or commented during a comprehensive hearing on two proposals for reform, one championed by Representative Elston and the other proposed by Representative Durham.[326] Representative Elston and his committee ultimately recommended and passed many reforms, and more importantly, supported each recommendation with detailed and persuasive evidence.[327] The Senate then relied on Elston's detailed work to pass the same reforms.[328] As a result, the 1948 reforms to the Articles of War are commonly referred to as the "Elston Act."[329] Elston's impact did not end there. The Elston Act also:

> [S]et the table for the [UCMJ] in two important ways: (1) The Elston Act gathered data and perspective on the World War II experience close in time to the war, and (2) it tackled some of the most significant reforms and sparked discussion of the others, meaning that the "battlefield was prepared" for the debates and exchanges that led to the 1950 act.[330]

Without Representatives Elston's and Durham's advocacy within the House of Representatives, the UCMJ would likely not have been passed as quickly or with as many substantive reforms.

---

[325] 1947 *Hearings*, *supra* note 307. For a detailed history of the Elston Act's genesis, see GENEROUS, *supra* note 37, ch. 3.
[326] 1947 *Hearings*, *supra* note 307.
[327] *Id. passim.*
[328] S. COMM. ON ARMED SERVICES, 80TH CONG., COURTS MARTIAL LEGISLATION: A STUDY OF THE PROPOSED LEGISLATION TO AMEND THE ARTICLES OF WAR (H.R. 2575); AND TO AMEND THE ARTICLES FOR THE GOVERNMENT OF THE NAVY (H.R. 3687; S1338) 1 (Comm. Print 1948).
[329] Military Selective Service Act of 1948, Pub. L. No. 80-759, §§ 201–46, 62 Stat. 604, 627-44 (1948); *see* MORRIS, *supra* note 227, at 125.
[330] MORRIS, *supra* note 227, at 125.

Senator Sam Ervin was the dogged advocate for the Military Justice Act of 1968. In 1962, Senator Ervin convened the first congressional hearing "on the [c]onstitutional rights of military personnel, in which he focused on command control of courts-martial, the right to legally trained defense counsel, differences in military justice amongst the services, and the effectiveness of military due process."[331] Senator Ervin again held hearings in 1963 and 1966.[332] Reform was ultimately passed in 1968, but only after six years of painstaking investigation and advocacy within the halls of Congress.[333]

For the 2014 NDAA, Senators Gillibrand and McCaskill have been the visible and vocal champions for major UCMJ reform.[334] Most of their ardent advocacy occurred in 2013, immediately before the 2014 NDAA changes. Indeed this recent wave of attention made some military leaders feel like reform was being rushed. In a September 25, 2013 statement to the Systems Response Panel in which he calls for "successful reform through a measured approach,"[335] Brigadier General Richard Gross stated, "Previous rapid changes, such as those made in 2007 to Article 120, resulted in provisions being held unconstitutional, increasing the potential for overturned convictions."[336] Brigadier General Gross's perspective concerning the relative speed of the 2005 NDAA changes to Article 120 is understandable given the military leadership's heretofore inward focus on UCMJ reform, which includes the JSC subcommittee's recommendation against such a course of action.[337] Brigadier General Gross's statement, however, persuasively illustrates why this framework and proposal for a new approach to UCMJ reform is needed, as the aforementioned change was not "rapid."

The sexual misconduct-related reforms have been the slowest developing UCMJ reform of all, as members of Congress have been contemplating the issue since at least 1992. In 1992, along with 21 co-sponsors, Representative Patricia Schroeder introduced a congressional

---

[331] *Id.* at 135 (citing GENEROUS, *supra* note 37, at 187–89).
[332] 1963 *Hearings*, *supra* note 56; 1966 *Hearings*, *supra* note 58.
[333] For a detailed, first-hand account of the background and legislative history behind the Military Justice Act of 1968, see Sam J. Ervin, Jr., *The Military Justice Act of 1968*, 45 MIL. L. REV. 77, 78–82 (1969).
[334] *See supra* notes 318–319, 324 and accompanying text.
[335] Gross Statement, *supra* note 11, at 2.
[336] *Id.*
[337] *See supra* notes 208–210 and accompanying text.

resolution entitled *Expressing the Sense of Congress Regarding the Elimination of Sexual Harassment and Sexual Assault in the Military*. After first "[e]xpressing the sense of Congress regarding the elimination of sexual harassment and sexual assault in the Armed Forces," the resolution specifically finds that "the Armed Forces have not adequately responded to reports of sexual harassment and sexual assault of female members of the Armed Forces."[338]

The 1992 resolution specifically addressed UCMJ reform. First the resolution then calls on the "Secretaries of the military departments" to take on many of the precise reforms subsequently enacted, including data collection, victim assistance and counseling availability, and educational campaigns.[339] Second, the resolution called for the Secretaries to "reevaluate their existing methods of investigating and processing sexual harassment and sexual assault complaints involving members of the Armed Forces and consider alternative methods to provide effective enforcement."[340] This demonstrates members of Congress had at least discussed potential Article 120 reform thirteen years prior to passing the 2005 reforms, the very reforms that Brigadier General Gross cites as "rapid."[341] In addition, the NDAA's changes to Article 32, UCMJ, are an example of a recommendation becoming law over twenty-one years after Congress first contemplated it.[342]

The 1992 resolution also charges the Secretaries to "reevaluate their existing sanctions against those members of the Armed Forces who commit sexual harassment or sexual assault to determine whether the sanctions serve as an effective deterrent."[343] The recently enacted mandatory general court-martial referral and mandatory minimum sentences for certain sex-related offenses is Congress's embodiment of another recommendation over twenty-one years after this issue was first raised.[344] In yet another prescient charge, the resolution asks the Secretaries "to determine whether adequate protections exist to ensure that members of the Armed Forces who report sexual harassment or

---

[338] H. Con. Res. 359, 102d Congress (1991-1992).
[339] *Id.*
[340] *Id.*
[341] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256–63 (codified at 10 U.S.C. § 920 (2006)).
[342] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 954–57.
[343] H. Con. Res. 359, 102d Congress (1991-1992).
[344] National Defense Authorization Act for Fiscal Year 2014 § 1705, 127 Stat. 959–60.

sexual assault do not experience retaliation for making such a report and, if not, develop effective protections."[345] The 2014 NDAA explicitly criminalizes retribution.[346] These resolutions were therefore not a one-time congressional glance at sex-related offenses and the military.

In many ways, members of Congress were screaming for reform, and had been doing so for quite some time. In 1992, Representative Schroeder again discussed sexual assault during a hearing on "Gender Discrimination in the Military."[347] In March 1994, the House Armed Services Committee held hearings on sexual harassment in the military and discussed "[DoD]'s commitment to ensuring that there are effective procedures to deal with sexual harassment and the protection of the victims of sexual harassment from further victimization."[348] The Senate's first proposed version of the 2000 NDAA tackled the issue of confidentiality of communications between a sexual assault or sexual harassment victim and those charged with providing assistance,[349] yet another issue that Congress again addressed in 2013.[350] In 2000, Senator Paul Sarbanes was the driving force behind the PAT.[351] In 2004, Representatives Loretta Sanchez, Ellen Tauscher, and Louise Slaughter also drew attention to sexual assault in the military.[352] In the 2005 NDAA, Congress explicitly charged the military with studying the UCMJ and its effectiveness as related to sexual assault offenses.[353]

While Patricia Schroeder was one of the first congressional advocates for the issue of sexual assault in the military, many others continued to effort. While all six elements of this framework typically must be present for Congress to pass UCMJ reform legislation, it is also worthy of looking at what specifically may have motivated congressional advocates to begin their often long and laborious calls for reform. A

---

[345] H. Con. Res. 359, 102d Congress (1991-1992).
[346] National Defense Authorization Act for Fiscal Year 2014 § 1709, 127 Stat. 962.
[347] *Gender Discrimination in the Military: Hearings Before the Military Personnel and Compensation Subcomm. and Defense Policy Panel of the H. Comm. on Armed Services*, 102d Cong. 3 (1992) [hereinafter 1992 *Hearings*] (statement of Rep. Patricia Schroeder), *available at* http://www.dtic.mil/dtfs/doc_research/p18_3.pdf.
[348] H.R. REP. 103-881, Report of the Activities of the Committee on Armed Services for the 103d Congress, H.R. REP. No. 881, 2d Sess. 1995, 1994 WL 731770, at *52.
[349] S. REP. 106-50, § 1026 (1994).
[350] National Defense Authorization Act for Fiscal Year 2014 § 1716(c), 127 Stat. 968.
[351] *See supra* Part III.A.3.iv.
[352] *See supra* notes 205–207 and accompanying text.
[353] *See supra* notes 208–210 and accompanying text.

strategic case is often the spark that motivates congressional attention and advocacy, as well as actual "yes" votes for UCMJ reform.

F. Multiple "Strategic Cases"

Since the dawn of time, people have been motivated by stories of other people. Members of Congress are no different. The concept of the "strategic case" accounts for this.

For the purposes of this framework, a "strategic case" is a narrative about a victim or victim group that motivates action. Strategic cases can work as a precursor or a catalyst, or both. Precursor strategic cases are ones that create prime conditions for the other variables in this framework to either be born or to grow. Catalytic strategic cases are figurative sparks that ignite a potent and present, yet previously dormant, mixture of the five variables discussed above. In other words, they turn potential energy into kinetic energy, which precursor strategic cases may have created. The distinction between precursor and catalytic strategic cases, although interesting, is not significant, as the critical function for both is to motivate action. Precursor strategic cases can morph into catalytic strategic cases. Strategic cases are powerful forces for action because they put a proverbial "face" on an issue or a problem. While the concept of precursor strategic cases versus catalytic strategic cases may be worthy of additional study, for the purposes of this article, it simply highlights the fact that strategic cases can either create a call for reform or foment an already existing debate. Breaking apart the three elements of a strategic case helps to better explain the concept.

Unlike the "strategic corporal," which is a concept that "refers to the devolution of command responsibility to lower rank levels in an era of instant communications and pervasive media images,"[354] the first element of a "strategic case" is that it be an actual story—an account of specific events involving at least one member of the victim group. Persuasive statistics are not strategic cases, as they are aggregate data. Statistics, however, are often powerfully used in conjunction with a strategic case to bolster a point.[355]

---

[354] Major Lynda Liddy, *The Strategic Corporal: Some Requirements in Training and Education*, 2 AUSTRL. ARMY J., no. 2, 139, SMALL WARS J. (Oct. 21, 2010), *available at* http://smallwarsjournal.com/documents/liddy.pdf.

[355] For a fascinating discussion of the differences between stories and statistics, as well

The second element is that it must be related to a victim group. As a result, strategic cases and high-profile cases are not the same thing. A strategic case may not be high profile. For example, if a sexual assault victim who was wronged by her chain of command described her ordeal to a member of Congress and that member of Congress was motivated to act because of the story, it would constitute a strategic case. On the other hand, a high-profile case may not be strategic. For example, the 2008 Army general court-martial of Staff Sergeant Alberto V. Martinez, who was accused of killing two other soldiers, was high-profile but not strategic, as there were no issues in his case aligned with calls for major UCMJ reform.[356]

For a story to be a strategic case, it must also motivate action. While this basic definition of a strategic case is applicable to any situation, because this framework focuses on UCMJ reform, the story must motivate a member of Congress to act. The action, nevertheless, can be anything, such as the actions listed in Part IV.E above, to include speaking with the media to advocate for a position, passing a formal resolution, convening congressional hearings, or actually voting for reform.[357]

There is no limit to the manner in which the narrative that constitutes a strategic case can be told or distributed to an audience. It can be partially or wholly factual, or it could be fictional. It can be intentionally designed to spur action, or it may unintentionally do so. It can be transmitted via any format or combination thereof, to include word-of-mouth, news media, and artistic mediums, such as film. Additionally, individual stories, which in and of themselves may not motivate action, may be joined together to form a "collective strategic case."

---

as a discussion of the tensions between the two, see John Allen Paulos, *Stories vs. Statistics*, N.Y. TIMES, Oct. 24, 2010, http://opinionator.blogs.nytimes.com/2010/10/24/stories-vs-statistics/.

[356] In 2008, Staff Sergeant (SSG) Martinez faced a capitally-referred general court-martial for the premeditated murder of two other Soldiers. In 2006, Staff Sergeant Martinez offered to plead guilty in exchange for a sentence of either life in confinement or life in confinement without the possibility of parole. Lieutenant General John N. Vines, the convening authority, rejected the offer to plead guilty. A panel later acquitted SSG Martinez of the murders. *See* Paul von Zielbauer, *After Guilty Plea Offer, G.I. Cleared of Iraq Deaths*, N.Y. TIMES, Feb. 20, 2009, http://www.nytimes.com/2009/02/21/nyregion/21frag.html?pagewanted=all&_r=0.

[357] *See supra* Part IV.E.

An examination of the three major UCMJ reforms indicates that multiple strategic cases are necessary to motivate Congress to reform the UCMJ. The strategic cases that appear to have played into the NDAA 2014 provide the primary data set for this conclusion. The creation of the UCMJ and Military Justice Act of 1968 also provide useful support.

Multiple strategic cases impacted the creation of the UCMJ. The 1946 Report, which examined the Articles of War, is replete with pages upon pages of specific accounts of due process violation victims.[358] For example, a 1944 case against Sergeant Odus West, who "was accused of brutality to prisoners in the stockade,"[359] was cited three different times to highlight the issues of improper investigation,[360] improper court membership,[361] and improper denial of defense witnesses.[362]

Another strategic case that motivated the UCMJ's creation was that of First Lieutenant (1LT) Sidney Shapiro, U.S. Army.[363] Lieutenant Shapiro, who was a law student at the time of his commissioning, was assigned to defend a soldier charged with "assault with intent to rape."[364] Convinced of both his client's innocence and an impending improper identification of his client during the court-martial, 1LT Shapiro replaced the accused at the defense table with another soldier "who had no connection to the case."[365] After three separate witnesses positively identified the impostor, 1LT Shapiro revealed the switch.[366] After a mistrial was declared, 1LT Shapiro's actual client was identified by the same witnesses during a second trial, and was convicted and sentenced to five years imprisonment.[367] Congress cited this case to highlight its belief that "[m]ilitary courts have been very careless, perhaps because unskilled," with identifications.[368] Captivatingly, Congress was not done with the Shapiro case.

As the 1946 Report discusses, 1LT Shapiro was subsequently tried by court-martial for wrongful and willful delay and obstruction of "the

---

[358] 1946 REPORT, *supra* note 193, *passim.*
[359] *Id.* at 17.
[360] *Id.*
[361] *Id.* at 18–19.
[362] *Id.* at 20.
[363] *Id.* at 21 (calling the *Shapiro* case a "cause célèbre").
[364] *Id.* at 21–22.
[365] *Id.* at 22.
[366] *Id.*.
[367] *Id.*
[368] *Id.* at 21.

orderly administration of justice before the aforesaid court-martial, to the prejudice of good order and discipline."[369] After the investigation against 1LT Shapiro was finished "at 11 a. m. on September 3, 1943," 1LT Shapiro was "charged, arraigned, tried, convicted, and sentenced to dishonorable dismissal from the service" in less than 5 hours.[370] Congress used the court-martial of 1LT Shapiro to illustrate multiple due process concerns with the Articles of War and how they were applied.[371] The 1946 Report also detailed more horror stories of unlawful command influence,[372] "secrecy and anonymity" of proceedings and decisions,[373] and "excessive and disparate sentences."[374] The 1949 debates also repeatedly explain how members of Congress received volumes of complaints about the Articles of War and the military justice system.[375] Given the staggering military justice statistics of World War II, such as the trial of 1.7 million courts-martial,[376] the fact that Congress relied so heavily on stories of individuals to justify reforming the Articles of War and creating the UCMJ demonstrates the power of strategic cases.

A "collective strategic case" was present for the Military Justice Act of 1968. Although no one single story appeared to motivate action, a large number of stories coalesced to motivate Senator Sam Ervin into action. In his 1969 Military Law Review Article, Senator Ervin explained that his subcommittee began investigating the UCMJ and due process concerns "following hundreds of complaints from servicemen and their families and an intense field investigation."[377] In 1962 congressional hearings, when discussing less than honorable discharges, Senator Clyde Doyle stated, "we have received hundreds of letters from men with families who received such discharges."[378] The fact that a group of similarly situated complaints self-organized to form a collective

---

[369] *Id* at 23.

[370] *Id.* The 1949 congressional floor debate on the Uniform Code of Military Justice took the unusual step to provide an update the Shapiro case. The record states, "Subsequently, Shapiro brought suit in the Court of Claims for his back pay, contending that his conviction was void and his dismissal illegal. He won—scant compensation for the former officer for the disgrace and chagrin he had suffered." 1949 DEB., *supra* note 50, at 278.

[371] 1946 REPORT, *supra* note 193, at 23–24.

[372] *Id.* at 35–39.

[373] *Id.* at 39–40.

[374] *Id.* at 40–45.

[375] 1949 DEB., *supra* note 50, *passim*.

[376] LURIE, *supra* note 41.

[377] Ervin, *supra* note 333, at 78.

[378] 1962 *Hearings*, *supra* note 54, at 317 (statement of Sen. Clyde Doyle).

precursor strategic case for UCMJ reform should give hope to individuals that their recommendations for UCMJ reform may be powerful.[379] Such collective precursor strategic cases were also a part of the 2014 NDAA reform, as were many others.

The 2014 NDAA was motivated by strategic cases of every form. Several precursor strategic cases brought initial attention to the issue. In 1992, the U.S. Navy's Tailhook scandal served as a high-profile, precursor strategic case, as it motivated Representative Schroeder into action.[380] The alleged sexual assaults in 1997 at Aberdeen Proving Ground resulted in congressional hearings about sexual misconduct in the military.[381] Ironically, another high-profile strategic case, the case against Sergeant Major of the Army Gene McKinney, became public the day before those hearings.[382]

All of these strategic cases functioned as precursors, as they brought the issue of sex-related crime in the military to the forefront and started the process for UCMJ reform that has culminated, to date, in the 2014 NDAA UCMJ reforms. Specifically, while Congress chose not to make a major modification to the UCMJ in the 2006 NDAA, its modifications to Article 120, UCMJ, indicate that all variables of this framework were present. By 2005, victims of military sexual trauma were a well-defined, large victim group that was aligned with established advocacy groups.[383] The 2006 NDAA followed nearly four years of conflict. In addition, both the media Congress had already demonstrated repeated interest in the topic.[384] Because the 2006 NDAA Article 120 reforms did not properly address the issue, all variables of this framework remained

---

[379] Political theorist William Connolly defines self-organization as "a process by which, say, a simple organism relentlessly *seeks* a new resting point upon encountering a shock or disturbance. Such activity may periodically help to bring something new into the world." WILLIAM E. CONNOLLY, THE FRAGILITY OF THINGS 8 (2013).

[380] 1992 *Hearings*, *supra* note 347, at 3; John Lancaster, *Jury is Still Out on Tailhook Scandal's Effect on Navy Attitudes*, WASH. POST, Feb. 17, 1994, at A10.

[381] *Army Sexual Harassment Incidents at Aberdeen Proving Ground and Sexual Harassment Policies Within the Department of Defense: Hearing Before the Committee on Armed Services*, 105th Cong. (1997).

[382] Jamie McIntyre, *Army's Highest Ranking Enlisted Soldier Accused of Assault, Harassment: Top Brass Reports to Congress on Tuesday*, CNN (Feb. 3, 1997, 10:45 PM), http://www.cnn.com/US/9702/03/pentagon.miseries/.

[383] The group was aligned with advocacy groups as early as 1992. *See* Lancaster, *supra* note 13 (interviewing a representative from the National Women's Law Center, "a nonprofit advocacy group").

[384] *See infra* notes 406–411 and accompanying text; *supra* notes 380–381 and accompanying text.

present, yet dormant. Unlike the Military Justice Act of 1968, which needed only a collective precursor strategic case, multiple high-profile catalytic strategic cases provided the necessary spark to ignite the 2014 NDAA UCMJ reforms.

The Invisible War,[385] a documentary film about sexual assault in the military, was a collective strategic case for the 2014 NDAA UCMJ reforms, as it brought together numerous individual stories to develop a powerful narrative that motivated action. In a 2013 interview, Senator Kirsten Gillibrand explained how *The Invisible War* motivated her to take action.

> One of the reasons why *The Invisible War* was so effective: It put a face on the issue. Those were real victims telling their stories. And that's why, as Chairwoman of the Personnel Subcommittee on the Armed Services Committee, my first hearing was on sexual assault and rape in the military, and I had the victims testify first to tell their stories.[386]

As Senator Gillibrand recognizes, the power of an individual case can give life to other data. During that March 2013 congressional hearing, Senator Gillibrand invited four victims of sexual harassment or sexual assault to testify at the same hearing as all of the service Judge Advocates General.[387] All four victims then used statistics to bolster their personal stories to prove that their experiences were commonplace.[388] Senator Gillibrand did not stop using the power of strategic cases at that hearing. To garner support for the MJIA, she passed out copies of *The Invisible War* to other senators.[389]

Senator Gillibrand's actions also demonstrate that providing a platform for a story can turn it into a strategic case, which in turn can help push the desired reform. Senator Gillibrand is effectively doing this

---

[385] THE INVISIBLE WAR (Chain Camera Pictures 2012).

[386] Rebecca Huval, *Sen. Gillibrand Credits The Invisible War with Shaping New Bill*, INDEPENDENT LENS BLOG (May 10, 2013), http://www.pbs.org/independentlens/blog/sen-gillibrand-credits-the-invisible-war-in-shaping-new-bill.

[387] 2013 *Hearing*, *supra* note 10, at 7–37.

[388] *Id.*

[389] Kristina Peterson, *Senate Clears Way for McCaskill's Military Sex-Assault Bill*, WALL ST. J., Mar. 6, 2014, http://online.wsj.com/news/articles/SB10001424052702303369904579423000447800282.

in many ways. For example, she has posted videos of victims sharing their stories on her website.[390] She has also told their stories on the floor of the Senate[391] and has held press conferences with them.[392] The fact that a bipartisan bloc of fifty-five senators has publicly supported the MJIA alone indicates the potential for future use of this strategy.

The aforementioned strategic cases are almost assuredly not the only ones present in each of the major reforms. Nonetheless, stories are always there. Military leaders must seek out, understand, and incorporate those stories into efforts to shepherd the UCMJ.

This framework sets forth a list of variables that, when present simultaneously, create an environment in which the odds of major UCMJ reform are likely even if such reform is contrary to DoD's recommendations. Accordingly, military leaders who internalize this framework will better understand when Congress thinks an issue is a problem and when Congress will be motivated to enact major reforms to the UCMJ. Unfortunately, military leaders who want to enact more effective and just UCMJ reform need more.

Without better tools to make an earlier diagnosis of a potential problem with the UCMJ, military leaders would be in the same position as a physician who correctly understands and identifies a cancer but does so too late for the most effective remedy to be prescribed. The next section provides military leaders with the diagnostic tools that they need to make the early diagnoses needed to most effectively cure future problems with the UCMJ.

V. The Early Indicators

Understanding when Congress will likely implement major reforms to the UCMJ is useful for two reasons. First, when advocating for UCMJ

---

[390] Kirsten Gillibrand, *Comprehensive Resource Ctr. for the Military Justice Improvement Act*, U.S. SENATE, http://www.gillibrand.senate.gov/mjia (last visited May 15, 2014).

[391] Kirsten E. Gillibrand, *Gillibrand: Military Sexual Assault Survivor Voices Will be Heard*, YOUTUBE (Nov. 15, 2013), http://www.youtube.com/watch?v=HA74W32WGbQ.

[392] Kirsten E. Gillibrand, *Gillibrand, Ret. Generals, Survivors, Veterans Keep up Fight for Independent Military Justice System*, YOUTUBE (Nov. 19, 2013), http://www.youtube.com/watch?v=_rJivXHJqdU#t=15.

reform, military leaders will understand how to package the proposed reforms to make passage more likely. Second, military leaders can prevent the unintended consequences of reform that is motivated, drafted, and passed by citizens and lawmakers. Both, however, are useful only if military leaders are able to accurately identify a potential problem with the UCMJ before it reaches the critical mass of congressional action.

Revisiting the medical analogy, the current methodology that DoD uses to diagnose problems with the UCMJ identifies the problems at such a late stage that the cure, at best, has undesirable side effects or, at worst, kills the patient. A physician who understands and identifies the early warning signs of a disease in his or her patient is better off than one who does not. Many diseases have early "warning signs" or symptoms that, if identified, provide a better opportunity for a cure or effective treatment. These warning signs are often discovered through research and scholarship. This section applies the same character of research and scholarship to the UCMJ. If military leaders, who are in the same position as the physician, are equipped with a better understanding of how to spot a problem with the UCMJ at an earlier point, actual problems have a better chance of being effectively cured.

In their infancy, potential problems with the UCMJ manifest themselves in one of four ways. Media reports are indicators. Legislative actions also provide indicators. Judicial actions are a third source of indicators. Finally scholarship can indicate problems. Military leaders see these indicators almost every day but have never implemented them as tools to diagnose potential problems with the UCMJ.

One may notice that these four factors are closely related to many of the variables listed in the congressional-action framework. This is true and understandable. Because Congress both controls the UCMJ and represents the American people, Congress, to a practical extent, defines what is and is not a problem with the UCMJ. In conjunction with the congressional-action framework, this part provides a way for military leaders to improve the UCMJ regardless of Congress's motivations, thoughts, or psyche. This section challenges military leaders to look at this readily available information in a new way and with an open mind. To date, military leaders have either not paid attention to this information, or if they have, have not incorporated it into reviews of the

UCMJ.[393] Military leaders who value what the American public says about the UCMJ via the media, legislators, case law, and scholarship, will then be able to apply the new approach for problem solving set forth in Part VI. First, an exploration of each of the early indicators is necessary.

A. Media Reports

The first signs of potential UCMJ problems are often found in media reports. Media reports can come in any form. For example, media reports can be newspaper editorials, radio reports, internet blogs, or anything similar. The important function that the media plays in reflecting public calls for UCMJ is outlined above,[394] as is the powerful impact of the media on Congress in terms of UCMJ reform.[395] Comparing these two roles with the timing and content of media reports prior to each major UCMJ reform shows that media reports are the first place that military leaders should look to identify potential problems with the UCMJ.

Prior to any congressional investigation or legislation, a series of *Washington Post* editorials from 1945 are prime examples of early indicators that the Articles of War had problems. A *Washington Post* editorial from April 22, 1945 stated, "All in all, the details of [the case outlined in the editorial], as far as they are known, are not likely to strengthen faith among those who have kindred in the services that military justice is always intelligently and impartially administered."[396] Interestingly, this editorial explains that it is intentionally serving as an early indicator of a problem. It concluded,

> It is probable that the publicity given to these cases is not altogether pleasing to the Army. But it will be valuable and salutary if it leads to a more careful scrutiny of courts-martial records, and perhaps to some curbing by the Judge Advocate General of officers

---

[393] *See supra* Part III.A.
[394] *See supra* Part III.B.1.
[395] *See supra* Part IV.D.
[396] *Military Justice*, WASH. POST, Apr. 22, 1945, at B4.

> whose authority and zeal for making examples exceeds their intelligence and discretion.[397]

The editorials and articles continued. A May 30, 1945 article begins, "So many instances of capricious and unintelligent conduct by Army courts-martial have come to light of late, it would seem that the whole administration of military justice might bear a little investigation."[398] Another July 8, 1945 article outlined that in the prior year, 18,000 soldiers were convicted at general courts-martial, 33,519 were confined, and 102 had been executed.[399]

Military leadership was initially resistant to change. In the same July 8, 1945 article, Undersecretary of War Robert Patterson explained that the court-martial system "operates according to the highest standards of justice and is fair to both the accused and to the Army."[400] In 1945, Army officials even considered "the use of a misleading press release . . . to whitewash the court-martial system, then receiving a great deal of unfavorable publicity."[401]

These articles preceded the first congressional attention to the Articles of War. A *Washington Post* article from April 21, 1945, indicated that a Representative Durham-led congressional committee "quietly" began investigating in late 1945, culminating with the 1946 Report.[402] On March 25, General of the Army Dwight D. Eisenhower formed the Vanderbilt Committee.[403]

Continued media attention may also provide an earlier indication of the severity of the problem. Despite the fact that Congress was already investigating the issue and the Vanderbilt Committee had begun its study, a *Washington Post* editorial from August 14, 1946 begins, "Along with the stench raised by the Lichfield trials comes another unsavory indication of inattention on the part of certain authorities in Europe to the

---

[397] *Id.*
[398] *Military Justice*, WASH. POST, May 30, 1945, at 6.
[399] James Chinn, *U.S. Convicted 18,000 Soldiers In Past Year*, WASH. POST, July 8, 1945, at M4.
[400] *Id.*
[401] GENEROUS, *supra* note 37, at 20.
[402] United Press, *supra* note 193, at M4.
[403] U.S. WAR DEP'T, REPORT OF THE WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 1 (13 Dec. 1946) [hereinafter VANDERBILT COMMITTEE REPORT].

workings of military justice in their bailiwick."[404] After describing horrific substantive and procedural due process rights violations of soldiers in pretrial confinement, the article concludes,

> It would be an obvious mistake to allow the gross remissness which this incident displays to reflect on Army justice as a whole. Nevertheless, it is the excesses that stigmatize any system. Abuses such as this tend to confirm the impression that the Army is exceedingly free with other people's time and that the individual becomes just a cog in a machine who can easily be forgotten. This sort of thing makes the public—especially prospective enlistees—lose confidence in the Army. . . . Several reports are now pending on reforms in military justice procedure. Doubtless they will contain many valuable suggestions. But the travesty [of the cases described in the editorial] indicates that it is not the system so much as the execution that is primarily at fault. By assuring merely that the rules now in effect are rigidly adhered to, the Army would meet much of the unfavorable criticism that has arisen over its court-martial policy.[405]

An even better example of media attention providing an early warning is found prior to the 2014 NDAA. Media reports indicated concerns about the UCMJ's effectiveness in prosecuting sex-related offenses as early as 1992.[406] The media reports continued for the next twenty-one years until passage of the 2014 NDAA. Between 1992 and September 11, 2001, the *New York Times* and *Washington Post* combined to publish approximately 100 articles that, to varying extents, discussed the military justice system and sexual misconduct.[407]

---

[404] *Trial Delay*, *supra* note 180. For more information on the Lichfield trials, see JACK GIECK, THE U.S. ARMY ON TRIAL (1997).

[405] *Trial Delay*, *supra* note 180.

[406] *See* Lancaster, *supra* note 13. One could persuasively argue that the media reports began in 1990. A front page story in the October 22, 1990 *Washington Post* stated, "The Navy has a serious problem with rapes sexual assaults and violations of 'fraternization' rules at its sprawling training center in Orlando, Fla., but often has failed to seek appropriate punishment for the offenders, according to a Pentagon investigation." Molly Moore, *Navy Failed to Prosecute In 6 Rapes; Probe Finds Laxity on Sex Offenses at Florida Base*, WASH. POST, Oct. 22, 1990, at A1.

[407] *See, e.g.*, Anderson & Binstein, *supra* note 28; John Eisenhower, Op-Ed., *The Military's Moment of Truth*, N.Y. TIMES, Nov. 16, 1996, at 23; Dana Priest, *Abuse In*

Following September 11, 2001, each paper published approximately seventy articles on the same topic.[408] Other than the articles discussing the military's ban against homosexual conduct, no other issue related to military justice was more prevalent in these papers than sexual misconduct.[409] While most of these articles did not criticize the UCMJ's handling of sexual misconduct, the simple fact that so many articles discussed this topic demonstrates that the issue of the UCMJ's relationship with sexual misconduct should have been studied in greater depth.

Some of the articles in the 1990s, on the other hand, identified specific concerns about the UCMJ's ability to properly handle sexual misconduct. In a 1996 *New York Times* Op-Ed piece, John Eisenhower explicitly called for UCMJ reform, arguing, "It is time for another Doolittle Board, this one to address sexual harassment throughout the armed forces."[410] In a 1997 *New York Times* article that focused on a case centered on Air Force rules fraternization rules, Representative Carolyn B. Maloney stated that the case is "just one more example of a lopsided, unfair operation known to some as the 'military justice system.' I really wish there was as much energy focused on real cases of sexual assault, harassment and rape."[411]

Luckily, the explosion of newer media formats over the past two decades, such as the internet and the twenty-four-hour news cycle, makes it even easier to spot potential challenges to the UCMJ. In other words, the very same media that has created the "strategic corporal"

Army 'Not That Unusual'; Sexual Misconduct By Trainers Long-Standing Problem For Military, WASH. POST, Nov. 21, 1996, at A1; Eric Schmitt, *Army Unsure As Soldier In Sex Case Asks to Retire*, N.Y. TIMES, June 5, 1997, at B14; Elaine Sciolino, *Air Force Chief Delays Decision in Sex Case*, N.Y. TIMES, July 4, 1997, at A10; Editorial, *The McKinney Verdict*, WASH. POST, Mar. 18, 1998, at A20; Rene Sanchez, *General's Case May Put Military on Trial*, WASH. POST, Mar. 16, 1999, at A2; Thomas E. Ricks, *Drugs, Sex & Recommendations*, WASH. POST, July 17, 2001, at A15. This statistic was obtained by using a Westlaw search using combinations of the terms "military justice," "sex!," "assault," "harass!," and "misconduct."

[408] *See supra* note 314 and accompanying text.

[409] This data is based on a multitude of Westlaw searches. The statistics are on file with the author.

[410] Eisenhower, *supra* note 407. Despite his use of the term "sexual harassment" in his call for reform, in the first paragraph of the article, Eisenhower uses the terms "sexual harassment," "sexual assault," and "sexual misconduct." The Doolittle Board was one of many groups that examined the Articles of War immediately following World War II. GENEROUS, *supra* note 37, at 16.

[411] Sciolino, *supra* note 407 (quoting Rep. Carolyn B. Maloney).

phenomenon can be used constructively to better understand potential problems with the UCMJ. The efforts to pass the 2014 NDAA and the MJIA provide a telling example.

The 24-hour news and internet have exponentially increased the amount of information available to both military leaders and the public. Almost every single major newspaper article ever written is available online.[412] Cable television is full of hundreds of channels, to include multiple stations that carry nothing but news-related programming.[413] The key is to look for the right information. In modern times, relevant information is often located in places other than newspapers.

Military leaders looking to make an earlier diagnosis of potential problems with the UCMJ should look to social media.[414] During the 2013 Hearings, Ms. Brigette McCoy, a sexual assault victim who testified at the hearing, explained to Senator Tim Kaine the power of social media in calling for UCMJ reform.

> Well, from my perspective, I come to this—I started a social media project that basically I just wanted to connect with other people who had been through the same things that I had been through. And so I perceive that social media and grassroots community activism has been the single most thing that brought people together to help solidify the groups of different, varying issues and brought all these people together to say, hey, we have an issue, let's work together to get something done in a positive direction.[415]

There is nothing preventing military leaders from accessing the publicly available websites and social media sites of the various advocacy groups aligned with a victim group. Obviously such visits

---

[412] *See, e.g.*, *ProQuest Archiver*, WASH. POST (Apr. 29, 2014), https://secure.pqarchiver.com/washingtonpost_historical/advancedsearch.html; *Search*, N.Y. TIMES (Apr. 29, 2014), http://query.nytimes.com/search/sitesearch/#//.

[413] *See* Justin Bachman, *The Ugly Numbers Behind Unbundled Cable TV*, BLOOMBERG BUSINESSWEEK, Dec. 6, 2013, http://www.businessweek.com/articles/2013-12-06/the-ugly-numbers-behind-unbundled-cable-tv (stating that the average cable television consumer has access to approximately 180 channels).

[414] For an article outlining the political power of social media, see Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, FOREIGN AFF., Jan./Feb. 2011.

[415] 2013 *Hearing*, *supra* note 10, at 36.

should be solely for the purpose of better understanding the group's perspective on what is wrong with the UCMJ. Part VI contains additional recommendation on how to use this information to create positive change.[416]

Many military leaders may have read many of the articles and media stories outlined above but, apparently, did not understand the value of the words they were reading. Given the military's nearly complete resistance to or disregard of the media attention outlined above,[417] it could appear that military leaders have so far agreed with Oscar Wilde, who famously quipped, "By giving us the opinions of the uneducated, [journalism] keeps us in touch with the ignorance of the community."[418] As demonstrated above, that public perception of the UCMJ, even if ignorant, is a powerful motivator for reform.[419] There is no reason that military leaders should not seek it out, and the best place to do so is through the media. Another place to look is to the people's elected representatives.

B. Legislative Indicators

Elected representatives at every level of government often indicate potential problems with the UCMJ well before formal legislation is proposed and debated. There are two common indicators. First, members of Congress often directly voice their concerns on a particular topic directly with military leaders, such as via legislation, congressional hearings, letters, or meetings. Second, members of Congress may voice their concerns in a more indirect manner, such as through legislation that does not pass, media interviews, or on websites. While each indicator individually may not be cause for concern, an aggregation of similarly-focused legislative indicators can serve as an early indicator that something is wrong.

Surprisingly, it appears that the most obvious early indicators, which are direct communications from one or more members of Congress, are frequently ignored or misunderstood. Such examples include

---

[416] *See infra* Part VI.
[417] *See supra* Part III.A.
[418] OSCAR WILDE, *The Critic As Artist*, *in* INTENTIONS 74 (1891).
[419] *See supra* Part IV; Schlueter, *supra* note 30, at 10 ("You are not entirely separate from society simply because you wear a uniform.").

Representative Schroeder's 1992 letter to then-Secretary of Defense Richard Cheney requesting that DoD "create a special civilian office to investigate charges that the military for years had covered up rapes and sexual assaults."[420] Given Secretary Cheney's refusal of the request and the absence of a UCMJ review, it is doubtful that he considered the request as an early indicator of the exact perceived problems with the UCMJ that the 2014 NDAA is designed to address.

Another example of a direct-communication indicator is when Congress asks or directs the military study an issue. These patent indicators of a potential problem often occur years before any actual reform. Examples include when Senator Sarbanes requested the PAT in 2000,[421] the 2005 NDAA's directive to the JSC to study sexual misconduct and the UCMJ,[422] and the 2013 NDAA-directed review of the UCMJ.[423] Even though direct communications are obvious indicators of a potential problem, the JSC subcommittee's 2006 recommendation to not reform the UCMJ indicate that military leaders and institutions for UCMJ reform may not have adequately weighted these concerns.

One more illustration of a direct legislative early indicator is when military leaders are called to testify at congressional hearings that predate formal legislative debate. For example, The Judge Advocate General, U.S. Army, has repeatedly testified at congressional hearings about military justice matters.[424] In 1962, Senator Ervin also asked for Chief Judge Robert Quinn to testify at congressional hearings regarding the due process rights of servicemembers.[425] In 2004, during a Senate Armed Services Committee panel, multiple senators "made it clear that they were not satisfied with either the level of misconduct that persists or

---

[420] JOAN A. LOWY, PAT SCHROEDER: A WOMAN OF THE HOUSE 163 (2003).

[421] *See supra* Part III.A.3.iv.

[422] National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1920–921.

[423] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112–213, § 576, 127 Stat. 1758, *available at* http://responsesystemspanel.whs.mil/public/docs/FY13%20NDAA%20(Subtitle%20H,%20sec%20576).pdf.

[424] *See, e.g.*, 1947 *Hearings*, *supra* note 307, at 1926 (testimony of Major General Thomas H. Green); 2013 *Hearing*, *supra* note 10, *passim* (testimony of Lieutenant General Dana K. Chipman).

[425] 1962 CODE COMMITTEE REPORT, *supra* note 89, at 49–64. Robert Quinn was a civilian, and therefore not a military leader. He was, however, the Chief Judge of the Court of Military Appeals and led the Code Committee, which included all of the service Judge Advocates General. *See supra* note 83 and accompanying text.

existing measures for treating victims of assault."[426] At this hearing, Senator Susan Collins opined that soldiers have "more to fear from fellow soldiers than from the enemy."[427] This comment implicates the UCMJ, as it is what is used to discipline soldiers. Senator John Warner presciently warned, "This committee is prepared to back the U.S. military to achieve zero tolerance," but "if you don't carry it out, we're going to take over."[428] Notably, military leaders did not see this direct attack on the UCMJ as troublesome, as the JSC subcommittee recommended no reform to the UCMJ in its report pursuant to the 2005 NDAA.[429] The 2006 NDAA and the 2014 NDAA demonstrates that Senator Warner's warning was accurate.

This article does not argue that military leaders should honor each direct request for action. To the contrary, many requests are either improper or unripe for direct action. The fact that a communication occurred, however, has value. Military leaders should amalgamate the information learned during these direct expressions of concern with more indirectly voiced concerns as an indicator that something might be amiss.

Members of Congress are also adept at more indirect indications of a problem. Legislation that fails to pass provides a perfect example. Such legislation may be doomed from the start, but it is still brought to send a message. Despite assured failure in the Senate, in the four years since the passage of the Affordable Care Act, the Republican-controlled U.S. House of Representatives has passed fifty-four bills that would "undo, revamp, or tweak" the health care bill.[430] Representative Tim Huelskamp stated that one of the votes was held "to send a message to our base."[431] Similarly, in 1992, Representative Schroeder and twenty-one co-sponsors sent a message with their resolution that raised many of the exact same concerns that the 2014 NDAA was passed to address.[432] The

---

[426] Bradley Graham, *Military Scolded on Assaults; Senators Seek More Protection for Female Soldiers*, WASH. POST, Mar. 11, 2011, at A19.
[427] *Id.*
[428] *Id.*
[429] *See supra* notes 117, 209–210 and accompanying text.
[430] Ed O'Keefe, *The House Has Voted 54 Times*, WASH. POST, Mar. 21, 2014, http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list/.
[431] Russell Berman, *House Conservatives Call for New Vote to Repeal Obamacare*, THE HILL (Apr. 24, 2013, 5:49 PM), http://thehill.com/policy/healthcare/295887-house-conservatives-call-for-new-vote-to-repeal-obamacare.
[432] *See supra* note 339–345 and accompanying text.

problem is that military leaders never looked for, received, or understood that message.

Indirect legislative indicators also come in the form of media interviews. For example, in May 2004, a full decade before the 2014 NDAA, Representative Louise Slaughter explicitly called for many of the exact changes found in the 2014 NDAA, such as a more precise definition of sexual assault, defined roles for victim advocates, and rules surrounding confidentiality.[433] During a June 2004 interview, Representative Loretta Sanchez, who was advocating for a reform of Article 120, UCMJ, stated, "There are some basic flaws that haven't been addressed."[434]

Congressional member websites are yet another location where indirect legislative indicators are located. For example, both Senators Gillibrand and McCaskill have websites dedicated to specific issues about which they are concerned,[435] to include UCMJ reform.[436] The fact that two senators have websites dedicated to a high-profile issue about which they care is not surprising. Unfortunately now that sexual assault in the military is a front-and-center issue, websites on the topic no longer offer any early warning.

Issue specific websites, however, can act as early indicators for future challenges to the UCMJ even if the websites do not specifically mention the UCMJ or military justice system. For example, both Senators Gillibrand and McCaskill have specific websites dedicated to veterans' issues.[437] On her website, Senator Gillibrand discusses her interest in ensuring that "fewer veterans fall through the bureaucratic cracks" by forcing the Department of Veterans Affairs (VA) to "pro-

---

[433] *See* Clemetson, *supra* note 207; National Defense Authorization Act for Fiscal Year 2014 § 1716, 127 Stat. 966–69.

[434] Smith, *supra* note 205 (quoting Rep. Loretta Sanchez).

[435] *Kirsten Gillibrand, United States Senator for New York*, U.S. SENATE, http://www.gillibrand.senate.gov/ (last visited May 15, 2014) (follow "Issues" tab); Claire McCaskill, *Missouri's Senator Claire McCaskill*, U.S. SENATE, http://www.mccaskill.senate.gov/ (last visited May 15, 2014) (follow "Issues" tab).

[436] Gillibrand, *supra* note 390; Claire McCaskill, *Curbing Sexual Assaults in the Military*, U.S. SENATE, http://www.mccaskill.senate.gov/militaryjustice (last visited May 15, 2014).

[437] Kirsten Gillbrand, *Veterans*, U.S. SENATE, http://www.gillibrand.senate.gov/issues/veterans (last visited May 15, 2014); Claire McCaskill, *Delivering for Veterans*, U.S. SENATE, http://www.mccaskill.senate.gov/?p=issue&id=380 (last visited May 15, 2014).

actively reach out to veterans and inform them of the benefits that should be available to them."[438] She also wants to "ensure that exiting veterans are automatically enrolled in the VA health care they are entitled to when they exit the military service."[439] Similarly, Senator McCaskill is interested in "improving access to treatment for mental health issues, including post-traumatic stress disorder and traumatic brain injury," and "combat[ing] homelessness by safeguarding vulnerable veterans."[440] Part VI will show how this legislative interest in veterans issues, indicated indirectly via a website, can combined with other early indicators to identify a potential problem with the UCMJ because of its inflexibility when it comes to dealing with wounded warriors.[441]

One more potential indirect legislative indicator is a statutory trend. Detecting a legislative trend on a particular issue is laborious and difficult to discern because of the fifty-seven federal, state, and territorial jurisdictions that serve under as many constitutions. Even so, there is at least one instance in which a legislative trend was applicable to the UCMJ. Between 1962 and 2003, 24 states repealed laws forbidding sodomy.[442] Article 125's ban on consensual sodomy, nonetheless, was in effect, at least technically, until the 2014 NDAA.[443] Although sometimes difficult to detect, legislative indicators are, nevertheless, potential early indicators that military leaders should explore.

While these indirect legislative indicators are not as pointed as direct ones, most are not difficult to locate. When the legislative indicators are then combined with direct ones, a more vivid picture of an actual or perceived problem with the UCMJ that would otherwise not be seen will emerge. The next early indicators to help such a picture emerge are case law indicators.

---

[438] Gillibrand, *supra* note 437.
[439] *Id.*
[440] McCaskill, *supra* note 437.
[441] *See infra* Part VI.
[442] While neither scholarly nor scientific, Wikipedia's page on *Sodomy Laws in the United States* is helpful, as it is the most accurate and well-organized summary that is easily available to the public. *Sodomy Laws in the United States*, WIKIPEDIA, http://en.wikipedia.org/wiki/Sodomy_laws_in_the_United_States (last visited May 15, 2014).
[443] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1707, 127 Stat. 961.

C. Case Law Indicators

In addition to legislators, judges and courts often provide early indicators that the UCMJ needs reform. Each day, appellate judges in federal and state jurisdictions interpret and apply laws using a variety of interpretive methods, theories, and philosophies.[444] As with everyone's decisions, these judges' opinions are shaped by experience, education, and heuristics.[445] Extensive quantitative and qualitative social science and legal research indicates that public opinion does impact judicial opinions.[446] For example, a modern accepted societal norm is that the Fifth and Sixth Amendments to the Constitution guarantees most persons who are accused of a criminal offense the effective assistance of counsel, which must be paid for by the government if necessary.[447] Such, however, was not the case as recent as 1963.[448]

Recognizing that these opinions serve as barometers of public opinion and thought, military leaders can look to them to understand trends in the law and, as a result, use them as a tool to spot potential problems with the UCMJ. One indicator may motivate a minor change to the UCMJ. An amalgam of judicial indicators could indicate the need for a major reform. The Supreme Court, federal appellate courts, and state courts provide valuable evidence.

The first place that military leaders should look is to the Supreme Court. Surprisingly, the Supreme Court's decisions are not always automatically applicable in military courts. The Supreme Court is established under Article III of the Constitution,[449] but the military, and therefore its courts, are established under Article I.[450] Further, the

---

[444] Appellate opinions are preferable over trial court opinions because of their accessibility and precedential nature.

[445] *See generally* JUDGMENT UNDER UNCERTAINTY: HEURISTICS & BIASES (Daniel Kahneman et al. eds., 1982); *see infra* Part VI.B.1.i.

[446] For a synopsis of the varying arguments of the role that public opinion has on judicial opinions, see Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2010).

[447] U.S. CONST. amends. V, VI.

[448] Gideon v. Wainwright, 372 U.S. 335 (1963).

[449] *Id.* art. III.

[450] For a synopsis of the relationship between the Supreme Court and military courts, see ANNA C. HENNING, CONG. RES. SERV., RL34697, SUPREME COURT APPELLATE JURISDICTION OVER MILITARY JUSTICE CASES 5 (Mar. 5, 2009), *available at* http://www.fas.org/sgp/crs/misc/RL34697.pdf, ("[L]egal interpretations of Article III

Supreme Court almost always exerts appellate, rather than original, jurisdiction.[451] The fact that the Supreme Court hears a case at all inherently indicates a potential shift in public opinion, as a widely-held, uncontroversial belief is less likely to generate a grant of certiorari. As a result, non-binding Supreme Court decisions are a counterintuitive, yet powerful, source to which military leaders should consult to diagnose potential problems with the UCMJ.

A bevy of Supreme Court decisions prior to the Military Justice Act of 1968 indicated that many Americans valued increased due process rights for those suspected or accused of committing crimes. Many refer to the period of time in which Earl Warren served as the Chief Justice of the Supreme Court (Warren Court) as the "Due Process Revolution" because, during that time, the Court greatly expanded "the meaning and scope of constitutional rights."[452] Because many military leaders supported the reforms of the Military Justice Act of 1968,[453] they were understandably not looking for these signs. They were nonetheless present.

One well-known example of a judicial indicator is the 1963 Supreme Court case of *Gideon v. Wainwright*.[454] In *Gideon*, the Court, for the first time, guaranteed all indigent defendants the right to counsel.[455] In justifying the decision, the Court states,

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every

---

courts do not necessarily create binding precedent for Article I courts, and vice versa. . . . [M]ilitary courts sometimes reject even Supreme Court precedent as inapplicable in the military context."). A good example of a constitutional protection that the Supreme Court has clarified for civilians, but remains unclear for the military, is the right to counsel of choice. *Compare* Brooker, *supra* note 41, at 8–11, *with* Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957).

[451] U.S. CONST. art. III, §§ 1, 2; Thomas E. Baker, *A Primer on Supreme Court Procedures*, A.B.A. PREVIEW OF U.S. S. CT. CASES, 475, 479 (2004), *available at* http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_scprimer.authcheckdam.pdf (explaining how original jurisdiction "is exercised rarely").

[452] GEORGE COLE & CHRISTOPHER SMITH, CRIMINAL JUSTICE IN AMERICA 78 (2008).

[453] *See supra* note 104 and accompanying text.

[454] Gideon v. Wainwright, 372 U.S. 335 (1963).

[455] *Id.*

> defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[456]

Even after *Gideon*, a military accused whose case was referred to a special court-martial did not have the right to legally-trained counsel despite the fact that a conviction carried the potential sentence of six months confinement and forfeiture of pay.[457] During the 1966 Senate hearings, Senator Ervin and two other witnesses mentioned the *Gideon* case as a reason to modify the UCMJ.[458] The Military Justice Act of 1968 finally gave an accused at a special court-martial the right to such counsel.[459] With *Gideon*, the proverbial "writing was on the wall" for over five years.

A second popular example of a judicial indicator is the 1966 Supreme Court case of *Miranda v. Arizona*.[460] In 1966, the Court found that a suspect in "custodial interrogation" must be "effectively apprised of his rights,"[461] which are that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[462] At that time, Article 31, UCMJ guaranteed only the right to remain silent, not the right to counsel during custodial interrogation.[463] *Miranda* was a powerful early indicator that military leaders should consider extending the right to counsel to earlier stages in the military justice process.[464] But *Miranda* neither explicitly nor implicitly applied to the military until the U.S. Court of Military Appeals decided *U.S. v. Tempia* in 1967 – four years later.[465]

---

[456] *Id.* at 344.

[457] McCoy, *supra* note 61, at 70–75 (discussing the right to counsel at special court-martial and citing UCMJ art. 27(c) (1964) and UCMJ art. 27(c), 10 U.S.C.A. § 827(c) (Supp. Feb. 1969)); UCMJ art. 19 (1951) (stating the jurisdictional maximum punishment at a special court-martial).

[458] 1966 *Hearings*, *supra* note 58, at 428, 440, 452.

[459] McCoy, *supra* note 61, at 70–75.

[460] Miranda v. Arizona, 384 U.S. 436 (1966).

[461] *Id.* at 444, 498.

[462] *Id.* at 444.

[463] UCMJ art. 31 (1951).

[464] Davis v. United States, 512 U.S. 452, 457 n.* (1994) (noting that the President extended the protection of the self-incrimination clause to servicemembers).

[465] United States v. Tempia, 16 U.S.C.M.A. 629 (1967); *see* Gaylord L. Finch, *Military Law and the Miranda Requirements*, 17 CLEV.-MARSHALL L. REV. 537 (1968), *available at* http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=2928&context=clevstlrev.

Much like strategic cases, military leaders will realize the true power of these indicators if they amalgamate them to show either a trend or critical mass. If multiple opinions impact an area of law pertinent to the UCMJ, military leaders should look to see if the cases indicate a trend or critical mass that is worth further exploration or action. If a trend or critical mass for change exists, a major reform is more likely. The Warren Court's "Due Process Revolution," which include *Gideon* and *Miranda*, is a perfect example. While not every "Due Process Revolution" case dealt with an issue directly applicable or relatable to the UCMJ, the trend of expanding due process rights, and how such a trend might impact the UCMJ, was ripe for research and study. Fortunately, the Supreme Court is not the only source of judicial indicators.

Federal circuit courts of appeal are another source of judicial indicators. A current example is a relatively recent case from the 9th Circuit Court of Appeals. In its initial *Veterans for Common Sense v. Shinseki* opinion, the court severely criticized the VA disability claims appeal process, expressing severe outrage at the VA.[466]

> Veterans who return home from war suffering from psychological maladies are entitled by law to disability benefits to sustain themselves and their families as they regain their health. Yet it takes an average of more than four years for a veteran to fully adjudicate a claim for benefits. During that time many claims are mooted by deaths. The delays have worsened in recent years, as the influx of injured troops returning from deployment has placed an unprecedented strain on the VA, and has overwhelmed the system that it employs to provide medical care to veterans and to process their disability benefits claims. For veterans and their families, such delays cause unnecessary grief and privation. And for some veterans, most notably those suffering from combat-derived mental illnesses such as PTSD, these

[466] Veterans for Common Sense v. Shinseki, 644 F.3d 845, 850 (9th Cir. 2011), *vacated by* Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1016 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 840, 81 U.S.L.W. 3130568 (U.S. Jan. 7, 2012) (No. 12-296).

> delays may make the difference between life and death.[467]

To be sure, even to trained military justice practitioners, this case would seem to have very little to do with the UCMJ. For one, the court's criticism is squarely focused on VA. Secondly, an en banc court vacated the initial judgment that was favorable to the plaintiff. Third, the statement above is dicta.

But despite those facts, the case remains a prime judicial indicator of a potential problem with the UCMJ. As will be discussed in Parts V.D and VI below, several scholars have researched the impact that the UCMJ plays in creating the exact situation that the court laments in the passage above.[468] How this judicial indicator meshes with many others to diagnose the UCMJ's potential problem with wounded warriors is set forth in Part VI.[469]

One more source of judicial indicators is from state and territorial courts. While the sheer magnitude of state and territorial court appellate opinions and the more than fifty different sets of rules can make an examination of state court opinions seem like a daunting task, indicators sometimes have a high-profile character. Further, most criminal actions and all family law actions are tried originally in state courts, and these types of cases may be among the best judicial indicators.

State court decisions that invalidated laws against consensual adult sodomy offer a prime example. As late as 1962, consensual adult sodomy was illegal in all fifty states,[470] while Article 125, UCMJ, criminalized consensual sodomy in the military.[471] Starting in 1974 with the Massachusetts case of *Commonwealth v. Balthazar*,[472] state supreme

---

[467] *Id.*

[468] *See, e.g.*, Major John W. Brooker et al., *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1 (2012); Major Evan. R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1 (2011); Major Tiffany M. Chapman, *Leave No Soldier Behind: Ensuring Access to Health Care for PTSD-Afflicted Veterans*, 204 MIL. L. REV. 1 (2010).

[469] *See supra* Part VI.

[470] *See supra* note 442.

[471] UCMJ art. 125 (1951).

[472] Commonwealth v. Balthazar, 318 N.E.2d 478 (1974).

courts began invalidating statutes that made consensual adult sodomy a crime. Between 1980 and 2003, appellate courts in nine other states followed.[473] If military leaders had been examining state court opinions for a trend, they would have seen that laws against sodomy were falling out of favor throughout the country and that, therefore, a reexamination of Article 125, which was not repealed until the 2014 NDAA, would have been appropriate.

Unlike the broad issue judicial indicators that signaled due process and veterans benefits concerns, judicial indicators on narrow issues such as a law against sodomy may only indicate the need for a minor UCMJ reform. Minor reform, however, often reverberates into larger change. Article 125's ban on consensual sodomy was inextricably linked with the larger policy issue of homosexuality in the military. With the repeal of "Don't Ask, Don't Tell" and overturning of the Defense of Marriage Act,[474] the judicial indicators regarding the legalization of sodomy were an early indicator of something even greater.

Judicial indicators will not likely be the first available indicator of a potential problem with the UCMJ. Media articles questioning Article 125's ban on consensual sodomy date as far back as 1983.[475] They do, nonetheless, lend significant weight and gravitas to other indicators, as they come from those educated and trained in the law. Fortunately, judicial indicators are not the only ones that emanate from learned legal professionals. Scholarly articles are another source of early indicators.

D. Research and Scholarship

Many scholars have not worn the same proverbial blinders as some military leaders and institutions seem to have worn when it comes to the UCMJ. Accordingly, some of the best and most explicit early indicators

---

[473] *See* People v. Onofre, 415 N.E.2d 936 (N.Y. 1980); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980); Newsom v. State, 763 P.2d 135 (Okla. 1988); Schochet v. State, 320 Md. 714 (Md. Ct. App. 1990); Kentucky v. Wasson, 842 S.W.2d 487 (Ky. 1992); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. 1996); Gryczan v. State, 942 P.2d 112 (Mont. 1997); Powell v. Georgia, 510 S.E.2d 18 (Ga. 1998); Doe v. Ventura, 2001 WL 543734; Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002).

[474] Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515–17; United States v. Windsor, 570 U.S. 12 (2013) (holding aspects of the Defense of Marriage Act, Pub. L. 104–199, 110 Stat. 2419 (1996), unconstitutional).

[475] Colman McCarthy, *Justice for a Lieutenant*, WASH. POST, Jan. 9, 1983, at M4.

of potential problems with the UCMJ are scholarly articles. This should be of no surprise to military leaders, as they have long demonstrated an institutional commitment to research, scholarship, and reflection.[476] The major problem with scholarly articles, though, is that very few people read them.[477] Military leaders who want to shepherd the UCMJ must not fall into this trap. Scholars are both powerful and cheap. They are highly trained in a particular discipline or profession, yet perform much of the "grunt work" for little to no additional cost to the government. Their research can be leveraged in useful ways. The value of scholarship as an early indicator is best shown by the events leading to the 2014 NDAA, as scholars have been discussing the main issues that motivated this major UCMJ reform for over two decades.

A limited amount of scholarship preceded both the UCMJ's enactment and the Military Justice Act of 1968. In 1948, a *Yale Law Journal* article discussing collateral attacks on the Articles of War in civilian courts is one example,[478] as is a 1950 *Stanford Law Review* article entitled, *Can Military Trials Be Fair? Command Influence Over Courts-Martial*.[479] Prior to the Military Justice Act of 1968, many military justice-related articles mentioned due process but few openly advocated for change.[480]

Scholarship can be valuable for three reasons. First, articles often consolidate other sources that can also serve as early indicators. Second, the mere fact that an issue is debated in a scholarly arena for an extended time indicates that it is worthy of additional formal study. Third,

---

[476] Examples include the Judge Advocate General's Graduate Course at The Judge Advocate General's School, U.S. Army, in Charlottesville, Virginia, and the Command and General Staff Officers' Course. *See, e.g.*, Fred L. Borch III, *Master of Laws in Military Law: The Story Behind the LL.M. Awarded by The Judge Advocate General's School*, ARMY LAW., Aug. 2010, at 2 (explaining the history of the Graduate Course); U.S. Army Combined Arms Center, *CGSC Command and General Staff Officers' Course*, http://www.cgsc.edu/ile/courses.asp (last visited May 15, 2014) (describing the Command and General Staff Officers' Course).

[477] Daniel Luzer, *No One Really Reads Academic Papers*, WASH. MONTHLY, Feb. 19, 2013, http://www.washingtonmonthly.com/college_guide/blog/academics_do_a_lot_of.php.

[478] *Collateral Attacks on Courts-Martial In the Federal Courts*, 57 YALE L. J. 483 (1948).

[479] *Can Military Trials Be Fair? Command Influence Over Courts-Martial*, 2 STAN. L. REV. 547 (Apr. 1950).

[480] *See, e.g.*, WILLIAM B. AYCOCK & SEYMOUR W. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE (1955); Lieutenant Colonel Charles G. Reid, *Some Aspects of "Military Due Process,"* 8 A.F. L. REV. 17 (1966).

scholarship often provides recommendations or proposed solutions that those who are charged to study a particular issue should consider. Scholarship prior to the 2014 NDAA could have served these valuable purposes. Examining each purpose in turn will show how.

First, published scholarship tends to consolidate and highlight other early indicators that military leaders may otherwise not see. Examples are plentiful. A 1993 *Military Law Review* article not only discussed the prosecution of sexual assault and sexual harassment in the military but also cited to a *Washington Post* article from 1990 about the Navy's failure to properly handle six rape cases.[481] A 1996 *Duke Law Journal* article focuses on a *Dayton Daily News* newspaper report that outlined an "eight-month examination of sexual assaults in the military."[482] If a military leader was not from Dayton or was not otherwise informed of this study, it is unlikely that he or she would have ever heard about this information. Another 1996 *Duke Law Journal* article entitled *By Force of Arms: Rape, War and Military Culture* provides an impressive array of sources, ranging from congressional hearings, other scholarly articles, and empirical, qualitative social science research.[483]

Second, published scholarship is no different than the other early indicators in that if an increasing amount of it relates to a particular potential problem with the UCMJ, additional study of that issue is wise, regardless of the specific arguments made in the articles. In the 1990s, the legal scholarship related to sexual misconduct in the military was extensive, and was published in some of the most highly regarded legal journals. To illustrate, in 1992 and 1993, articles were published in the *University of Missouri at Kansas City Law Review*,[484] the *Military Law Review*,[485] and the *California Western Law Review*.[486] The *Air Force*

---

[481] Moore, *supra* note 406.

[482] Christopher P. Beall, *The Exaltation of Privacy Doctrines Over Public Information Law*, 45 DUKE L.J. 1249, 1249–52 (discussing Carollo, *supra* note 189). Ironically, this article was focused on the Freedom of Information Act but was found during a Westlaw search for scholarship related to sexual assault and the military. *Id*.

[483] Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651, 683 (1996).

[484] Peter Nixen, *The Gay Blade Unsheathed: Unmasking the Morality of Military Manhood in the 1990s, An Examination of the U.S. Military Ban on Gays*, 62 UMKC L. REV. 715 (1992).

[485] Lieutenant Commander J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Assault in the Military*, 140 MIL. L. REV. 1 (1993).

[486] Douglas R. Kay, *Running A Gauntlet of Sexual Abuse: Sexual Harassment of Female Naval Personnel in the United States Navy*, 29 CAL. W. L. REV. 307 (1992).

Law Journal and *Duke Law Journal* published articles in 1996.[487] The *Minnesota Law Review* and *American University International Law Review* published articles in 1998,[488] and the *Yale Law Journal* published an article in 1999.[489] While the articles all took different positions about sexual misconduct and the UCMJ, the simple fact that the issue was so widely discussed well before any actual legislative reform demonstrates that scholarship can be a very powerful early indicator that change may be necessary.

Third, published scholarship can provide what may later seem to be clairvoyant recommendations. Elizabeth Hillman, an Air Force veteran who is now the Provost and Academic Dean at the University of California Hastings College of the Law, persuasively attacked the military's "good soldier defense" in her 1999 *Yale Law Journal* article *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*.[490] A full fifteen years prior to the passage of the 2015 NDAA, Hillman, as a law student, expertly outlined the argument against the admissibility of evidence of good military character in sexual misconduct cases.[491] Fifteen years later, the 2015 NDAA barred the admission of military character evidence "for the purpose of showing the probability of innocence of the accused" for a number of offenses.[492]

The 2002 book *Evolving Military Justice* demonstrates how one single work serves all three ends. First, it compiles the scholarly work product from a broad spectrum of the finest military scholars, to include academicians, jurists, and practitioners.[493] Second, this scholarship raises

---

[487] Major Timothy W. Murphy, *A Matter of Force: The Redefinition of Rape*, 39 AIR FORCE L. REV. 19 (1996); Beall, *supra* note 482; Morris, *supra* note 483.

[488] Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305 (1998); Raymond J. Toney & Shazia N. Anwar, *International Human Rights Law and Military Personnel: A Look Behind the Barracks Walls*, 14 AM. U. INT'L L. REV. 519 (1998).

[489] Elizabeth Lutes Hillman, *The"Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L. J. 879 (1999).

[490] *Id.*

[491] *Id.* Dean Hillman has become one of the chief advocates for UCMJ reform. She is also a member of the Response Systems to Adult Sexual Crimes Panel. *Professor Elizabeth Hillman*, RESPONSE SYSTEMS TO ADULT SEXUAL CRIMES PANEL, http://responsesystemspanel.whs.mil/index.php/about/panel/hillman (last visited May 15, 2014).

[492] National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 536, 128 Stat. 3292 (2014).

[493] *See* EVOLVING MILITARY JUSTICE, *supra* note 19, at xi–xv (listing the qualifications of the contributors).

issues, such as unlawful command influence, that have been debated for decades.[494] In one prediction, John S. Cooke, a retired Brigadier General in the U.S. Army Judge Advocate General's Corps, stated, "Although I believe in the current system, I think command discretion and our power-down model will be points of criticism and vulnerability."[495] Third, it provides detailed recommendations that ultimately proved true. For example, Brigadier General Cooke recommended that all "[A]rticle 32 investigating officers be lawyers.[496] This recommendation predated the 2014 NDAA by over eleven years.[497]

Active duty military scholars also produced scholarship that served as an early indicator to the 2014 NDAA. In 2002, then-Major Eugene Baime, an active duty U.S. Army judge advocate, authored an article arguing that private adult consensual sodomy is constitutionally protected.[498] This article predated the landmark decision of *Lawrence v. Texas* by over a year and the repeal of Article 125's ban against consensual sodomy by over eleven years.[499] Admittedly, Article 125's ban against consensual sodomy was already controversial when Baime's article was published. In fact, the Cox Commission had already recommended its repeal.[500] Nonetheless, the mere presence of Baime's article, along with its detailed legal rationale and prescient recommendation that both the Supreme Court and Congress ultimately followed, shows the power of scholarly analysis in identifying potential problems with the UCMJ and recommending well-researched solutions long before the factors in Part IV motivate legislative reform.

Military leaders who fail to consult highly respected journals, particularly when those journals discuss the UCMJ, are willfully ignoring early indicators in plain sight. Not only can the mere presence of the scholarly discussion itself serve as an indicator; but the research behind the scholarship can act like a proverbial fishing net, bringing together

---

[494] *Id. passim.*
[495] Cooke, *supra* note 20, at 184.
[496] *Id.* at 189.
[497] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 954–57.
[498] Eugene E. Baime, *Private Consensual Sodomy Should Be Constitutionally Protected in the Military By the Right to Privacy*, 171 MIL. L. REV. 91 (2002).
[499] Lawrence v. Texas, 539 U.S. 558 (2003); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1707, 127 Stat. 961.
[500] 2001 COX COMMISSION, *supra* note 238, at 11.

other relevant early indicators and recommendations for the way forward.

The examples of the early indicators discussed in this part show that there is typically a significant time gap measured in years, if not decades, between these early indicators and congressional action. Military leaders who understand these early indicators can prevent the unsolicited congressional action that typically takes place when the congressional action framework elements are simultaneously present. The point of understanding early indicators, however, is not to avoid unsolicited congressional action for the sake of maintaining the status quo. To the contrary, unsolicited congressional action is the ultimate measure of effectiveness of the military leadership's ability to properly shepherd the UCMJ in a constantly changing environment. Referring back to the medical analogy, if military leaders understand what constitutes a disease and effectively incorporate the diagnostic tools set forth in this part, more treatment options for the disease to the UCMJ are available. The next part provides the recommended new cure and how to administer it.

VI. The Way Forward

The framework in Part IV and early indicators in Part V are deceptively simple. Part IV includes six related variables that, individually, are rather intuitive. When all six variables imbricate, Congress is most likely to make major reforms to the UCMJ. Using the medical analysis, the simultaneous presence of all six variables is when Congress typically decides that the disease has progressed to the level where a powerful cure is required. Unfortunately, such a cure can have devastating unintended consequences, or using medical terminology, side effects. Accordingly, the best course of action is to not let the disease progress to that point. Part V sets forth four simple and readily available diagnosis tools to help military leaders better diagnose the problem at an earlier point.

A. Why a New Approach is Necessary

What can military leaders do when the potential problem—the potential disease—is diagnosed at an early stage? What can military leaders do to cure the problem at the earlier stage? What medicines are

available, and how should military leaders administer them? The systematic and repeated failures of the institutions currently charged to recommend UCMJ reform demonstrates that military leaders must fundamentally change their approach to UCMJ reform. Given that the Code Committee and military leaders have largely eschewed their prior efforts to shepherd the UCMJ, why should they start now?

While the professional ethic within both the profession of arms and profession of law requires self-policing,[501] military leaders must adopt a new approach for an operational reason. An enemy's goal is to weaken a military leader's unit. A weak UCMJ will do the exact same thing. Operational doctrine supports this article's approach to understanding and solving problems with the UCMJ. Joint Publication 3-0, *Joint Operations*[502] states,

> [T]ransition to a new phase is usually driven by events rather than by time. . . . Sometimes . . . the situation will undergo an unexpected change in conditions that is not necessarily associated with a planned transition, yet may require the JFC [Joint Forces Commander] to direct an abrupt shift in operations. Such a change in conditions will rarely be uniform in time and space across an operational area, but can represent a critical period in the course of operations. The JFC must be able to recognize this fundamental transition in the situation, and transition quickly and smoothly in response. Failure to do so can cause the joint force to lose momentum, miss an important opportunity, experience a significant setback, or even fail to accomplish the mission. Conversely, successful transition can allow the joint force to seize the initiative in a situation and garner disproportionately favorable results. The JFC must seek to anticipate potential situational transformations. . . .[503]

Parts IV and V help military leaders recognize "a fundamental transition" in the situation, and this part helps leaders understand how to "seize the initiative."

---

[501] *See supra* notes 29–31 and accompanying text.
[502] JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS (11 Aug. 2011).
[503] *Id.* para. V.B.3.d.

While the Code Committee and JSC would be well-served to use the framework and tools that this article offers, this article purposefully does not advocate which body should lead the effort in UCMJ reform. While an enduring institution may be ideal, as issues that could impact the UCMJ will always arise, so long as someone with the ear of senior military leaders is performing the steps set forth below, it does not matter who does it. An explanation of this fundamentally different approach will reveal why.

B. A Four-Step Process

Using the information, framework, and logics set forth above, this part proposes a continuous, never-ending four-step method for shepherding the UCMJ. These four steps are presented in a logical sequential order, but they will often occur simultaneously or in a different order. There will also be many instances in which steps must be repeated. Such is the design of the approach.

First, military leaders must "seize the initiative" and identify potential problems. This step requires military leaders to fundamentally change their methodology for identifying such problems. Once a potential problem is identified, the second step is to study the problem and make an initial determination of the problem's possible root causes. Embracing complexity and understanding causation are prerequisites for success during this step. Third, based on the initial findings in the second step, military leaders must initiate an inclusive, interdisciplinary dialogue to evaluate the validity of their initial findings. If something was missed, this process can start anew from either step one or step two. If the root causes of the potential problem are identified, then step four is to implement a broadly informed and researched experimental intervention to solve the problem. Experimental interventions can range from education campaigns to soliciting Congress to pass major UCMJ reforms.

Using the medical analogy, military leaders, as physicians, will use step one to see potential symptoms of an illness with its patient, the UCMJ. In step two, military leaders will perform an initial assessment of the symptoms to identify the potential causes, as well as what team of specialists is needed to properly diagnose the illness. After repeating

each step as many times as is necessary, military leaders will apply the recommended cure to the UCMJ.

1. Identifying the Problem

Before military leaders can use the diagnostic tools set forth in Part V, they should change their method of thinking about how to approach UCMJ reform. In her book *The Trouble With the Congo*, Séverine Auteserre explains that despite her often pointed critiques, her new approach for peacebuilding in the Democratic Republic of the Congo should be seen as just that, and no more.

> [T]his book offers a new explanation for the failures of third-party intervenors. . . . [T]his book is not a criticism of the UN Mission in the Congo. . . . Rather, the goal of this book is to help policy makers further boost the positive aspects of international peacekeeping interventions. . . .[504]

This article adopts the same approach. While this article criticizes the methods that have been used in recent decades to examine the UCMJ, it does not question any person's motives or desire for a more effective and just UCMJ. Nonetheless, military leaders' thought process should change.

i. Heuristics

It appears that heuristics and misplaced logic have tainted most UCMJ reviews over the past four decades. Heuristics are "rules of thumb" that people use to make decisions.[505] Major Blair Williams, U.S. Army, persuasively argues, "For commanders and staff officers to willingly try new approaches and experiment on the spot in response to surprises, they must critically examine the heuristics (or 'rules of

---

[504] SÉVERINE AUTESERRE, THE TROUBLE WITH THE CONGO 13–14 (2010).

[505] Major Blair S. Williams, *Heuristics and Biases in Military Decision Making*, MIL. REV., Sept.-Oct. 2010, at 40, *available at* http://www.au.af.mil/au/awc/awcgate/milreview/williams_bias_mil_d-m.pdf. Major Williams holds a Ph.D. in Public Policy from Harvard University. *Id.*; KAHNEMAN et al., *supra* note 445.

thumb') by which they make decisions and understand how they may lead to potential bias."[506]

A "search set bias" likely contributed to the incomplete methodologies that many ad hoc committees used to review the UCMJ. Williams explains the search set bias in operational terms, "As we face uncertainty in piecing together patterns of enemy activity, the effectiveness of our patterns of information retrieval constrain[s] our ability to coherently create a holistic appreciation of the situation."[507] Williams uses an operational example to illustrate this phenomenon:

> When observing IED [Improvised Explosive Device] strikes and ambushes along routes, we typically search those routes repeatedly for high-value targets, yet our operations rarely find them. Our search set is mentally constrained to the map of strikes we observe on the charts in our operations center. We should look for our adversaries in areas where there are no IEDs or ambushes.[508]

The Westmoreland Committee,[509] WALT,[510] and 2004 Army Committee[511] all fell victim to the search set bias. With potential problems to the UCMJ serving as the enemy, all three bodies were constrained by the search sets created by their prior operational and legal experience, training, and knowledge. By conducting similar surveys of the same military members and failing to sufficiently account for any other outside perspectives,[512] these bodies failed to identify problems with the UCMJ, much like those downrange failed to find IEDs. The bias simply caused them to not look everywhere that they needed to look.

---

[506] Williams, *supra* note 505, at 40.
[507] *Id.* at 43.
[508] *Id.*
[509] *See supra* Part III.A.3.ii.
[510] *See supra* Part III.A.3.iii.
[511] *See supra* Part III.A.3.v.
[512] The Westmoreland Committee was overtly hostile to civilian input and even was disrespectful to the Supreme Court. *See supra* notes 134–136 and accompanying text. The WALT relied on interviews and questionnaires of military personnel. *See supra* notes 141–142 and accompanying text. While the 2004 Army Committee looked at some early indicators, such as scholarly articles, their focus appeared to have little to no civilian input. *See supra* notes 147–150 and accompanying text.

Similarly, the anchoring bias also appears to have influenced the JSC subcommittee's 2005 recommendation to not amend the UCMJ.[513] Williams succinctly explains the anchoring bias, "When facing a new problem, most people estimate an initial condition. As time unfolds, they adjust this original appraisal. Unfortunately, this adjustment is usually inadequate to match the true final condition."[514] Given the fact that every judge advocate on the JSC subcommittee had spent his or her entire career practicing under a largely unreformed UCMJ, the ultimate anchoring effect appeared to have occurred. The JSC subcommittee's sole justification for not recommending UCMJ reform was that they "were unable to identify any sexual misconduct that cannot be prosecuted under the current UCMJ and MCM."[515] The JSC subcommittee's viewpoint that a legal authority to prosecute was the only relevant factor demonstrates that these heuristics were present.

The potential impact of biases in the ongoing military sexual assault debate is almost limitless. For example, the "illusory correlation," a bias where "[p]eople often incorrectly conclude that two events are correlated due to their mentally available associative bond between similar events in the past,"[516] is arguably built into courts-martial with the "good soldier defense."[517] It is also possible that advocates on both sides of the debate are a victim to the "confirmation bias," which causes us to "actively pursue only the information that will validate the link between two events."[518] Senator McCaskill states,

> The victim community is not monolithic on this. We've had victims call our office, victims that have been featured in some of the documentaries about this subject that have said, we think your approach is better. They're feeling, I think, marginalized because—as sometimes we have sometimes felt marginalized, because the other side

---

[513] *See supra* notes 209–210 and accompanying text.
[514] Williams, *supra* note 505, at 48.
[515] Letter from Colonel (COL) Michael J. Child, *supra* note 117.
[516] Williams, *supra* note 505, at 45.
[517] The "good soldier defense" allows an accused servicemember to introduce "evidence of good military character in order to convince a military judge or jury that the accused did not commit the offense charged." Hillman, *supra* note 489, at 882. The defense has arisen out of a mix of Military Rule for Evidence (MRE) 404(a)(1) and case law. *Id.*; MCM, *supra* note 26, MIL. R. EVID. 404(a)(1) (2012).
[518] Williams, *supra* note 505, at 45.

> wanted to make this argument about victims vs. uniforms.[519]

While heuristics are unavoidable, understanding their potential impact on decision-making and how to guard against their suboptimal effects is a powerful tool in better self-awareness. Williams provides a prescription that military leaders charged with shepherding the UCMJ should adopt. Williams recommends that organizations embrace "the concept of reflective practice," which is defined as "valuing the processes that challenge assimilative knowledge (i.e. continuous truth seeking) and by embracing the inevitable conflict associated with truth seeking."[520] This four-step process is an attempt to do just that.

ii. Applied Example

a. Early Indicators

Military leaders who adopt a reflective practice and look for the early indicators set forth in Part V will see another challenge to the UCMJ on the horizon. Many early indicators have pointed to a potential problem with the rather unforgiving manner in which the UCMJ handles cases of servicemembers who commit misconduct but whose misconduct is related, in some degree, to service-connected or wartime-related injuries. Many argue that the UCMJ, as applied, does not properly value the impact that the service-connected disability has on the misconduct. If a servicemember's misconduct leads to an other than honorable or punitive discharge, DoD and VA benefits, to include health care benefits for the service- or wartime-connected disability, are jeopardized. One may argue that other than honorable discharge issues are not related to the UCMJ, as they are administrative.[521] Such logic, however, is flawed, as

---

[519] *See, e.g.*, *Newshour: Sens. McCaskill, Ayotte: Keep Military Sexual Assault Cases in Chain of Command* (PBS television broadcast Aug. 1, 2013), *available at* http://www.pbs.org/newshour/bb/politics-july-dec13-military_08-01/.

[520] Williams, *supra* note 505, at 50 (citing and quoting Christopher R. Paparone & George Reed, *The Reflective Military Practitioner: How Military Professionals Think in Action*, 88 MIL. REV., no. 2, 66-77 (2008)); *see* Schlueter, *supra* note 30, at 9–10 (providing reasons why military leaders should listen to critics of the UCMJ).

[521] U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES *passim* (12 Apr. 2006) (RAR 13 Sept. 2011); U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS *passim* (6 June 2005) (RAR 6 Sept. 2011); U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS *passim* (18 Mar. 2014).

many other than honorable discharges are given as a pseudo-plea bargain to avoid a trial by court-martial.[522]

The earliest indicators of this potential problem were media reports. A November 15, 2011 *Stars and Stripes* article entitled *Critics: Fort Carson Policy Targeted Troubled, Wounded Soldiers* discussed cases in which Soldiers were being tried by court-martial and separated with less than honorable discharges for drug offenses and other misconduct despite such misconduct being attributable to wartime-related disabilities.[523] Their less than honorable discharge characterizations, which were often granted pursuant to requests for discharge that soldiers submitted to avoid court-martial, stripped many former servicemembers of much needed DoD and VA benefits.[524]

The media stories have continued. A sample indicates the breadth of media attention. An August 11, 2012 *Seattle Times* article cites a Naval Research Health Center survey that found that a Marine with a PTSD diagnosis was "11 times more likely to receive a misconduct discharge" than a Marine who had not deployed and was not diagnosed with PTSD.[525] It also explains that "federal law draws a sharp dividing line between honorably discharged veterans, who are offered access to veterans health-care and disability compensation, and those whose misdeeds may put those benefits at risk."[526] A 2013 four-part *Colorado Springs Gazette* investigative series entitled *Other than Honorable* discusses the exact same issues as the above articles.[527] The individual articles in this series, which are paired with powerful pictures and videos, are entitled *Disposable: Surge in Discharges Includes Wounded Soldiers*,[528] *Left Behind: No Break for the Wounded*,[529] and *Locked*

---

[522] Professional Experiences, *supra* note 236; AR 635-200, *supra* note 521, ch. 10.

[523] Bill Murphy Jr., *Critics: Fort Carson Policy Targeted Troubled, Wounded Soldiers*, STARS & STRIPES, Nov. 15, 2011, http://www.stripes.com/critics-fort-carson-policy-targeted-troubled-wounded-soldiers-1.160871.

[524] *Id.*

[525] Hal Bernton, *Troubled Veterans Left Without Health-Care Benefits*, SEATTLE TIMES, Aug. 11, 2012, http://seattletimes.com/html/localnews/2018894574_vets12m.html.

[526] *Id.*

[527] Dave Philipps, *Other than Honorable*, COLO. SPRINGS GAZETTE, http://cdn.http://cdn.csgazette.biz/soldiers/ (last visited Feb 2, 2015).

[528] Dave Philipps, *Disposable: Surge in Discharges Includes Wounded Soldiers*, COLO. SPRINGS GAZETTE, May 19, 2013, http://cdn.csgazette.biz/soldiers/day1.html.

[529] Dave Philipps, *Left Behind: No Break for the Wounded*, COLO. SPRINGS GAZETTE, May 20, 2013, http://cdn.csgazette.biz/soldiers/day2.html.

Away: Army Struggles with Wounded Soldiers.[530] In December 2013, National Public Radio ran a four-piece series on the *Morning Edition* radio program that highlighted the exact same issues.[531]

There also numerous direct and indirect legislative indicators that indicate that this issue may impact the UCMJ. A direct legislative indicator came on March 5, 2014. During a Senate Armed Services Committee hearing, Senator Richard Blumenthal "secured a commitment from U.S. Secretary of Defense Chuck Hagel to reconsider the cases of Vietnam Veterans who received other-than-honorable discharges due to symptoms associated with what would today be classified as Post-Traumatic Stress."[532] Another direct legislative indicator came in the 2015 NDAA, which tasks the Comptroller General of the United States with submitting "a report on the impact of mental and physical trauma . . . on the discharge of members of the Armed Forces from the Armed Forces for misconduct."[533] There are also numerous indirect legislative indicators. During a press conference, Senator Blumenthal stated that Vietnam War veterans who received "bad paper" discharges because of their PTSD "were wounded in war and then wounded again by their

---

[530] Dave Phillips, *Locked Away: Army Struggles With Wounded Soldiers*, COLO. SPRINGS GAZETTE, May 21, 2013, http://cdn.csgazette.biz/soldiers/day3.html.

[531] Marisa Peñaloza & Quil Lawrence, *Morning Edition: Other-Than-Honorable Discharge Burdens Like a Scarlet Letter* (NPR radio broadcast Dec. 9, 2013), *available at* http://www.npr.org/2013/12/09/249342610/other-than-honorable-discharge-burdens-like-a-scarlet-letter; Peñaloza & Lawrence, *supra* note 171; Marisa Peñaloza & Quil Lawrence, *Path to Reclaiming Identity Steep for Vets with 'Bad Paper'* (NPR radio broadcast Dec. 11, 2013), *available at* http://www.npr.org/2013/12/11/249962933/path-to-reclaiming-identity-steep-for-vets-with-bad-paper; Marisa Peñaloza & Quil Lawrence, *Morning Edition: Filling the Gaps For Veterans With Bad Discharges* (NPR radio broadcast Dec. 12, 2013), *available at* http://www.npr.org/2013/12/12/250289588/filling-the-gaps-for-veterans-with-bad-discharges.

[532] Press Release, Senator Richard Blumenthal, Blumenthal to Hagel: Review Vietnam Veterans' Bad Paper Discharges (Mar. 5, 2014), http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-to-hagel-review-vietnam-veterans-bad-paper-discharges. Secretary Hagel followed through on this commitment by issuing supplemental guidance to the Military Boards for Correction of Military/Naval Records designed to "ease the application process for veterans who are seeking redress and assist the Boards in reaching fair and consistent results in these difficult cases." Memorandum from Sec'y of Defense Chuck Hagel for Sec'ys of the Military Dep'ts, Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (Sep. 03, 2014), *available at* http://www.defense.gov/news/OSD009883-14.pdf.

[533] National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 536, 128 Stat. 3292, § 588.

country."[534] In 2012, Senator Patty Murray stated to the *Seattle Times* that she was concerned for former servicemembers who are "outside of the VA looking in" and that the VA claims appeals process should be "vastly improved."[535] While one might argue that Senator Blumenthal's efforts are focused on Vietnam and not the present day, further study would reveal that the DoD discharge system and the VA claims evaluation system have not changed since Vietnam.[536]

There are also at least two judicial indicators even at this early stage. As discussed in Part V.C, the *Veterans for Common Sense v. Shinseki*[537] case is a judicial indicator for this very issue. Additionally, in March 2014, a conglomeration of former servicemembers and established advocacy groups

> filed a class action lawsuit in federal court . . . seeking relief for tens of thousands of Vietnam veterans who developed Post-Traumatic Stress Disorder (PTSD) during their military service and subsequently received an other than honorable discharge. The lawsuit challenges the Pentagon's refusal to recognize that injury led to "bad paper" discharges.[538]

Again, while this lawsuit focuses on Vietnam veterans, military leaders who blend their expertise with a reflective practice would see that the UCMJ and military justice system that led to these discharges have not changed. Additionally, in determining misconduct-based discharges today, many of those discharges still do not reflect any potential medical causes.[539]

Scholarship has also pointed to this problem. The *Seattle Times* article referred to above states, "In recent years, the federal law that guides veterans benefits has come under fire from a surprising source:

---

[534] Yale Law School, *YLS Clinic Files Nationwide Class Action Lawsuit on Behalf of Vietnam Veterans with PTSD*, YALE UNIV. (Mar. 3, 2014), http://www.law.yale.edu/news/18096.htm.

[535] Bernton, *supra* note 525 (quoting Sen. Patty Murray).

[536] *See* Brooker et al., *supra* note 468.

[537] Veterans for Common Sense v. Shinseki, 644 F.3d 845, 850 (9th Cir. 2011), *vacated by* Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1016 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 840, 81 U.S.L.W. 3130568 (U.S. Jan. 7, 2012) (No. 12-296).

[538] Yale Law School, *supra* note 534.

[539] Professional Experiences, *supra* note 236.

some Army lawyers frustrated by the frequency with which troubled combat veterans are tossed out of the military without ready access to VA health care."[540] In fact, the Summer 2010 *Military Law Review* contained two articles related to this topic. In *Leave No Soldier Behind: Ensuring Access to Care for PTSD-Afflicted Veterans*, Major Tiffany Chapman, a U.S. Army judge advocate, argued for a change to a statute that bars servicemembers convicted of certain offenses from receiving VA health care benefits.[541] In *A "Catch-22" for Mentally-Ill Military Defendants: Plea-Bargaining away Mental Health Benefits*, Vanessa Baehr-Jones explains how sanity boards pursuant to Rule for Court-Martial (RCM) 706 can have an unintended impact on VA benefit eligibility.[542]

Two subsequent articles by U.S. Army judge advocates not only linked the problem to the UCMJ but also proposed solutions. In a 2011 *Military Law Review* article entitled *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, Major Evan Seamone accurately explains that when applying the UCMJ, "the prosecutor diminishes the wounded warrior's injuries and experiences in efforts to downplay the bases for mitigation and extenuation."[543] In a 2012 *Military Law Review* article entitled *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, Major Seamone, Ms. Leslie Rogall, and this author explain the problem and propose a method for military leaders to use the current system to better account for the medical causal mechanisms of misconduct.[544]

The power of an early indicator is often demonstrated by how interconnected it is with other early indicators. In the wounded warrior example, the newspaper articles cited the scholarship and vice versa. The judicial indicators cited the legislative indicators and vice versa. These imbrications can start a movement that ultimately results in congressional attention. Applying Part IV's framework to this wounded

---

[540] Bernton, *supra* note 525.
[541] Chapman, *supra* note 468.
[542] Vanessa Baehr-Jones, *A "Catch-22" for Mentally-Ill Defendants: Plea-Bargaining away Mental Health Benefits*, 204 MIL. L. REV. 51 (2010).
[543] Seamone, *supra* note 468.
[544] Brooker et al., *supra* note 468.

warrior issue will demonstrate that if military leaders do not apply a cure to this problem, Congress may take control of the issue.

b. Congressional Action Framework

Applying the six-variable congressional action framework demonstrates that this is not only a potential problem with the UCMJ, but it is also one in need of immediate action. While all six variables are not yet satisfied, such could change quickly. Once all six variables are satisfied, unsolicited congressional reform is likely to ensue. A quick look at all six variables demonstrates how potentially close this issue is to exploding.

First and foremost, this victim group is large. During the Vietnam War, 255,800 servicemembers were given discharge characterizations that either legally or practically barred them from receipt of VA benefits. Between 2000 and 2005, 68,660 former servicemembers found themselves in the same position. Estimates for the years 2006–2011 indicate that roughly 30,000 more former servicemembers joined this victim group.[545] When combined with the increasingly understood link between PTSD and misconduct,[546] the VA estimates that thirty-one percent of Vietnam War veterans, twenty percent of Operation Iraqi Freedom (OIF) veterans, and eleven percent of OEF veterans are afflicted with PTSD,[547] indicating that this victim group is made of tens of thousands of veterans.

Second, established veterans groups have recently shown interest in the issue. The Vietnam Veterans of America, the Vietnam Veterans of America Connecticut State Council, and the National Veterans Council for Legal Redress are parties to the Yale class action lawsuit outlined above.[548] There are also forty-six congressionally chartered Veterans Service Organizations (VSOs), many of which employ powerful

---

[545] Brooker et al., *supra* note 468, at 17 (citing Lawrence M. Baskir & William A. Strauss, Chance and Circumstance: The Draft, The War, and the Vietnam Generation 155 fig. 6 (1978)).
[546] *See* Brooker et al., *supra* note 468, at app. I.
[547] *PTSD: A Growing Epidemic*, NIH MEDLINEPLUS (Winter 2009), *available at* http://www.nlm.nih.gov/medlineplus/magazine/issues/winter09/articles/winter09pg10-14.html.
[548] Yale Law School, *supra* note 534.

lobbying efforts.[549] If those lobbying efforts decide to advocate for UCMJ reform as it relates to wounded warriors, the impact could be substantial.

Third, this issue is not only coming on the heels of a protracted armed conflict but is directly attributable to it. Fourth, the increasing media attention on the problem is outlined above.[550] Fifth, while the congressional attention and advocacy on this issue is not yet protracted, Senator Blumenthal's recent comments and the 2015 NDAA indicate that it is increasing.[551] A cogent argument can also be made that the congressional attention and advocacy on the UCMJ as it relates to sexual assault could serve as the protracted congressional attention necessary to bring this issue to the forefront. In other words, the protracted congressional attention and advocacy may not have to be issue specific. Given that Congress has, for the first time in sixty-five years, indicated a fundamental distrust of commanders and their ability to implement the UCMJ,[552] the protracted attention about sexual assault could easily serve as a proxy for the UCMJ's difficulty in dealing with wounded warrior cases.

Finally, there has not yet been a catalytic strategic case. While dozens of precursor strategic cases are outlined in the early indicators set forth above, nothing similar to *The Invisible War* has yet come along to bring this issue to the doorstep of every Senator. That case could come along at any point and could come in any variety of forms.

This wounded warrior issue is just one example of many potential challenges to the UCMJ that are possibly self-organizing at this very moment. Military leaders who want to properly correct any problems with the UCMJ must first understand if the UCMJ is a part of the problem. The only way to do that is to study any potential issue in a more detailed manner to understand the causes of the problem in

---

[549] House Comm. on Veterans Affairs, *Veterans Service Organizations*, U.S. HOUSE, http://veterans.house.gov/citizens/resources (last visited May 18, 2014); *see, e.g.*, John D. McKinnon & Siobhan Hughes, *Rapid Deployment Quashed Cut in Military Pensions*, WALL ST. J., Feb. 14, 2014, http://online.wsj.com/news/articles/ SB10001424052702304703804579383400581084332 (describing the lobbying power of VSOs).

[550] *See supra* notes 523–532 and accompanying text.

[551] *See supra* notes 532–534 and accompanying text.

[552] While members of Congress have consistently expressed some reservations about command control and unlawful command influence, the last time that the distrust was so profound appears to have been in 1949. *See* 1949 DEB., *supra* note 50, at 10.

granular detail, and embracing the fact that these causes will almost assuredly be complex.

2. Embracing Complexity and Examining Causation

i. Complexity

Military leaders deal with complex situations every day. In an unconventional way, an April 26, 2010 *New York Times* article about PowerPoint best illustrates this point.[553] The caption to a fascinatingly busy PowerPoint slide, which the author states "looked . . . like a bowl of spaghetti," reads, "A PowerPoint diagram meant to portray the complexity of American strategy in Afghanistan certainly succeeded in that aim."[554] When presented with the slide, General Stanley McChrystal, the senior ranking officer in Afghanistan, commented, "When we understand that slide, we will have won the war."[555] While the article and General McChrystal were taking a jab at PowerPoint and how the military uses it, the substance of the caption and General McChrystal's comment could not have been more correct. Instead of making fun of complexity, military leaders must now embrace it when it comes to UCMJ reform, as most challenges to the UCMJ are unquestionably complex, consisting of interacting and imbricating open systems.[556] The recent sexual misconduct-motivated major UCMJ reform provides a perfect example.

The issue of military sexual assault, as well as the UCMJ's role in it, is almost unanimously recognized as complex. Joyce Grover, executive director of the Kansas Coalition Against Sexual and Domestic Violence, states, "Sexual assault in the military is a complex problem. . . ."[557] In a written submission to The United States Commission on Civil Rights, Lieutenant General Dana K. Chipman, The Judge Advocate General,

---

[553] Elisabeth Bumiller, *We Have Met the Enemy and He Is PowerPoint*, N.Y. TIMES, Apr. 27, 2010, at A1, *available at* http://www.nytimes.com/2010/04/27/world/27powerpoint.html?_r=0.
[554] *Id.*
[555] *Id.*
[556] For a provoking, yet persuasive discussion of open systems and self-organization, see CONNOLLY, *supra* note 379, *passim*.
[557] Ann Marie Bush, *Consultant Speaks About Sexual Assault in the Military*, TOPEKA CAPITAL-J., Feb. 12, 2014, http://cjonline.com/news/2014-02-12/consultant-speaks-about-sexual-assault-military (quoting Joyce Grover).

U.S. Army, stated, "Sexual assault and special victim cases are complex, and difficult to prosecute and defend."[558] More broadly, Secretary Hagel, in discussing the complexity of military sexual assault, stated, "There are so many dimensions to this that I don't think you can come at it in one simple way."[559]

Widely accepted scholarship confirms the belief that the relationship between the UCMJ and military sexual assault is a complex problem. When evaluating a complex problem, the Cynefin framework is a widely-used and useful tool. Published in the Harvard Business Review, the Cynefin framework, which is named after the Welsh word "that signifies the multiple factors in our environment and our experience that influence us in ways we can never understand," "allows executives to see things from new viewpoints, assimilate complex concepts, and address real-world problems and opportunities." [560] Some of the characteristics of a complex problem are that there is "flux and unpredictability," "many competing ideas," and "a need for creative and innovative approaches."[561]

The Cynefin framework also succinctly explains why the simple acts of recognizing and understanding complexity are important. It predicts that many leaders who face complex problems are susceptible to "fall back into habitual, command-and-control mode," "look for facts instead of patterns," and seek an "accelerated resolution of problems or exploitation of opportunities."[562] Given the military culture's emphasis on command and control and doctrinal support for maintaining an offensive posture and exploiting opportunities,[563] as well as the legal profession's focus on facts versus patterns, changing the entire approach to UCMJ reform will take serious effort and command emphasis.

---

[558] Written Submission from Lieutenant General Dana K. Chipman, The Judge Advocate General, U.S. Army, to The U.S. Commission on Civil Rights 9 (Jan. 11, 2013), *available at* http://www.eusccr.com/Chipman,%20Army%20WrittenStatement_USCCR.pdf.

[559] Karen Parrish, Am. Forces Press Serv., *Hagel: Solving Sexual Assault Crisis will Take "All of Us"*, U.S. DEP'T OF DEF. (May 17, 2013), http://www.defense.gov/news/newsarticle.aspx?id=120082.

[560] David J. Snowden & Mary E. Boone, *A Leader's Framework for Decision Making*, HARV. BUS. REV., Nov. 2007, at 70.

[561] *Id.* at 73.

[562] *Id.*

[563] *See* U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUB. 3-90, OFFENSE AND DEFENSE (Aug. 2012).

Recent DoD-initiated attempts at studying the UCMJ, such as the PAT and 2004 Army Committee, failed recognize the complexity of a major UCMJ reform, as they failed to identify that a potentially complex problem was already infecting the UCMJ. Complex problems are understandably difficult to solve. The Cynefin framework recommends that military leaders facing complex problems "increase levels of interaction and communication."[564] Given that problems with the UCMJ often involve areas with which military leaders and their reform institutions are unfamiliar, military leaders must first try to identify with whom the increased communication should begin.

ii. Causation

When reflecting on Iraq, General Odierno stated,

> You know, one of the things we've learned over the last 10 or 12 years is not what happened, but why something happened. And as you figure out—so we're trying to—as we train our leaders, it's about training them to figure out, why is this happening? Then, what's the right tool to fix it?[565]

Military leaders must take the same approach with problems involving the UCMJ.

The previous ad hoc committees did not take the approach General Odierno advocates. They employed methodologies more appropriate for simple problems. They failed to implement "extensive interactive communication" and focused their review on "ensur[ing] that proper processes are in place."[566] Such an approach is no longer viable. Military leaders understand that "common leadership approaches that work well in one set of circumstances [may] fall short in others."[567] The only way to understand what approach is required is to understand causation.

---

[564] Snowden & Boone, *supra* note 560, at 73.
[565] *Amid Tighter Budgets, U.S. Army Rebalancing and Refocusing: A Conversation with Raymond T. Odierno*, COUNCIL ON FOREIGN RELATIONS (Feb. 11, 2014), http://www.cfr.org/united-states/amid-tighter-budgets-us-army-rebalancing-refocusing/p32373.
[566] *Id.* at 73.
[567] *Id.* at 70.

Once military leaders embrace that major reform-producing problems with UCMJ often include "unknown unknowns,"[568] military leaders must use their experience, education, and open minds in a preliminary attempt at understanding some of the causes of the criticism. A clearer understanding of causation sets up the remaining steps of this process, as without it, it is impossible to understand with whom to discuss the problem and how to craft a solution.

Analyzing causation is an ongoing process. A broad and interdisciplinary dialogue is, by its very design, to stimulate more study and understanding of causation. Accordingly, steps two and three of this four-step method often occur simultaneously. Through rigorous scholarship and thought, scholars have created frameworks and concepts that military leaders should use when studying a potential problem with the UCMJ.

The first concept that military leaders should use is of durational time. In his book *A World of Becoming*, political theorist William Connolly explains the concept:

> As we do so, we find ourselves plunged into a moment of time without movement, engaging different zones of temporality coursing through and over us. For that scene arrests multiple sites and speeds of mobility that impinge upon one another when in motion. We may commune for a moment with a drop of time itself before we ease up from our seats to ramble out of the theater . . . . We belong to time, but we do think often about the strange element through (or 'in') which we live, breathe, act, suffer, love, commune, and agitate. Indeed, it would be unwise if we focused on this register of experience too often. We would lose our ability to act with efficacy, confidence, and fervor in the world. For action requires simplified perception to inform it.[569]

---

[568] *Id.* at 73. During an oft-quoted press conference, former Secretary of Defense Donald Rumsfeld explained the concept by stating, "There are known knowns. There are things we know we know. We also know there are known unknowns. That is to say, we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know." Bezan Darro, *Donald Rumsfeld Unknown Unknowns !*, YOUTUBE (Aug. 7, 2009), http://www.youtube.com/watch?v=GiPe1OiKQuk.

[569] WILLIAM E. CONNOLLY, A WORLD OF BECOMING 2 (2011).

Connolly then uses two more images to better explain the concept.

> We barely glance at the cup of coffee before picking it up, refusing to tarry over its size, texture, shape, colors, odor, and distance. And there is no time to note the color and make of that car rushing at you before you dive out of its way. But still it does make both thought and action more subtle to dwell in time periodically.[570]

Yet another way to understand the concept is to imagine a photograph. What systems within the world have come together, at that specific moment in time, to make that photograph what it is? If the photograph is of a person, why are they laughing, smiling, crying, or other conveying look at that very moment? What are their apparent emotions? What motivated them to be in that exact spot? What is happening in the background? What is the weather? By performing this exercise and listing all the open systems one can imagine, one will have a more precise understanding of all of the open systems interacting at that very moment.

Trial attorneys should have no problem implementing the concept of durational time, as the entire point of a criminal trial is to perform this exact exercise. All of the procedural and evidentiary rules are designed to help the court receive the most accurate picture possible to analyze when making a decision. The entire purpose of a scientific crime scene investigation is to preserve or recreate that moment in time when the offense occurred. Surprisingly, military attorneys in charge of reviewing the UCMJ appear to have rarely, if ever, employed this approach when trying to better understand a claimed problem with the UCMJ. Part VI.B.1.ii provides an example of how to do this. First, however, an explanation of how to categorize the causes of problems is necessary.

One frequent problem with a causation diagnosis is the lack of a typology. Typologies help for a number of reasons. In medicine, typologies facilitate the study and treatment of conditions. One of the most well-known and extensive typologies is the *Diagnostic and Statistical Manual of Mental Disorders*.[571] Because the biological causes

---

[570] *Id.*

[571] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL HEALTH DISORDERS (5th ed. 2013).

of mental-health disorders are not as precisely diagnosable as other maladies, mental-health professionals use typologies to assist with understanding not only the potential cause of the disorder but also how to treat it. Such a typology would assist military leaders shepherding the UCMJ, as the causal mechanisms behind problems with the UCMJ are also not biological or tangible.

In *How to Map Arguments in Political Science*, Craig Parsons "proposes a typology of explanation of human action."[572] Since the criminal activity that the UCMJ regulates, as well as those responsible to regulate it, are human in nature, it provides a tailor-made way to characterize the causes of problems. There are four explanations, or causal logics, that explain conduct. While this article cannot fully explore or describe these logics, a brief introduction paired with the applied example below will demonstrate their potential usefulness.

The first two causal logics, which are labeled "structural" and "institutional," are "logic-of-position" causes, as all rational actors would do the same thing if placed in the same scenario. A structural claim is when one argues that a rational actor is doing what anyone would do because the "obstacle course of material . . . channels her to certain actions." An institutional claim is when one argues that a rational actor is doing what anyone would do because the "obstacle course of . . . man-made constraints and incentives channels her to certain actions."[573]

The second two, which are labeled "psychological" and "ideational," are "logic-of-interpretation" causes, as they explain actions "by showing that someone arrives at an action only through one interpretation of what is possible or desirable." "Ideational claims do so by asserting that particular people have historically situated ways of interpreting things around them." For example, religious beliefs and cultural norms are often largely ideational. "Psychological claims assert that people perceive the world around them through hard-wired instincts, affective commitments, and/or cognitive shortcuts." Suboptimal results created by heuristics are the primary example.[574]

Military leaders who read and digest Parsons's book will better understand the causal claims behind the current sexual assault debate.

---

[572] CRAIG PARSONS, HOW TO MAP ARGUMENTS IN POLITICAL SCIENCE 3 (2007).
[573] *Id.* at 13.
[574] *Id.*

For example, the debate on whether commanders should retain disciplinary authority under the UCMJ invokes all four types of claims. A claim that any rational actor would take away command authority is structural. A claim that the UCMJ's rules on pretrial investigations, which made sense when enacted but, because of path dependence,[575] now produce unintended, suboptimal results, is likely institutional. A claim that commanders simply choose to not prosecute sexual assault to protect their friends is likely ideational. A claim that heuristics caused military leaders to miss the sexual misconduct-related challenge to the UCMJ is psychological.

Three of the benefits that Parsons sees flowing from his typology would benefit military leaders who use it. First, it helps users focus on "the most basic bits of logic about what causes what," thereby eliminating "odd historical distinctions and false debates."[576] Because Senator McCaskill has often opined that there is a false "victims versus commanders" debate,[577] those who use Parsons's typology would be better able to get to the crux of her frustration. Second, his typology is all encompassing, which "clarifies and focuses our efforts."[578] In other words, it sets proverbial "left and right limits" in terms of explanations for actions, which facilitates more productive discussion. Third, much like doctrine, a shared understanding of core terms "facilitate[s] rather than impede[s] direct competition and combination."[579]

Mastering the concepts of durational time and causal mechanisms requires study and practice. Such persistence is necessary, as a failure to use them or other similar tools could result in the same mistakes as before, resulting in an unsolicited major change to the UCMJ. How to apply these tools is demonstrated in the following applied example.

---

[575] Path dependence, which is "integral" to the institutional causal logic, occurs when "the impact of institutions on subsequent action" is unintended. *Id.* at 72–74.
[576] *Id.* at 3.
[577] *Senate Approves McCaskill Sex Assault Bill*, NAVY TIMES, Mar. 10, 2014, http://www.navytimes.com/article/20140310/NEWS05/303100027/Senate-approves-McCaskill-sex-assault-bill.
[578] PARSONS, *supra* note 572, at 3.
[579] *Id.*

iii. Applied Example

The concept of durational time can be applied to any moment. While trial attorneys are adept at applying the concept of durational time to specific events, in the context of UCMJ reform, it may be more useful to start with a moment in time at which multiple early indicators have coalesced. The wounded warrior example provides an ideal example.

On March 3, 2014, Senator Richard Blumenthal held a joint press conference with members of Yale Law School's Veterans Legal Services Clinic, a representative of the Vietnam Veterans of America Connecticut State Council, and former servicemembers with "bad paper" discharges who are plaintiffs in the case.[580] Because of all of the speakers at this conference either individually or representatively factor into the framework set forth in Part IV, it would be a good place to apply the durational time concept to understand the complexity of the issue and the causes of the problem.

The nearly forty-five-minute-long press conference is full of investigatory leads. The press conference begins with an overview of the issue. Many individual stories that serve as precursor strategic cases are told. Senator Blumenthal then provides an overview of the reasons that he supports the case. In highlighting the unfairness of many less than honorable discharges, to include punitive discharges by court-martial, Senator Blumenthal states,

> The reasons for these discharges were directly related to post-traumatic stress. Their actions resulted from the wounds of war, and they were discharged with less than honorable status, which became a stigma, or a black mark, causing them not only to be denied the benefits of medical treatment and employment aid, but also to be discriminated against by employers.[581]

Senator Blumenthal concludes his remarks with a striking warning, vowing,

> I [will] continue a legislative solution that will help correct this injustice and I'm going to continue to try to

---

[580] Press Conference, Yale Law School & Senator Richard Blumenthal (Mar. 3, 2014), http://vimeo.com/88110369 [hereinafter Joint Press Conference].
[581] *Id.*

> persuade officials that they can do the right thing without legislation or a lawsuit. In fact, the Secretary of Defense, literally today, could grant what this lawsuit seeks, on his own authority, correct this injustice. . . . I will call . . . on the Secretary of Defense to correct this injustice, to do the right thing.[582]

Unlike many media articles, Senator Blumenthal properly points the focus on DoD, not VA, noting that the VA is bound by the characterization of discharge that DoD issues. He continues, "This issue really is with the Department of Defense and Secretary of Defense Hagel."[583]

Using this press conference as the moment in durational time to study, military leaders would see numerous potential open systems that could contribute to this problem. To illustrate just a few, Senator Blumenthal correctly pointed out that the UCMJ is a critical factor in this problem. Second, because of the PTSD angle, human psychology, particularly as it relates to the manner in which humans respond to stressful stimuli, is also in play. Third, the military's Physical Disability Evaluation System (PDES) plays a role in this problem.[584] Fourth, the VA and its policies and procedures are worthy of review. Fifth, Senator Blumenthal's interest in the issue could be explored. Sixth, the advocacy groups and their background and motivations for becoming involved are open for discussion.

The next step is to apply Parsons's causal-mechanism typology to better understand how these systems might interrelate. While this step should typically be repeated during and after step three, which is developing a broad and interdisciplinary dialogue, an initial attempt will help identify with whom that dialogue should occur. In this case, the lawsuit is based upon several premises. First, the speakers all allege that PTSD contributes to criminal behavior. Post-traumatic stress disorder, however, is usually not a defense for a crime, as those with PTSD can appreciate the wrongfulness and quality of their actions.[585] Why then,

---

[582] *Id.*
[583] *Id.*
[584] For a good overview of the PDES, see Lakandula Duke Dorotheo, *The Army Physical Disability Evaluation System*, U.S. ARMY MEDICAL DEP'T J., Jan.–Mar. 2010, at 5, *available at* http://www.cs.amedd.army.mil/AMEDDJournal/2010janmar.pdf.
[585] U.S. DEP'T OF ARMY, PAM 27-9, MILITARY JUDGES' BENCHBOOK ¶ 6-4 (1 Jan. 2010). For a simple, non-technical summary, see Seth Robson, *Using PTSD as a Defense*, STARS

should PTSD matter? The answer becomes clear when applying Parsons's causal-mechanism typology. Even though the cause of criminal misconduct is almost always ideational, Parsons's typology illustrates that psychological causes can still impact one's decision making, even though that person retains enough control over their actions to be legally responsible for the results.[586]

The next fact that should be explored using Parsons's causal typology is why veterans with documented service connections are not eligible for benefits. Applying the typology will show three potential institutional causes for this problem. First, PDES-related rules designed to protect servicemembers from being administratively discharged prior to qualifying for DoD disability benefits might have actually created more wounded warriors without benefits, as commands chose to use court-martial charges to punish misconduct that the command would have otherwise punished administratively.[587] Second, the complicated morass that are the VA's rules on benefits eligibility, while enacted for valid reasons, have created an almost impossible-to-navigate bureaucracy that is effectively denying hundreds of thousands of potential veterans a fair assessment of their claim.[588] Third, and most importantly, the UCMJ, whose rules were developed and repeatedly modified to "strengthen the national security of the United States,"[589] may have created a generation of prosecutors who are motivated to minimize the role of psychological causal mechanisms versus accounting for them in a manner that is more well-suited for the UCMJ's ultimate purpose.[590]

& STRIPES, Aug. 21, 2008, http://www.stripes.com/news/using-ptsd-as-a-defense-1.82145.

[586] *See* PARSONS, *supra* note 572, at 15 (presenting a diagram that depicts how psychological causal mechanisms can impact ideational causal mechanisms). Lieutenant Colonel Celestino Perez, Jr., used this example during a lecture on *How to Map Arguments in Political Science*. Celestino Perez, Jr., Lecture on PARSONS, *supra* note 572 (Jan. 10, 2014).

[587] *See* Murphy, *supra* note 523. *But see* Information Paper, Colonel (COL) Jonathan Kent, MEDCOM SJA, Impact of Misconduct during Army Physical Disability Evaluation System Process (2 Jan. 2012), *available at* http://www.crdamc.amedd.army.mil/meb/_files/Impact_Misconduct.pdf (discouraging circumvention of the PDES process).

[588] *See* Brooker et al., *supra* note 468, pt. IV.C.

[589] MCM, *supra* note 26, pt. I, ¶ 3.

[590] *See* Seamone, *supra* note 468, at 10–12 (setting forth an example of this potential phenomenon).

Third, military leaders should apply Parsons's typology to better understand why commanders routinely give benefit-precluding discharge characterizations to servicemembers whose misconduct is related to their service-connected injuries. Does the cause include ideational elements? In other words, are commanders making an informed choice to value retribution and deterrence versus rehabilitation? Or, is the cause partially structural? In other words, are commanders not properly educated on the manner? Are they making the same decision that anyone in their shoes would make, but without the correct information about how their decision will impact a servicemember's future, they make the wrong choice?

By performing the exercises in durational time and identifying and classifying potential causes of the problem, military leaders would identify numerous possible officials with whom to open a dialogue. For example, military justice experts could provide insight based on their experiences in these cases. Military physicians could explain their perspective on the PDES and how it might contribute to the problem. VA benefits experts could explain how "characterization of discharge" cases are handled throughout the VA.[591] Forensic psychiatrists and neuropsychologists could provide valuable insight on PTSD and how it relates to criminal activities. Veterans Service Organization (VSO) representatives could provide their perspective on the impact that less than fully honorable discharges have on veterans who desperately need the care that their type and characterization of discharge precludes. The VSOs could also provide a good scope for military leaders on how prevalent the problem really is, as military leaders often do not focus on societal issues not involving current servicememembers. Employers could discuss their hesitation to hire a veteran with a less than fully-honorable discharge. The potential list of valuable contributors is only limited by one's intellect, imagination, and resources.

This applied example indicates that the UCMJ, like any other system, is hopelessly intertwined with numerous other systems. Connolly summarizes it well with his theory called "a world of becoming."[592] He states,

---

[591] While VA claims adjudicators have difficulty adjudicating these complicated cases, there are experts at the Veterans Benefits Administration (VBA) headquarters who understand these complicated cases and could provide this expertise. Professional Experiences, *supra* note 236.

[592] CONNOLLY, *supra* note 569, at 27.

> A world of becoming—consisting of multiple temporal systems, many of which interact, each with its own degree of agency—is a world in which changes in some systems periodically make a difference to the efficacy and direction of others. Moreover, since human beings themselves are composed of multiple micro-agents collaborating and conflicting with one another, it is wise to think of both individual and collective human agency as a complex assemblage of heterogeneous elements bound loosely together.[593]

Accordingly, when military leaders are looking to shepherd the UCMJ through ever-changing times, the seemingly entrenched approach of self-reflection is no longer enough. Military leaders cannot fix future problems alone. They need help from an array of perspectives and expert opinions that the tools in this section can help identify.

3. Developing A Broad, Interdisciplinary, and Team-Oriented Dialogue

Developing a broad and interdisciplinary dialogue sounds deceptively simple, but in terms of the DoD examination of the UCMJ, there is no evidence that it has ever been done on anything more than on an ad hoc basis as a reaction to a specific issue. This is surprising given that most judge advocates who have served as defense counsel on a complex case have developed a broad and interdisciplinary dialogue. A defense counsel who has represented a client charged with a serious sexual assault will almost assuredly develop and lead an extended and productive team-oriented dialogue, which will include input from psychiatrists, forensic neuropsychologists, mitigation experts, jury consultants, and family members and friends of the accused.[594] A good defense counsel will also create a dialogue with investigators, prison counselors and guards, and prosecuting attorneys.

The Cynefin framework also calls for this type of dialogue. For complex problems, it recommends that leaders "increase levels of

---

[593] *Id.*
[594] Professional Experiences, *supra* note 236.

interaction and communication."[595] The discussions should be open, and leaders should "encourage dissent and diversity."[596] A healthy competition of ideas is what creates successful dialogue.[597]

Perhaps the reason that such is not done for UCMJ reform, in addition to the impact of heuristics and other factors, is that doing so is so difficult. As is the case in trial preparation and UCMJ reform, things are not as simple as they first appear. Developing each element of the dialogue shows why.

The dialogue must be broad. This element is designed to incorporate a wide array of perspectives. In 1963, Major General Decker lauded the concept of incorporating external perspectives in UCMJ review.[598] The Code Committee's composition, which includes five civilian judges and two additional civilians,[599] appears to have been designed with this idea in mind. The breadth, however, must be much greater than this. As soon military leaders identify a potential problem with the UCMJ, they must seek out and initiate discussion with those advocating for the change. If discussing the case with an individual is not wise because that person may take legal action against DoD, an advocacy group could perform the same role. Advocacy groups would likely welcome such attention, as doing so would give them a voice for change with a receptive and powerful audience—one in addition to Congress.

Using the wounded warrior example as an illustration, a broad dialogue would include input from former servicemembers with service-connected disabilities who were denied benefits because the disability-fueled misconduct led to a less than honorable discharge. It would also include the advocacy groups, such as VSOs. Those who believe that they have been saddled with the consequences of the discharge, such as family members, social workers, or veterans treatment court mentors,[600] could also provide valuable input.

---

[595] Snowden & Boone, *supra* note 560, at 73.

[596] *Id.*

[597] Professor Schlueter states that military leaders should listen to critics of the UCMJ because "like eating oatmeal, it is the right thing to do." He explains, "Criticisms should not be ignored simply because they irritate or annoy us. If we are wrong, then we should listen." Schlueter, *supra* note 30, at 10.

[598] *See supra* notes 96–99 and accompanying text.

[599] UCMJ art. 146(b) (2012).

[600] For a good description of veterans treatment courts, see JUSTICE FOR VETS, http://www.justiceforvets.org/ (last visited May 16, 2014). For a good description of how these courts could interact with the military justice system, see Seamone, *supra* note 468,

The dialogue must also be interdisciplinary. This element is intended to incorporate expertise from any profession that may provide valuable input in how to properly shepherd the UCMJ. The Response Systems to Adult Sexual Crimes Panel is a good example of how to do this.[601] Luckily, the military has uniformed expertise in almost every topic. The key is to find and leverage it. Applying the concept to the wounded warrior applied example, an interdisciplinary dialogue would include psychiatrists and neuropsychologists to provide input on the mechanics and dynamics of PTSD. Physicians and attorneys who specialize in the PDES would provide input on that system and how they see it relating to others. VA disability specialists would explain how the Veterans Affairs' systems perceive these cases, and how the military commander's decisions when applying the UCMJ's rules impact their decisions. Commanders would discuss how they value less than honorable discharges as a device to deter misconduct. Veterans Affairs physicians would provide their input on the long-term personal costs and ramifications of not providing treatment for service-connected injuries. Economists would calculate the cost on society. While gathering this group of people sounds laborious time consuming, the costs pale in comparison to the impact that an unsolicited major reform to the UCMJ could have on the military's readiness. As the 2014 NDAA proves, Congress will direct or perform this interdisciplinary approach if the military does not.

The dialogue must also be team-oriented. While attorneys are familiar and comfortable with adversarial processes and relationships, the effective dialogues are not generally possible unless all participants feel that their efforts are a part of a solution. Military leaders must also not let geographical challenges inhibit this dialogue. While in-person meetings are likely the most effective way to build a team-oriented approach, any approach may be more effective than the alternative of not taking adopting a broad and interdisciplinary dialogue.

The output of this dialogue is not rigid or even tangible. In most instances, military leaders will have to restart this approach from the beginning after gaining a better initial understanding. Such restarts are encouraged, as the entire point of the first three steps of the process is to gain a better understanding of the potential problem with the UCMJ at

---

pt. VIII.

[601] *See supra* Part III.A.3.vi.

the earliest opportunity. Once military experts are satisfied that they have diagnosed the problem, step four is where they fix it before Congress takes unsolicited action. Using the medical analogy, step four is the application of the proposed cure.

4. Experimental Action

As Connolly explains, some of history's greatest philosophers, despite differences in viewpoints, "emphasize the value of dwelling periodically in fecund moments of duration to help usher a new idea, maxim, concept, faith, or intervention into being."[602] If military leaders use the concept of durational time to begin and foster the proper dialogues to properly shepherd the UCMJ, innovative solutions will likely ensue. Interestingly, military leaders may find that if a potential problem is diagnosed at an early enough stage, most solutions will not require UCMJ modification.

This article cannot predict what form the solutions might take. That is the beauty and power of the concept. Creating a broad and interdisciplinary team to solve a potential problem will foster solutions that prior UCMJ review committees never fathomed. Assumptions, such as the role of the commander in administering discipline, will be properly challenged from the beginning, versus simply taken as a given. There is guidance on how and when such solutions should be implemented.

In his book *System Effects: Complexity in Political and Social Life*, Robert Jervis explains,

> In a system, the chains of consequences extend over time and many areas: The effects of action are always multiple. Doctors call the undesired impact of medications "side effects." Although the language is misleading—there is no criterion other than our desires that determines which effects are "main" and which are "side"—the point reminds us that disturbing a system will produce several changes.[603]

---

[602] CONNOLLY, *supra* note 569, at 71.

[603] ROBERT JERVIS, SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE 10 (1997) (quoting Garrett Hardin, *The Cybernetics of Competition*, PERSPECTIVES IN BIOLOGY IN MED. 79–80 (Autumn 1963)).

As the early indicators suggest, action should be taken as early as possible, as more treatment options will be available. Early action can have a dramatic result on the final result. Subscribers to the chaos theory in science are likely familiar with the "butterfly effect" concept, which posits that "a complicated dynamical system could have points of instability—critical points where a small push can have large consequences."[604] Even those who do not subscribe to chaos theory understand how early action can open options. It is widely known that early detection of cancer can increase treatment options and improve one's prognosis, and a wise investment of money early in life can lead to many more financial options later in one's life. Despite the complexity of the world, early intervention can make a big difference.

Given that the UCMJ, which itself is complex, is purposefully interwoven with countless other systems, there is a better way to intervene when we perceive that a correction is necessary. As Jervis states, "[W]e cannot develop or find 'a highly specific agent which will do only one thing. . . . We *can never do merely one thing*.'"[605] As a result, military practitioners can borrow another concept from William Connolly. Applying portions of the experimental-action concept to UCMJ reform, military leaders should "seek periodically to usher new concepts and experimental actions into the world that show promise of negotiating unexpected situations," and then "recoil on those interventions periodically to improve the chance that they do not pose more dangers or losses than the maxims they seek to correct."[606] Connolly is not alone in proposing this method of intervention.

General Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, has also borrowed from other disciplines in considering the exact same approach to solving complex problems. In a February 2014 interview, he stated,

---

[604] JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE 18–19 (1987). The "butterfly effect" is "the notion that a butterfly stirring the air today in Peking can transform storm systems next month in New York." *Id.* at 8. This concept is also grounded in folklore. "For want of a nail, the shoe was lost; For want of a shoe, the horse was lost; For want of a horse, the rider was lost; For want of a rider, the battle was lost; For want of a battle, the kingdom was lost!" *Id.* at 23.

[605] JERVIS, *supra* note 603, at 10 (quoting Garrett Hardin, *The Cybernetics of Competition*, PERSPECTIVES IN BIOLOGY IN MED. 79-80 (Autumn 1963)) (emphasis added by JERVIS).

[606] CONNOLLY, *supra* note 569, at 165.

> And then the other interesting thing about strategy, to me, is whether it's best to define an end state and then deliberately plot a series of actions to achieve that end state . . . or whether the world in which we live today actually is one where, kind of like the Heisenberg principle in physics, where you should touch it and see what happens.[607]

There is no reason that such an approach should not be applied to our mission of shepherding the UCMJ in our ever-changing world. The Cynefin framework also supports an approach where we make a correction and then reevaluate its effectiveness. It states that in complex situations, "the leader's job" is to "probe, sense, respond."[608] Hypothetically applying this principle to the very real wounded warrior applied example will illustrate how it could work.

Using our applied example, assume that military leaders took all of the actions described in the three steps above. Leaders found the issue by applying the early indicator tools. Embracing the complexity of the problem, they performed an initial causation analysis and developed a broad, interdisciplinary, team-oriented dialogue to better understand the problem. The team has now decided on one experimental action.

After applying the three steps above, all team members agree to recommend that Congress afford VA health benefits to all service-connected injuries even if the type and characterization of discharge precludes the former servicemember from receiving other benefits. All physicians agreed on this course of action, as they were most concerned with ensuring that former servicemembers in need of care could receive it. Senior VA administrators expressed unanticipated support, as the steep public relations and adjudication costs that these cases cause offset the additional treatment costs. The VA representatives were concerned that additional strain on the VA's already understaffed mental-health treatment could cause other problems, but they concluded that VA's ongoing efforts to hire more mental-health professionals should mitigate

---

[607] *A Conversation with the Chairmen: General Martin E. Dempsey*, WAR ON THE ROCKS (Feb. 25, 2014), http://warontherocks.com/2014/02/a-conversation-with-the-chairman-general-martin-e-dempsey/.

[608] Snowden & Boone, *supra* note 560, at 73.

this risk.[609] Veterans law experts also pointed out that, contrary to assertions by Senator Blumenthal and others that all Soldiers with other than honorable discharges are precluded from receiving health care benefits,[610] most soldiers who receive OTH discharges are already entitled to health care.[611] This dialogue motivated the VA to implement an education effort to ensure that all VA adjudicators were not operating on mistaken assumptions. Military commanders were also satisfied with the plan, as the deterrent effect of a less than honorable discharge was protected.

Research commensurate with the dialogue revealed that a statutory change to VA benefits statutes, and not the UCMJ, was the only way to accomplish this. Military leaders, through the JSC, recommended this change to VA law. The recommendation had power because a broad, interdisciplinary dialogue was formed. Not only did the JSC make this recommendation, but so did the VA and all of the powerful VSO lobbies. Using the congressional action framework, the established advocacy groups highlighted the large victim class whose lives were impacted by protracted wars. The multidisciplinary team engaged Senator Blumenthal, educating him on both the logic of the proposal and the flaws in his previous statements about benefits eligibility. Senator Blumenthal, as a result, engaged and leveraged other members of Congress. Multiple precursor strategic cases were turned into catalytic strategic cases by congressional attention and media reports. As a result, Congress removed the statutory bars to VA health care.[612]

A brief counterfactual analysis to this hypothetical example illustrates might have happened military leaders not embarked on this approach. During his press conference at Yale Law School, Senator Blumenthal's disgust was focused on DoD, not VA.[613] He included punitive discharges issued to wounded warriors in his list of gripes with DoD. After years of calls to address this issue, Senator Blumenthal introduced legislation that, instead of taking a proverbial scalpel to the

---

[609] News Release, Dep't of Veterans Affairs, Office of Pub. & Intergovernmental Affairs, VA Hires Over 1600 Mental Health Professionals to Meet Goal, Expands Access to Care and Outreach Efforts, Directs Nationwide Community Health Summits (June 3, 2013), http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2450.

[610] *See, e.g.*, Joint Press Conference, *supra* note 580; Murphy, *supra* note 523.

[611] Brooker et al., *supra* note 468, pts. VIII, IX.

[612] Two statutes can serve as a bar to VA health care benefits. *See* 38 U.S.C. § 5303 (2006); Pub. L. No 95-126, 91 Stat. 1106 (1977).

[613] *See* Joint Press Conference, *supra* note 580.

issue, addressed it with a hatchet. Senator Blumenthal, frustrated by the years of inaction and additional attention to this issue, lost confidence in commanders and their perceived ability to manage the UCMJ. Accordingly, he teamed with Senator Gillibrand, another senator who possessed the same frustrations, albeit because of a different issue. Together, they were successful in amending the UCMJ to remove commanders' prosecutorial discretion.

While counterfactual analyses to hypothetical situations are admittedly tenuous support for a proposition, this one strikingly corresponds with the debate around sexual assault in the military and the UCMJ's role in the problem. Notwithstanding the multitude of early indicators to the sexual assault crisis that were identified in Part IV, and despite decades of military leader assertions that they were focused on the problem of sexual assault in the military,[614] the situation got worse, and the UCMJ's role was never fully examined until after the unsolicited 2014 NDAA was passed.

This hypothetical example is purposefully oversimplified to illustrate the process's operation and potential. What, on the other hand, would happen in a situation in which the dialogue did not produce agreement or consensus? Surprisingly, the results do not change. Just because one of the people or organizations with whom the military initiates dialogue does not agree to a proposed solution does not change the value of the process to military leaders. In other words, the concurrence of those consulted is not required. Broad dialogue should not be conflated with broad consensus. In the end, military leaders must decide how to shepherd the UCMJ. Armed with a deeper understanding of a problem's complexity and cause at an earlier stage, military leaders can take more appropriate action. If military leaders had engaged in this dialogue in the 1990s or early 2000s, they may have recommended the exact same changes found in the 2014 NDAA. Given the military leader's vigorous opposition, however, such is unlikely. A better understanding of the problem could have prompted change in other areas. Even when no UCMJ or military justice system-related changes are necessary, military leaders should use the increased understanding to develop an informed and persuasive narrative.

Military leaders can engage the American public via Congress, media, and advocacy organizations to explain their perspective and

---

[614] *See supra* Part IV.

efforts. Currently, military leaders do not do this enough. For example, military leaders refused to comment during the four-piece NPR series on wounded warriors.[615] Perceived inaction has multiple potential negative effects. As demonstrated above with Senator Blumenthal and his frustration with Secretary Hagel's perceived initial inaction,[616] precursor and catalytic strategic cases can be born. Media attention and advocacy groups also appear to be fueled by perceived DoD inaction.[617] Using the congressional action framework, perceived DoD inaction, even if untrue, can fuel congressional action. Engaging the American public with an honest and actively informed narrative is indispensible in any case, particularly those where a broad consensus is not possible.

VII. Conclusion

The 2014 NDAA demonstrates that the military needs to do a better job of diagnosing and fixing problems with the UCMJ. This article provides military leaders with the tools to do just that. The congressional action framework helps military leaders understand what Congress would define as a problem—a disease—with the UCMJ. It also serves to inform them when Congress may take unsolicited action to cure a disease. The early indicators show that issues that may impact the UCMJ are identifiable at a very early stage. The four-step approach shows military leaders how to best address, and if required, fix those problems.

There is no guarantee that military leaders will learn any lessons from the difficult debates surrounding the UCMJ and sexual misconduct. When interviewed about the wounded warrior issue that this article uses as an applied example, General Dempsey stated

> I wouldn't suggest that we should in any way reconsider the way we characterize discharges at the time of occurrence. . . . It is a complex issue and we all make choices in life that then we live with for the rest of

---

[615] *See* Peñaloza & Lawrence, *Morning Edition: Other-Than-Honorable Discharge Burdens Like a Scarlet Letter*, *supra* note 531 ("The Pentagon. . . declined a request for an interview.").

[616] Joint Press Conference, *supra* note 580.

[617] *See, e.g.*, Yale Law School, *supra* note 534; Philipps, *supra* note 527.

> our lives and I think we have to understand that as well.[618]

The trouble with this quote is not General Dempsey's position to not change the discharge characterization system. What is disturbing is his hesitation to even consider the proposition even though he admits that it is a complex issue. General Dempsey, of all military leaders, has emphasized the role of professionalism and self-regulation.[619] Ironically, his assertion that we must live with our choices also evinces that he understands that decisions at an early stage can have a significant impact. Surprisingly, when it comes to the UCMJ and military justice issues, he and many other leaders appear hesitant to even look at potential issues.

Military leaders have shepherded the UCMJ to an existential crossroads. The strength of this nation's military depends on military leaders taking a new approach to UCMJ reform. This article will hopefully be just one of many suggestions on how to improve both the public's confidence in the UCMJ, as well as its objective ability to be fair and effective within a largely subjective environment.

---

[618] Peñaloza & Lawrence, *Path to Reclaiming Identity Steep for Vets with 'Bad Paper'*, *supra* note 531.

[619] Jim Garamone, Am. Forces Press Serv., *Dempsey Calls for Rededication to Profession of Arms*, U.S. DEP'T OF DEF. (Feb. 23, 2012), http://www.defense.gov/news/newsarticle.aspx?id=67307.

DON'T FORGET THE FAR EAST: A MODERN LESSON FROM THE CHINESE PROSECUTION OF JAPANESE WAR CRIMINALS AFTER WORLD WAR II

MAJOR NATHANIEL H. BABB*

Nothing the Nazis under Hitler would do to disgrace their own victories could rival the atrocities of Japanese soldiers under Gen[eral] Iwane Matsui.[1]

I. Introduction

In the early morning hours of December 13, 1937, approximately 50,000 Japanese soldiers breached the walled city of Nanking, China.[2] The troops carrying out the assault were part of a larger force—the 200,000-strong Japanese Central China Area Army (CCAA), led by General Iwane Matsui—sent to encircle and annihilate the remaining

---

* Judge Advocate, U.S. Army. Presently assigned as Brigade Judge Advocate, Combat Aviation Brigade, 1st Infantry Division, Fort Riley, Kansas. LL.M., 2014, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2005, Hamline University School of Law, St. Paul, Minnesota; B.A., 2002, William Jewell College, Liberty, Missouri. Previous assignments include Chief, Intelligence Law and Legal Instructor Division, 304th Military Intelligence Battalion, 111th Military Intelligence Brigade, Fort Huachuca, Arizona, 2011–2013; Office of the Staff Judge Advocate, United States Military Academy, West Point, New York, 2009–2011 (U.S. Corps of Cadets Trial Counsel, 2010–2011; Administrative Law Attorney, 2009–2010); Trial Counsel and Detention Operations Attorney, Headquarters and Headquarters Company, 2d Brigade, 1st Armored Division, Baghdad, Iraq, 2008–2009; Trial Counsel, Headquarters and Headquarters Company, 2d Brigade, 1st Armored Division, Baumholder, Germany, 2007–2008; Claims Judge Advocate, Headquarters and Headquarters Company, 1st Armored Division, Friedberg, Germany, 2006–2007. Member of the bars of Minnesota and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 62d Judge Advocate Officer Graduate Course. The author thanks Dr. Joseph G.D. Babb and Lieutenant Colonel Bill Johnson for their insight and guidance. The author also thanks Majors Keirsten H. Kennedy and Cara-Ann Hamaguchi for their editorial prowess.

[1] ROBERT LECKIE, DELIVERED FROM EVIL: THE SAGA OF WORLD WAR II, at 303 (1987).

[2] IRIS CHANG, THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II, at 42 (1997); *see also* Fujiwara Akira, *The Nanking Atrocity: An Interpretive Overview*, *in* THE NANKING ATROCITY, 1937–38: COMPLICATING THE PICTURE 29, 38–40 (Bob Tadashi Wakabayashi ed., 2007). Nanking is located nearly 300 kilometers west of Shanghai on the southern bank of the Yangtze River. The city was not a part of the Japan's original invasion plan. However, after the Japanese failed to destroy the Chinese army in Shanghai in the fall of 1937, the imperial army received new orders to expand their operations to a broader "central China area." CHANG, *supra*, at 42.

Chinese forces inside the ancient capital.[3] Upon entering the city, the Japanese were instantly outnumbered by 90,000 Chinese soldiers and more than half a million civilians.[4] The Japanese commanders leading the assault fully appreciated the potentially disastrous ramifications if their men failed to contain the civilian population.[5] Within hours, the Japanese began the systematic separation and execution of Chinese prisoners of war (POWs), leaving no one to protect the Chinese civilians.[6] Soon the Yangtze River was a logjam of bobbing and bloated human corpses.[7]

The acts committed by the Japanese forces in Nanking were arguably the most heinous and barbaric war crimes committed during World War II. In the six weeks following the fall of Nanking, Japanese forces killed approximately 260,000 Chinese civilians.[8] Japanese methods of torture and execution included: burying people alive, carving long strips of flesh from people before killing them, setting people on fire after gouging out their eyes and cutting off their noses and ears, freezing people to death, and impaling babies with bayonets.[9] In addition to the mass executions, Japanese soldiers raped between 20,000 and 80,000 women, including children, elderly women, and women in the late stages of pregnancy.[10] Yet, the atrocities committed in Nanking were not isolated incidents. Japanese forces committed similar acts throughout China and numerous other countries across the Pacific theater.[11]

---

[3] CHANG, *supra* note 2, at 35.

[4] *Id.* at 42.

[5] *Id.*

[6] *Id.* at 42, 45. The Japanese used perfidy to trick the Chinese forces into surrendering *en masse* by promising fair treatment. Upon surrender, the prisoners of war (POWs) were divided into groups of 100 to 200 men, led to different locations throughout Nanking, and executed. *Id.*

[7] LECKIE, *supra* note 1, at 303.

[8] CHANG, *supra* note 2, at 102. Given the lack of an accurate pre-December 1937 census of Nanking's civilian population, scholars often disagree on civilian casualty estimates. However, recent calculations estimate the actual death toll to range between 300,000 and 400,000. *Id.* at 101–03.

[9] *Id.* at 87–88. *See also* Richard J. Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 TUL. J. INT'L & COMP. L. 59, 64–66 (2003).

[10] CHANG, *supra* note 2, at 89. These rapes were frequently accompanied by the slaughter of entire families. *Id.* at 91.

[11] Galvin, *supra* note 9, at 63. Between 1941 and 1942, in the Communist-controlled areas of China, Japanese forces implemented the "three-all" policy—sanko seisaku: "kill all, burn all, destroy all"—that purportedly decreased the population by nineteen million people. *Id.* at 64–65 (citing JOHN W. DOWER, WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR 43 (1986)). The atrocities that started in China spread to other

Following Japan's official surrender on September 2, 1945,[12] perhaps no other country, short of the United States,[13] had a greater interest in post-war justice in the Pacific theater than China. China used a three-system approach to effectuate that interest: it participated in the International Military Tribunal for the Far East (IMFE), also known as the "Tokyo Tribunal" or "Tokyo War Crimes Trials"[14] as one of eleven nations; it allowed another country (i.e., the United States) to hold trials within its borders; and it conducted its own domestic trials at various

---

Japanese-occupied territories in Malaya, Burma, Singapore, Thailand, the Philippines, Vietnam (formerly Indochina), and Korea. Galvin, *supra* note 9, at 63. For example, from mid-1942 and continuing into 1943, the Japanese set out to build a railway military supply line connecting Bangkok, Thailand, with Rangoon, Burma, using slave labor. The Japanese mobilized more than 61,800 allied POWs for the project; one in every five (approximately 12,300) died from mistreatment. The Japanese also forced more than 200,000 civilians from Southeast Asia to work on the railway's construction—between 42,000 and 74,000 died because of mistreatment. YUMA TOTANI, THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II, at 142–43 (2008). Ultimately, the Japanese were responsible for an estimated 2,850,000 Chinese civilians deaths and 758,000 deaths throughout the rest of Asia and the Pacific regions. Galvin, *supra* note 9, at 63 (citing R.J. RUMMEL, DEATH BY GOVERNMENT 143–56 (1994)).

[12] *Featured Documents*, NAT'L ARCHIVES & RECORDS ADMIN., http://www.archives.gov/exhibits/featured_documents/japanese_surrender_document/index.html (last visited Mar. 21, 2014) [hereinafter Instrument of Surrender].

[13] The atrocities committed against U.S. POWs included the infamous Bataan Death March, which resulted in deaths of more than 17,200 American and Filipino captives; the mock trial and execution of captured American pilots, including eight of the Doolittle Raid fliers shot down over China in 1942; and countless POW camp abuses, such as the torture, starvation, and improper medical care of POWs at Kokura prison camp No. 3 that resulted in approximately 150 deaths. PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945–1951, at 66, 68–74, 84–85 (1979). In total, 27,465 American POWs were held by the Japanese during World War II, more than 40.44% (11,107) died while in detention. GARY K. REYNOLDS, CONG. RESEARCH SERV., CRS-11, U.S. PRISONERS OF WAR AND CIVILIAN AMERICAN CITIZENS CAPTURED AND INTERNED BY JAPAN IN WORLD WAR II: THE ISSUE OF COMPENSATION (2002) *available at* http://www.history.navy.mil/library/online/usprisoners_japancomp.htm.

[14] The terms "Tokyo Tribunal" or "Tokyo War Crimes Trials" technically refer to the work of the International Military Tribunal for the Far East (IMTFE) at Tokyo between May 3, 1946, and November 12, 1948. However, over the years, these terms have expanded to include all the trials held across the Asian/Pacific region. TIMOTHY MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS, at xiii (2001). For the purposes of this article, the term Tokyo Tribunal will refer specifically to the IMTFE conducted in Tokyo and will be used synonymously with IMTFE. The term "domestic trials" will be used to describe the prosecution of suspected Japanese war criminals in forums outside of the international tribunal at Tokyo.

locations throughout China.[15] China's three-system approach is an overlooked but valuable model for prosecuting current and future war crimes committed during an armed conflict.

The recently completed Special Court for Sierra Leone (SCSL) presents an interesting case study regarding the modern-day application of China's "lessons-learned."[16] The parallels between China and Sierra Leone—in terms of both conflict brutality and post-war instability—are sufficiently similar to merit further examination. First, both countries endured more than a decade of war that was marred with horrific crimes committed against their respective civilian populations.[17] Second, the governments in both China and Sierra Leone struggled to retain authority over their territory after the end of hostilities—in China, the Nationalist Government clashed with the Communists,[18] while Sierra Leone's peace agreement with the Revolutionary United Front (RUF) was shaky at best.[19] Third, both countries recognized the immediate importance of soliciting outside assistance—China sought help from the United States, while Sierra Leone requested aid from the United Nations (UN). Finally, both China and Sierra Leone dealt with the difficult challenge of prosecuting (or failing to prosecute) a head of state—China with Japan's Emperor Hirohito (who was ultimately granted immunity)[20] and Sierra Leone with Liberia's Charles Taylor (who was convicted after a nearly

---

[15] For the purposes of this article, the term "China" refers to the internationally-recognized sovereign government of China led by Chiang Kai-shek. Although the Chinese communists, led by Mao Tse-tung, played a key role in opposing Japanese forces throughout World War II, this article only examines the actions of the Chinese government recognized by the United States during the time period in question.

[16] The Special Court for Sierra Leone (SCSL) is the international community's latest experiment in prosecuting war crimes. Established in 2002, the SCSL indicted thirteen war criminals, ultimately prosecuting ten of them. The court officially closed in December 2013. Residual Special Court for Sierra Leone, *The Special Court for Sierra Leone, the Residual Special Court for Sierra Leone*, http://www.rscsl.org/ (last visited Oct. 31, 2014) [hereinafter RESIDUAL SPECIAL COURT FOR SIERRA LEONE].

[17] Although Sierra Leone's conflict if often classified as a non-international armed conflict (NIAC), its cross-border components—especially, the roles of Liberia and Burkina Faso—present clear international armed conflict characteristics. John R. Morss & Mirko Bagaric, *The Banality of Justice: Reflections on Sierra Leone's Special Court*, 8 OR. REV. INT'L L. 1, 13 (2006) (citing Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT'L L. J. 391, 408, 417 (2001)).

[18] *See generally* U.S. DEP'T OF STATE, UNITED STATES RELATIONS WITH CHINA: WITH SPECIAL REFERENCE TO THE PERIOD 1944–1949, at 311–13 (1949) [U.S. DEP'T OF STATE].

[19] DANNY HOFFMAN, THE WAR MACHINES: YOUNG MEN AND VIOLENCE IN SIERRA LEONE AND LIBERIA, at xii (2011).

[20] PICCIGALLO, *supra* note 13, at 16.

six-year trial).[21]

Drawing on the practices of the SCSL, the remaining sections of this article survey how each of the three systems China employed could have been used to alleviate or eliminate the key shortcomings of the SCSL. Part II examines the background and key legal characteristics of the International Military Tribunal for the Far East (IMTFE), which includes a brief review of the International Military Tribunal at Nuremberg (IMTN)—the precedent used to create the IMTFE. After gaining an understanding of the circumstances surrounding the establishment of the IMTFE and its legal components, Part III examines China's role in the IMTFE and assesses the "hybrid" court established in Sierra Leone.[22] This Part also considers two major shortcomings of the SCSL—jurisdictional limitations and the exclusion of interested parties—and how these perceived defects could have been limited (or even prevented) by considering the international model used in the Far East. Then, Part IV explores the two domestic forums used in China—one American-led and one Chinese-led—and discusses how these distinct trial systems could have enhanced the perception of justice in Sierra Leone. This article concludes by highlighting the value of China's three-system approach and the practical lessons-learned it offers for prosecuting future war crimes.

II. Background

A. The International Model after World War II

While many scholars have written about the long-lasting, positive impact of the European model for prosecuting war crimes after World War II—the International Military Tribunal at Nuremberg (IMTN)—the war trials conducted in the Pacific following Japan's surrender have

---

[21] Afua Hirsh, *Charles Taylor Is Guilty—But What's the Verdict on International Justice?*, THE GUARDIAN (Apr. 26, 2012), http://www.theguardian.com/commentisfree/libertycentral/2012/apr/26/charles-taylor-guility-abetting-war-crimes.

[22] The SCSL is referred to as a "hybrid" tribunal because it is a combination of efforts between the international community (i.e., the United Nations) and the national institutions of a country where war crimes were committed (i.e., Sierra Leone). Hybrid tribunals typically incorporate both domestic and international law into their statutes and employ both national and international judges, counsel, and staff personnel. David Cohen, *"Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future*, 43 STAN. J. INT'L L. 1, 2 (2007).

received far less scrutiny. That said, what limited attention has been given to the IMTFE has been overwhelmingly negative.[23] When comparing the IMTFE to the IMTN, critics tend to focus on how the Tokyo Tribunal was created—through a unilateral executive decree rather than an international agreement—and four common deficiencies related to: (1) allowing Emperor Hirohito to escape prosecution; (2) prosecuting only certain types of crimes; (3) failing to prosecute all criminals and offenses; and (4) missing a key opportunity to educate the Japanese civilian population.[24] While some censure of the IMTFE is warranted, many critics fail to appreciate the unique challenges posed by the conditions in the Pacific theater and the abundant similarities between Tokyo and Nuremberg.

Several key characteristics of the IMTN must be considered since the IMTFE Charter "carefully copied" the IMTN language with few modifications.[25] The IMTN was established by charter (negotiated by the United States, the United Kingdom, France, and the Soviet Union (present-day Russia)) at the London Conference in the summer of 1945.[26] Jurisdiction for the trial of military commanders, as well as national leaders, was established in Article 6 of the IMTN Charter.[27] Specifically, Article 6 called for the trial and punishment of major war criminals of the European Axis countries for not only conventional war crimes but also for two new crimes: "crimes against peace" and "crimes against humanity."[28] Convened at Nuremberg's Palace of Justice in November

---

[23] At the opening of the tribunal in 1946, the IMTFE was marked with bad publicity. *Time* magazine stated that the Tokyo Tribunal "looked . . . like a third-string road company of the Nuremberg show." RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 3 (1971) (citing TIME, May 20, 1946).

[24] *See* Galvin, *supra* note 9, at 72; Zhang Wanhong, *From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial (on the Sixtieth Anniversary of the Nuremberg Trials)*, 27 CARDOZO L. REV. 1673, 1675–77 (2006); *see generally* Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT'L L. 1085 (2010).

[25] MINEAR, *supra* note 23, at 23.

[26] *Id.* at 7.

[27] *Id.* at 23. *See* Charter of the International Military Tribunal, U.S.-Fr.-U.K.-U.S.S.R, art. 6, Aug. 8, 1945, 59 Stat. 1544 [hereinafter Nuremberg Charter].

[28] MINEAR, *supra* note 23, at 23; *see* Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 16–17 (1973). The term "crimes against peace" was defined in Article 6(a) of the Nuremberg Charter as "planning, preparation, initiation, or waging of a war of aggression, or war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing . . . ." Nuremberg Charter, *supra* note 27, art. 6(a). The term "crimes against humanity" was defined in Article 6(c) of the Charter as "inhumane acts committed against any civilian population, before or during war." *Id.* art. 6(c).

1945, the IMTN tried twenty-two of the highest-ranking political and military leaders of Nazi Germany.[29] The IMTN lasted a full year and produced eleven death sentences.[30] Upon completion of the IMTN, thousands of Nazi war criminals were left to be tried in other military tribunals[31] and domestic courts throughout Europe pursuant to the Moscow Declaration[32]—a policy that would carry over to the Far East to guide the prosecution of the Japanese.[33]

B. The International Military Tribunal for the Far East

Unlike the Nuremberg Charter, which is universally accepted as a true international agreement—the product of lengthy negotiations between the Big Four—the IMTFE Charter was issued via a unilateral declaration.[34] On January 19, 1946, acting under orders from the U.S. Joint Chiefs of Staff, General Douglas MacArthur, the Supreme Commander for the Allied Powers (SCAP),[35] established the IMTFE and

---

[29] HILARY EARL, THE NUREMBERG SS-EINSATZGRUPPEN TRIAL, 1945–1958: ATROCITY, LAW, AND HISTORY 23 (2009).

[30] *Id.*

[31] E.g., such as the additional twelve subsequent Nuremberg proceedings conducted by the United States. *Id.*

[32] The Moscow Declaration called for German officers and men, who had been responsible for or had taken a consenting part in the atrocities, to be "sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries. . . ." Suzannah Linton, *Rediscovering the War Crimes Trials in Hong Kong, 1946–48*, 13 MELB. J. INT'L L. 284, 289–90 (2012).

[33] *Id.* at 290.

[34] ARNOLD C. BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS 60 (1987). The Nuremberg Charter was later backed by nineteen other nations and ultimately endorsed by the General Assembly of the United Nations. MINEAR, *supra* note 23, at 36.

[35] General MacArthur had previously accepted the surrender of the Japanese "for the United States, Republic of China, United Kingdom, and the Union of the Soviet Socialist Republics, and in the interest of the other United Nations at war with Japan," on September 2, 1945. Instrument of Surrender, *supra* note 12. With the signing of the Instrument of Surrender, the Japanese government formally recognized the Allied Powers' right to prosecute Japanese war criminals. TOTANI, *supra* note 11, at 7. Almost immediately thereafter, the United States took affirmative steps to create an international military tribunal for prosecuting suspected war criminals. On September 22, 1945, General MacArthur received a U.S. Joint Chiefs of Staff (JCS) directive that included detailed instructions concerning the establishment of an international military tribunal. Within two weeks of Japan's surrender, the Supreme Commander of the Allied Powers's Legal Section initiated the process for apprehending major Japanese war criminals. By December 1945, President Harry Truman had appointed former assistant to the attorney

issued its Charter through executive decree.[36]

Although no formal negotiations preceded the IMTFE Charter,[37] this document relied heavily on the structure and language of the Nuremberg Charter, which incorporated the respective views of the countries attending the negotiations in London in 1945.[38] Further, without question, the other allied countries were included in the IMTFE policy-making process.[39] Following the Moscow Conference in December 1945, the allied nations established the Far Eastern Commission (FEC) to formulate the policies, principles, and standards to ensure Japan fulfilled its obligations under the terms of surrender.[40] In the end, the amended IMTFE Charter, issued on April 26, 1946, contained revisions proposed by the FEC.[41] The most notable change to the Charter gave each FEC member, not just the signatories of the Instrument of Surrender, the right to nominate a justice and an associate counsel (i.e., assistant prosecutor) to the IMTFE.[42]

The key differences between the IMTN and IMTFE Charters were these: the number of judges (eleven at Tokyo versus four at Nuremberg); the number of languages (two at Tokyo, as opposed to four at Nuremberg); the number of prosecutors (a chief prosecutor and eleven associate prosecutors at Tokyo instead of four co-equal prosecutors at Nuremberg); and the absence of a provision to prosecute criminal

---

general Joseph B. Keenan as chief prosecutor for the tribunal in Tokyo in the hopes that a coherent prosecution staff and case would emerge. PICCIGALLO, *supra* note 13, at 10.

[36] PICCIGALLO, *supra* note 13, at 10–12.

[37] MINEAR, *supra* note 23, at 20.

[38] *Id.* at 20–21. Typically, such action by the United States would have caused major friction amongst the Allies; however, General MacArthur's actions were generally accepted by the Allied Powers. *Id.*

[39] The initial JCS directive to General MacArthur was actually reviewed and approved by the allied countries. PICCIGALLO, *supra* note 13, at 10–11.

[40] *Id.* at 10–11. The Far Eastern Commission (FEC) was composed of representatives from eleven nations: the U.S., the U.S.S.R., United Kingdom, China, France, the Netherlands, Canada, Australia, New Zealand, India and the Philippines. JAMES F. BYRNES ET AL., REPORT OF THE MEETING OF THE MINISTERS OF FOREIGN AFFAIRS OF THE UNION OF SOVIET SOCIALIST REPUBLICS, THE UNITED STATES OF AMERICA, THE UNITED KINGDOM (Dec. 16–26, 1945), *available at* http://avalon.law.yale.edu/20th_century/decade19.asp. As part of the FEC, each nation was responsible, in varying degrees, for investigating, locating, apprehending, and prosecuting Japanese war criminals. PICCIGALLO, *supra* note 13, at xii. Much like the London Conference that preceded the signing of the IMTN Charter, the FEC provided a forum for the other allied countries to voice any reservations. *Id.* at 11.

[41] PICCIGALLO, *supra* note 13, at 11.

[42] MINEAR, *supra* note 23, at 21.

organizations.[43] However, arguably the biggest difference was the IMTFE Charter's "exclusive provision" that restricted prosecution to only those persons charged with an offense that included crimes against peace.[44] Article 5(a) of the IMTFE Charter explicitly mandated that the IMTFE would have the power to try and punish "war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace."[45] Since the IMTFE's authority to prosecute derived from this article, suspects prosecuted for such crimes became known as class "A" defendants.[46] With jurisdiction limited to only crimes against peace, just twenty-eight class "A" defendants were selected for prosecution at the Tokyo Tribunal.[47]

All but two of the defendants tried at the IMTFE "occupied the highest government and military posts" at some point between 1928 and 1945.[48] Unfortunately, Japan's Head of State, Emperor Hirohito, was

---

[43] Robert B. Smith, *Japanese War Crime Trials*, HISTORYNET (June 12, 2006), http://www.historynet.com/japanese-war-crime-trial.htm. *See* MINEAR, *supra* note 23, at 22.

[44] PICCIGALLO, *supra* note 13, at 11–12; *see* International Military Tribunal for the Far East (IMTFE) Charter art. 5 (Jan. 1, 1946) [hereinafter IMTFE Charter], *available at* http://www.uni-marburg.de/icwc/dateien/imtfec.pdf.

[45] IMTFE Charter, *supra* note 44, art. 5. Article 5(a) defined "crime against peace" as "[n]amely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing[.]" *Id.* The Charter's inclusion of "crimes against peace" directly reflected the precedent set at Nuremberg and the idea that war waged against peaceful countries in breach of the General Treaty for the Renunciation of War of 1928 (i.e., the Kellogg-Briand Pact) constituted a crime under international law. Although the Kellogg-Briand Pact did not establish individual criminal responsibility for such a war, Nuremberg established a new international standard. TOTANI, *supra* note 11, at 20–21.

[46] Galvin, *supra* note 9, at 70. The IMTFE Charter also addressed "violations of the laws or customs of war" and "crimes against humanity" under articles 5(b) and 5(c) respectively (commonly referred to as class "B" and "C" violations). IMTFE Charter, *supra* note 44, art. 5. However, because of the "exclusive provision"—limiting the IMTFE's prosecution to only class "A" defendants—the Charter essentially compelled domestic courts or commissions to prosecute the class "B" and "C" cases. PICCIGALLO, *supra* note 13, at 12.

[47] PICCIGALLO, *supra* note 13, at 14.

[48] *Id.*; *see* Galvin, *supra* note 9, at 70. The accused included four former prime ministers, four former foreign ministers, five former war ministers, two former navy ministers, and four former ambassadors, amongst others. Smith, *supra* note 43. At arraignment, all the defendants pled not guilty to all counts except for Shumei Okawa, who was dismissed from court to undergo psychiatric treatment. MINEAR, *supra* note 23, at 25. Of the twenty-eight defendants arraigned, only twenty-five were ultimately sentenced. *Id.* Two

omitted from the list of accused—arguably the single biggest contributing factor to the IMTFE's negative legacy.[49] Critics of the Tokyo Tribunal emphasize the apparent lack of justice done in the Far East because the person ultimately responsible for Japan's armed forces—and by extension the atrocities committed by Japanese forces—was never prosecuted.[50]

But these same critics forget (or purposefully ignore) the fundamental differences of the military occupations in Germany and Japan. Specifically by the time Germany surrendered on May 7, 1945, little was left of the German military and the former Nazi regime.[51] Hitler was dead, Berlin had fallen to the Soviets, and the United States and Great Britain controlled Western Europe from the Atlantic to the Elbe River.[52] On the contrary, the four main islands of Japan were never occupied by the United States or any other allied country before the landing of the 11th Airborne Division troops on the outskirts of Tokyo on August 30, 1945.[53] And while the Instrument of Surrender was considered unconditional, concessions were clearly made to avoid the large number of casualties that were predicted for the invasion of Japan's main islands.[54] Yet, despite its deficiencies, the IMTFE proved to be a valuable and efficient international forum for executing justice.[55]

---

defendants died before completion of the trial, and Shumei Okawa was found unfit to stand trial. *Id.*

[49] Galvin, *supra* note 9, at 71–72.

[50] *Id.*

[51] James B. Griffin, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 VAND. J. TRANSNAT'L L. 405, 410 (2001).

[52] *Id.*

[53] E.M. FLANAGAN, JR., AIRBORNE: A COMBAT HISTORY OF AMERICAN AIRBORNE FORCES 340–41 (2002).

[54] Although Japan's navy and industrial capacity had been destroyed by 1945, millions of armed Japanese soldiers remained resolved to fight for Emperor Hirohito. Griffin, *supra* note 51, at 414. Without question, no concession was greater than granting immunity to Emperor Hirohito—"a calculated political decision undertaken in the best interests of the Allied powers." PICCIGALLO, *supra* note 13, at 16.

[55] On November 4, 1948—two-and-a-half years after the opening of the IMTFE—the eleven international justices, "after analyzing the enormous collection of evidence introduced at the trial," returned their verdict. Twenty days later, the representatives of the Allied Council for Japan reviewed and confirmed the verdicts. PICCIGALLO, *supra* note 13, at 23, 31. In comparison, the trial of Charles Taylor alone took more than six years to complete. Indicted by the SCSL on March 7, 2003, Taylor was taken into custody and transferred to the SCSL on March 29, 2006. *Background on Prosecutor v. Charles Ghankay Taylor*, http://www.sc-sl.org/CASES/CharlesTaylor/tabid/107/Default.aspx (last visited Mar. 19, 2014). His sentence was announced on May 30, 2012. Owen

III. International Tribunals

A. China's Role in the International Military Tribunal for the Far East

China's role in the development of international war crimes policy in the Pacific theater pre-dated Japan's official surrender on September 2, 1945.[56] In January 1942, a Chinese minister attended the signing of the Allied Declaration of St. James, which declared Nazi atrocities to be in violation of the laws and customs of war, and subscribed to its principles.[57] The Chinese joined in the establishment of the UN War Crimes Commission (UNWCC) in October 1943, and spearheaded the creation of the Far Eastern Sub-Committee (FESC) in 1944.[58]

Following Japan's surrender, the Chinese attended the Far Eastern Advisory Committee (FEAC) meeting in Washington, D.C., in October 1945.[59] Once the FEAC was reconstituted as the Far Eastern Committee (FEC) in December 1945, China presided over sub-committee No. 5, "War Criminals," throughout its duration.[60] In May 1946, when the IMTFE finally convened, a Chinese judge sat on the bench (alongside the other ten judges from the represented nations), and a Chinese attorney worked on the international prosecution team.[61] Additionally, the Chinese assisted a fact-finding group that "scoured China for evidence

---

Bowcott, *Charles Taylor Sentenced to 50 Years in Prison for War Crimes*, THE GUARDIAN, May 30, 2012, http://www.theguardian.com/world/2012/may/30/charles-taylor-sentenced-50-years-war-crimes.

[56] As previously discussed in footnote 35, although General MacArthur officially accepted Japan's surrender on behalf of the Allied Powers, China was one of four signatories to the Instrument of Surrender. Instrument of Surrender, *supra* note 12.

[57] PICCIGALLO, *supra* note 13, at 158. Signatories of the St. James Declaration, which included representatives in exile of the nine European countries under German occupation, committed themselves to punish, "through the channel of organized justice," those guilty of or responsible for war crimes. Wen-Wei Lai, *Forgiven and Forgotten: The Republic of China in the United Nations War Crimes Commission*, 25 COLUM. J. ASIAN L. 306, 309 (2012).

[58] PICCIGALLO, *supra* note 13, at 158. On multiple occasions, Chinese representatives at the UN War Crimes Commission argued for the expansion of jurisdiction over Japanese war crimes to include offenses committed starting with the Manchuria invasion. Lai, *supra* note 57, at 315–18. At China's urging, the IMTFE's prosecutorial branch eventually expanded its jurisdiction to cover war crimes committed since April 1928, when the Japanese assassinated Chinese Generalissimo Zhang Zuolin, whose forces occupied Manchuria. *Id*. at 318.

[59] PICCIGALLO, *supra* note 13, at 158.

[60] *Id.*

[61] *Id.*

and witnesses for use at the [Tokyo] tribunal."[62]

The IMTFE Charter established specific procedural safeguards and guaranteed certain rights for the twenty-eight Japanese defendants tried in Tokyo.[63] Similar to Nuremberg, the Allies recognized the unique character of war-crimes trials and relaxed the rules of evidence; they adopted and applied "to the greatest possible extent expeditious and non-technical procedure," admitting any evidence deemed to have probative value.[64] At the close of the IMTFE, all of the defendants were found guilty of at least one of the charged counts.[65] The findings were fully supported by eight of eleven judges, including the judge from China.[66]

---

[62] *Id.* at 158–59. China had a strong interest in promoting justice through the prosecution of war criminals under the IMTFE Charter. From the Chinese standpoint, two of the most infamous defendants prosecuted at the Tokyo Tribunal were General Iwane Matsui, former Commander of Japan's Central China Area Army during the Rape of Nanking, and Mr. Hirota Koki, the foreign minister at same time (1937–1938). MINEAR, *supra* note 23, at 71–72.

[63] These rights and safeguards included: public indictments and statement of plain, concise charges in the Japanese language; bilingual (English/Japanese) trials; the right to counsel (specifically, freely chosen counsel subject to the tribunal's approval); the right to examine witnesses and conduct a defense; and aid in the production of evidence. MINEAR, *supra* note 23, at 21–22. Allied authorities even established an International Defense Staff, consisting of distinguished Japanese attorneys and Western attorneys (mostly American), brought on "to assist Japanese counsel" with Western legal concepts, trial procedures, and style. PICCIGALLO, *supra* note 13, at 13–14.

[64] PICCIGALLO, *supra* note 13, at 12. This guidance opened the door for government and ICRC documents that "appeared" genuine, which included: any affidavit, deposition, or signed statement; sworn and unsworn statements (to include diary entries and letters); copies of the aforementioned documents (rather than originals); and hearsay. The evidentiary realities (e.g., repatriation of ex-POWs, witnesses and evidence scattered across the Pacific, destruction of key documents, difficulties identifying, locating, and apprehending suspects, etc.) made trying these cases very difficult. Following any restrictive rules of evidence (like any rules of evidence that were applicable at the time) would have made prosecution nearly impossible. *Id.* at 12–13. Article 13 of the Charter outlined the rules of evidence applicable at the tribunal. IMTFE Charter, *supra* note 44, art. 13.

[65] MINEAR, *supra* note 23, at 31. On the other hand, none of the defendants were convicted of all counts. Sentences for the defendants included death by hanging (seven), life imprisonment (sixteen), twenty years' confinement (one), and seven years' confinement (one). *Id.*

[66] *Id.* The three dissenting justices were France (who dissented in part because Emperor Hirohito had not been indicted and because the decision came from "the tribunal" versus "the majority"), the Netherlands (who dissented on the reasoning behind the finding that aggressive war was a crime, but not the finding itself, and on the issue of civilian responsibility for military acts), and India (who stated that the evidence had been slanted in favor of the prosecution, that the counts had not been proved, and that all accused were innocent on all counts). *Id.* at 32–33.

The defendants were granted ten days to appeal to the SCAP. After consultation with the diplomatic representatives of the nations comprising the FEC, General MacArthur confirmed the sentences.[67]

B. The Special Court for Sierra Leone

Created by an international agreement between the Government of Sierra Leone and the United Nations,[68] the SCSL was a departure from the international ad hoc criminal tribunals and the International Criminal Court, which employ only international law.[69] Instead, the SCSL combined international and domestic law into one system, enabling it to prosecute both international and national crimes.[70] Consequently, proponents of hybrid tribunals argue that these courts are less likely to be manipulated by politics and corruption or compelled to use limited or antiquated laws as domestic courts might.[71] Additionally, unlike entirely international tribunals, hybrid courts are arguably better suited to meet the needs of countries emerging from conflict and are less likely to be removed from the circumstances where the crimes occurred.[72] In the

---

[67] *Id.* at 33 (citing Solis Horwitz, *The Tokyo Trial*, INT'L CONCILIATION, Nov. 1950, at 573).

[68] Tom Perriello & Marieke Wierda, *Prosecutions Case Studies Series: The Special Court for Sierra Leone Under Scrutiny* 1 (2006), ICTJ, http://ictj.org/publication/special-court-sierra-leone-under-scrutiny. In June 2000, Sierra Leone's president, Ahmed Tejan Kabbah, sent a letter to the UN Security Council requesting international support for a "special court" to prosecute members of the Revolutionary United Front (RUF) for their crimes against the Sierra Leone and UN peacekeepers. Letter from the Permanent Representative of Sierra Leone, to the United Nations to the President of the Sec. Council, U.N. Doc. S/200/786 [hereinafter Kabbah's Letter]. The UN Security Council responded by passing UN Security Council Resolution (UNSCR) 1315 authorizing the Secretary-General to negotiate the creation of an international special court with Sierra Leone. S.C. Res. 1315, para. 1, U.N. SCOR., U.N. Doc. S/RES/1315 (Aug. 14, 2000), *available at* http://unscr.com/en/resolutions/doc/1315 [hereinafter UNSCR 1315].

[69] Chandra Lekha Sriram, *Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone*, 29 FORDHAM INT'L L.J. 472, 474 (2006).

[70] *Id.* at 474.

[71] *Id.*

[72] *Id.* In the case of Sierra Leone, while there was a functioning national government at the time the SCSL was created, the country's civil and judicial infrastructure had been severely damaged, and the RUF was on the verge of another coup. LANSANA GBERIE, A DIRTY WAR IN WEST AFRICA: THE RUF AND THE DESTRUCTION OF SIERRA LEONE 166 (2005). Arguably, the hybrid nature of the court gave Sierra Leone a sense of "ownership" over the cases since national law alone was not capable. Charles Chernor Jalloh, *The Contribution of the Special Court for Sierra Leone to the Development of International Law*, 15 AFR. J. INT'L & COMP. L. 165, 173 (2007).

case of the SCSL, the court was completely independent of the country's regular judicial system and exercised concurrent jurisdiction with, but also primacy over, the domestic courts.[73]

Established in January 2002 following a decade-long civil war that devastated Sierra Leone, the SCSL "emerged from a unique convergence of a government eager for justice in the wake of a failed amnesty . . . and an international community anxious to stabilize the region by removing those who threatened the peace."[74] The conflict began in 1991 when the Revolutionary United Front (RUF), a partly indigenous rebel group, invaded Sierra Leone from neighboring Liberia,[75] resulting in the disintegration of state authority.[76] By the close of the war in 2000, Sierra Leone had suffered two military coups (in 1992 and 1997), a partial restoration of the government (in 1998), and a failed negotiated peace agreement, the Lomé Accord (in 1999).[77]

The conflict in Sierra Leone was notable for the war crimes committed against tens of thousands of civilians, which included torture, rape, mutilation, and murder.[78] But it was the widespread use of child combatants,[79] systematic amputations, and the trafficking of "blood diamonds" that made the conflict infamous.[80] Further, although

---

[73] Sriram, *supra* note 69, at 480–81. This meant that the SCSL had the authority to compel Sierra Leone's domestic courts to relinquish certain cases upon request. *Id.* at 481.

[74] Perriello & Wierda, *supra* note 68, at 1, 14.

[75] *Id.* at 4. Out of the 100 RUF fighters who initially invaded Sierra Lone, almost fifty of them were Liberian and Burkinabe mercenaries. Matiangai Sirleaf, *Regional Approach to Transitional Justice: Examining the Special Court for Sierra Leone and the Truth & Reconciliation Commission for Liberia*, 21 FLA. J. INT'L L. 209, 218–19 (2009) (citing Int'l Crisis Group, Africa Reports No. 43, Liberia the Key to Ending Regional Instability 2 (2002)).

[76] Sirleaf, *supra* note 75, at 218.

[77] Perriello & Wierda, *supra* note 68, at 5–7. The Lomé Accord remains a matter of controversy. Critics feel it was a failure because Charles Taylor was able to dictate the terms of the agreement despite his ties to the RUF. Additionally, the final agreement included an amnesty "for all fights from all factions from all crimes." *Id.* at 7 (citing Lomé Peace Agreement, Sierra Leone-RUF, July 7, 1999, art. IX). Moreover, the Lomé Accord failed to end all hostilities. In May 2000, the RUF took 500 UN peacekeepers hostage and a week later "closed in on Freetown." *Id.* British paratroopers were deployed to evacuate citizens, provide security, and free hostages." *Id.*

[78] Cohen, *supra* note 22, at 11.

[79] Sriram, *supra* note 69, at 475.

[80] Cohen, *supra* note 22, at 11. Notoriety of these blood diamonds can be attributed, in part, to the Oscar-nominated Warner Bros. film *Blood Diamond* (2006), starring Leonardo DiCaprio. *See Blood Diamond*, INTERNET MOVIE DATABASE,

considered a non-international armed conflict, the violence in Sierra Leone had unique regional elements, specifically the involvement of citizens of neighboring states as both targets and combatants.[81] The conflict's cross-border aspect was underscored by the direct support provided to the RUF by the former Liberian president, Charles Taylor.[82]

Unfortunately, the jurisdictional reach of the SCSL was extremely limited, and thus it did not sufficiently cover the conflict's gruesome war crimes.[83] Yet, limited jurisdiction was just one of several pitfalls that plagued the SCSL, many of which likely could have been avoided if China's three-system approach to prosecuting war criminals had been considered.

C. Lessons Learned from the Tokyo Tribunals

When the United Nations and Sierra Leone developed the concept of the SCSL, they apparently did not consider the similar challenges seen at the Tokyo Tribunals. As a result, they failed to adequately resolve several common (and easily foreseeable) shortcomings.

1. Jurisdictional Limitations

The SCSL was established as a court of limited personal, territorial, and temporal jurisdiction.[84] While limited jurisdiction is not uncommon in international criminal tribunals—for instance, the IMTFE Charter limited personal jurisdiction to only those defendants "charged with

---

http://www.imdb.com/title/tt0450259/. And, to hip-hop artist Kanye West, who won a Grammy Award for "Best Rap Song" in 2005 for "Diamonds from Sierra Leone." *See Kanye West*, GRAMMY, http://www.grammy.com/artist/kanye-west.

[81] Sriram, *supra* note 69, at 482 (citing Fritz & Smith, *supra* note 17, at 408, 417). Both Liberia and Burkina Faso provided considerable support to the RUF, such as training, ammunition, money, and safe-haven. Additionally, Guinea was a victim of cross-border attacks. Fritz & Smith, *supra* note 17, at 417.

[82] At the time, Taylor was the leader of the National Patriotic Front of Liberia (NPFL), which had invaded northern Liberia in December 1989. Taylor believed that the Economic Community of West African States was blocking his attempts to take control of Liberia's capital. In an effort to destabilize the region, Taylor backed the RUF. The RUF received weapons, training, and safe haven in NPFL held territories. Sirleaf, *supra* note 75, at 218–19.

[83] Perriello & Wierda, *supra* note 68, at 2.

[84] *Id.* at 15–16.

offenses which include[d] crimes against peace"[85]—the SCSL's jurisdictional restrictions negatively impacted the notion of post-war justice.[86] Under the SCSL Statute, personal jurisdiction was limited to only "those who bear the greatest responsibility."[87] As a result, only thirteen individuals were indicted for war crimes after more than ten

---

[85] IMTFE Charter, *supra* note 44, art. 5. *See* PICCIGALLO, *supra* note 13, at 12.

[86] Another key component that impacted the post-war justice process in Sierra Leone was the creation of the country's Truth and Reconciliation Commission (TRC). A product of the 1999 Lomé Accord, the TRC promised full amnesty to combatants (on both sides) as part of the peace settlement. William Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, CRIM. LAW FORUM 15, 3–54, 3 (2004) *available at* http://center.theparentscircle.org/images/19c948eced2d4fde8a8dd5c1324def04.pdf. While continued hostilities between Sierra Leone and the RUF dissolved the agreement (and prompted Sierra Leone's President Kabbah to request UN support for the creation of the SCSL), Sierra Leone's Parliament eventually passed the Truth and Reconciliation Act in February 2000. *Truth Commission: Sierra Leone*, U.S. INST. OF PEACE, http://center.theparentscircle.org/images/19c948eced2d4fde8a8dd5c1324dcf04.pdf (last visited Oct. 31, 2014). The TRC was mandated "to produce a report on human rights violations beginning in 1991, provide a forum for both victims and perpetrators, and recommend policies to facilitate reconciliation and prevent future violations." *Id.* However, at times, the parallel operations of the TRC and SCSL created unnecessary tension. Both institutions respected the role of the other and appreciated their respective contributions to post-war justice but full cooperation between the two never fully matured. Schabas, *supra* note 85, at 5. In fact, during the final months of the TRC's existence, the SCSL's prosecutor was forced to litigate a major dispute over the testimony by indicted prisoners (who requested to testify in a public hearing at the TRC) before the court's judges. *Id.* President of the Appeals Chamber, Geoffrey Robertson, ruled that the accused could testify, but not publicly—a decision that split the proverbial "baby." *Id.* Given the intended scope of this article, examination of post-war justice is limited to war-crimes prosecution since a TRC was not conducted in China after World War II. *See generally* Galvin, *supra* note 9.

[87] Article 1(1) of the SCSL Statute states that

> [t]he Special Court shall . . . have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law . . . including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

Statute of the Special Court for Sierra Leone art. 1(1), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176 [hereinafter Special Court Statute]. Article 2 provides the court with authority to prosecute "crimes against humanity," while Article 3 grants the court jurisdiction over conventional war crimes (i.e., violations of Article 3 common to the Geneva Conventions and of Additional Protocol II). *See id.* arts. 2, 3.

years of war;[88] other perpetrators, who played an important role in the violence but did not reach the "greatest responsibility" threshold, avoided prosecution by the SCSL altogether.[89]

The SCSL was also restricted by limited temporal and territorial jurisdiction. Although the Sierra Leonean conflict dated back to 1991, only crimes committed after November 30, 1996, were prosecuted before the SCSL; thus, any atrocities that occurred during the five years prior to that date fell outside of the court's purview.[90] Even more troubling than this temporal restriction was the decision to limit the SCSL's territorial jurisdiction to crimes "committed in the territory of Sierra Leone."[91] The war crimes committed during the conflict were not limited to Sierra Leone. And unfortunately, crimes committed elsewhere in the region—particularly in Liberia and Guinea—were not heard by the court.[92]

As previously noted, limited jurisdiction is not uncommon to international tribunals. The IMTFE Charter, which also recognized the existence of Class B and C violations (i.e., "violations of the laws or customs of war" and "crimes against humanity"), only enabled the

---

[88] *Court Records Documenting System*, SPECIAL COURT FOR SIERRA LEONE, http://www.sc-sl.org/scsl/Listcases.asp [hereinafter *Court Records Documenting System*] (last visited Mar. 9, 2014). Three indictments—against RUF leader Foday Sankoh, his chief of staff Sam Bockarie, and Sierra Leone's interior minister, Sam Hinga Norma—were subsequently dismissed because the defendants died. J. Peter Pham, *A Viable Model for International Criminal Justice: The Special Court for Sierra Leone*, 19 N.Y. INT'L L. REV. 37, 42 (2006). Ten more individuals were charged by the SCSL for contempt of court resulting from their testimony. *Court Records Documenting System*, *supra*.

[89] Cohen, *supra* note 22, at 26.

[90] Perriello & Wierda, *supra* note 68, at 16. Some proponents of the November 30, 1996 start date argued that going back to 1991 would make prosecution very difficult, if not impossible. Yet, most of the crimes that took place in Sierra Leone's outlying provinces were committed before the conflict reached the capital, Freetown, in 1997. Thus, the Court's temporal jurisdiction limitation appeared to ignore the crimes committed against people outside of Freetown. *Id.*

[91] Special Court Statute, *supra* note 87, art. 1(1). Arguably, this limited territorial jurisdiction is appropriate for war crimes committed in a non-international armed conflict. However, as previously discussed, given the cross-border elements of the conflict, this limitation adversely effected post-war justice—especially for the Liberians.

[92] Fritz & Smith, *supra* note 17, at 417. *See* Sirleaf, *supra* note 75, at 220–21. Charles Taylor was not only responsible for crimes committed in Sierra Leone, but also for "grave international crimes occurring in the territory of Liberia." *Id.* at 238. Liberia's exclusion from the SCSL will be discussed in greater detail in the next subsection.

IMTFE to prosecute class A violations (i.e., "crimes against peace").[93] Additionally, certain categories of crimes were excluded from prosecution at the IMTFE, to include crimes related to the procurement and use of "comfort women" (i.e., forced prostitution)[94] and the use of biological and chemical weapons.[95] Finally (and arguably the greatest criticism of the IMTFE), the IMTFE had no jurisdiction over Emperor Hirohito, who had been granted immunity by the allied nations.[96] While Sierra Leone did not repeat the IMTFE's decision to immunize a Head of State from prosecution, it failed to expand the scope of personal, temporal, and territorial jurisdiction to include more crimes and more perpetrators, and therefore, it missed an opportunity to bring justice to a larger percentage of victims.[97]

2. Exclusion of Other Interested Parties

The SCSL, which was composed of two Trial Chambers (each with three judges) and one Appeals Chamber (consisting of five judges),[98]

---

[93] IMTFE Charter, *supra* note 44, art. 5. Thus, class B and C violations were left to the domestic tribunals assembled outside of Tokyo. PICCIGALLO, *supra* note 13, at 12, 33.

[94] Galvin, *supra* note 9, at 74. Apart from one national trial regarding the rape of Dutch comfort women, no other cases involving such crimes were prosecuted in either the Tokyo Tribunal or national-level tribunals. *Id*.

[95] *Id*. at 74–75. The U.S. prosecutors decided to grant immunity to Japanese soldiers assigned to Unit 731 in return for information obtained from medical experiments. *Id*. at 74. Unit 731 was a Japanese military unit that produced biological weapons, engaged in biological warfare, and conducted nonconsensual medical experiments, such as testing "plague-infested flea bombs" and releasing anthrax bombs. *Id*. at 65.

[96] Lai, *supra* note 57, at 320–21; *see* Wanhong, *supra* note 24, at 1675. Granting Emperor Hirohito immunity arguably had significant unintended consequences; specifically, failure to prosecute Hirohito greatly reduced "any sense of national shame or guilt over the atrocities committed by Japanese forces." Galvin, *supra* note 9, at 72 (citing GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 191 (1999)).

[97] *See* Cohen, *supra* note 22, at 26.

[98] RESIDUAL SPECIAL COURT FOR SIERRA LEONE, *supra* note 16. The original composition of the court was two Chambers—one Trial Chamber and one Appeals Chamber. Perriello & Wierda, *supra* note 68, at 19. The second Trial Chamber was added six months later in January 2005. Cohen, *supra* note 22, at 12. Trial Chambers judges were appointed by both Sierra Leone (one appointment) and the UN Secretary-General (two appointments). As for the Appeals Chamber, two judges were appointed by Sierra Leone and three were appointed by the UN Secretary-General. Perriello & Wierda, *supra* note 68, at 19.

never fully integrated representatives from all interested parties.[99] Initially, Sierra Leone only used three of its four judicial nominations.[100] Even after replacing two judges in the Appeals Chamber[101] and adding two judges as alternates,[102] no judges were ever appointed from neighboring Liberia, Burkina Faso, Guinea, or Cote d'Ivoire[103]—all of which, to varying degrees, had an interest in stabilizing the region and prosecuting war criminals involved in the conflict.[104] Furthermore, the court's Office of the Prosecutor, which included approximately sixty-five professional staff employees, was overwhelmingly comprised of Americans and Canadians.[105] From an equity standpoint, the Sierra

---

[99] The following countries were represented in the three SCSL chambers: Austria, Cameroon, Canada, Nigeria, Northern Ireland, Samoa, Sierra Leone, Sri Lanka, Uganda, and the United Kingdom. Justice Hassan Jallow (The Gambia) was formerly appointed as an Appeal Chamber judge, but left the court in September 2003 to become the Chief Prosecutor of the International Criminal Tribunal for Rwanda. Perriello & Wierda, *supra* note 68, at 19.

[100] Sierra Leone appointed two Sierra Leonean judges, Justices George Gelaga King and Rosolu John Bankole Thompson, and a Samoan judge, Justice Richard Lussick, to the court. *Id*. The decision to only nominate two national judges contributed to the perception that the court was not a true hybrid institution. *Id*.

[101] Justice Geoffrey Robertson (the United Kingdom) resigned over allegations of bias in 2007. *Geoffrey Robertson QC's Replacement Appointed*, HARV. INT'L L. J. ONLINE (Nov. 14, 2007, 9:28 AM), http://www.harvardilj.org/tag/scsl/feed/. Justice A. Raja N. Fernando (Sri Lanka) died in 2008. Press Release, Special Court for Sierra Leone, Justice A. Raja N. Fernando Passes Away (Nov. 24, 2008), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=woFmRisBcRA%3d&tabid=181 (on file with the Special Court for Sierra Leone Outreach and Publication Office). The two vacant positions in the Appeals Chamber were filled by Justice Jon Kamanda (Sierra Leone) in November 2007 and Shireen Avis Fisher (the United States) in May 2009. THE APPEALS CHAMBER, THE SPECIAL COURT FOR SIERRA LEONE AND THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE, FREETOWN, AND THE HAGUE, http://rscsl.org/Appeals_Chamber.html (last visited Oct. 31, 2014) [THE APPEALS CHAMBER].

[102] Justice El Hadji Malick Sow (Senegal) was appointed alternate judge to the Trial Chamber II by the United Nations in May 2007. *See* TRIAL CHAMBER II, THE SPECIAL COURT FOR SIERRA LEONE AND THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE, FREETOWN, AND THE HAGUE, http://rscsl.org/Trial_Chamber_II.html (last visited Oct. 31, 2014) [TRIAL CHAMBER II]). Justice Philip Nyamu Waki (Sierra Leone) was appointed alternate judge to the Appeals Chamber and joined the court in Feb. 2012. *See* THE APPEALS CHAMBER, *supra* note 101.

[103] *See* THE APPEALS CHAMBER, *supra* note 101; TRIAL CHAMBER II, *supra* note 102; TRIAL CHAMBER I, THE SPECIAL COURT FOR SIERRA LEONE AND THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE, FREETOWN, AND THE HAGUE, http://rscl.org/Trial_Chamber_I.html (last visited Oct. 31, 2014).

[104] Sirleaf, *supra* note 75, at 220–21.

[105] While Sierra Leoneans held approximately one-third of the staff positions, nearly half the posts (and almost every senior position) were occupied by the individuals from the

Leoneans were underrepresented.[106] Furthermore, Liberia, which arguably had a greater interest in prosecuting its former Head of State, Charles Taylor, than Sierra Leone, was left out of the trial process entirely.[107]

Unlike the SCSL, the Tokyo Tribunal provided an international forum that included all the allied nations that were involved in the Pacific-theater conflict. And although not commonly recognized as a true international court, the IMTFE included representatives from eleven different nations when it opened in May 1946.[108] In contrast, the absence of Sierra Leone's neighboring West African countries—especially Liberia—only supports the assertion that the SCSL was not truly international (nor truly regional) in nature.[109] Undoubtedly, the conflicts in Liberia and Sierra Leone, "which resulted in nearly 300,000 deaths and created millions of refugees and internally displaced people[,]" were tied to Taylor and his relationship with the RUF leader, Foday Sankoh.[110] Yet, despite the SCSL's successful prosecution of

---

"Global North" (i.e., the United States and Canada). Perriello & Wierda, *supra* note 68, at 21.

[106] In a hybrid system, appointing local judges and hiring local staff can help shape local perception of the legitimacy of the system. However, marginalizing local institutions and actors undermines the hybrid court's authority. *See* Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 361–62 (2006). Until the additions of Justices Kamanda (in 2007) and Waki (in 2012), only two Sierra Leoneans occupied SCSL judge positions (out of thirteen available). *See* Perriello & Wierda, *supra* note 68, at 19; *see also supra* note 97 and accompanying text. Furthermore, the first Sierra Leonean Acting Prosecutor of the Special Court, Joseph Kamara, was not appointed until the fall of 2009. *See* Press Release, Special Court for Sierra Leone, Joseph F. Kamara Named Acting Prosecutor (Sept. 8, 2009), *available at* http://www.rscsl.org/Documents/Press/2009/pressrelease-090809.pdf (on file with the Special Court for Sierra Leone Outreach and Publication Office).

[107] No Liberians were selected to serve as judges or prosecutors. Participation as a defendant or witness was the exception. *See generally* Sirleaf, *supra* note 74.

[108] The countries included the United States, the United Kingdom, Australia, the Netherlands, China, the Philippines, France, the Soviet Union, Canada, New Zealand, and India. PICCIGALLO, *supra* note 13, at xii–xiii. The Chief Justice of the IMTFE, Sir William Webb, was an Australian and sat beside justices from the ten other countries. *Id.* at 11. The official indictment, primarily a British document, was modified to represent each of the eleven legal systems involved, and was signed by all eleven prosecutors. *Id.* at 14.

[109] *See generally* Sirleaf, *supra* note 75; Perriello & Wierda, *supra* note 68, at 2.

[110] Sirleaf, *supra* note 75, at 218–19. The connection between the Liberian and Sierra Leonean conflicts dates back to December 1989 when the National Patriotic Front of Liberia, led by Taylor, invaded northern Liberia. Because Taylor's attempts to seize control of Liberia's capital were blocked by the Economic Community of West African

Taylor at The Hague,[111] the Liberians were left with only a shaky Truth and Reconciliation Commission to address the human-rights abuses they endured.[112] By failing to include all interested parties in the prosecution of these war crimes, the SCSL arguably delegitimized (even if only by perception) the post-conflict justice efforts in the region. This failure was then exacerbated by Sierra Leone's inability to recognize the importance of domestic war-crimes tribunals.

IV. The Use of Domestic Tribunals

In the aftermath of World War II in the Pacific, the Chinese relied heavily on their relationship with the United States to effectuate post-war justice.[113] With only twenty-eight Class A defendants indicted at the IMTFE, the vast majority of Japanese war criminals—ranging somewhere between 2,200 and 5,700—were left to be tried in domestic tribunals.[114] China's complex post-war political, economic, and military landscape was not conducive to a unilateral prosecutorial effort.[115] The

---

States Cease-Fire Monitoring Group (ECOMOG)—in which Sierra Leone's then-President Momoh played a major role—Taylor began supporting the RUF's efforts in Sierra Leone. Even after taking power of Liberia via election in July 1997, Taylor's on-going support of the RUF continued to destabilize the region. *Id.* at 218–20.

[111] Taylor was found guilty of eleven counts of aiding and abetting war crimes and crimes against humanity and was sentenced to fifty years in jail. Bowcott, *supra* note 54. However, some critics argue that Charles Taylor's prosecution was a failure of the SCSL. For years, Taylor was able to avoid prosecution by seeking asylum in Nigeria. If not for the actions of Nigerian President Obasanjo (who handed Taylor over to the newly elected Liberian president Ellen Johnson-Sirleaf, who in turn transferred him to the SCSL on March 29, 2006), Taylor may have never been brought to justice. Higonnet, *supra* note 106, at 388. Taylor's prosecution (from extradition to verdict) took six years to complete, and cost an estimated $35–40 million per year to secure a conviction. Hirsh, *supra* note 21.

[112] *See generally*, Sirleaf, *supra* note 75.

[113] With assistance from the United States, the Nationalist government was able to affect the surrender of the vast majority of the 1.2 million Japanese troops in China proper. U.S. DEP'T OF STATE, *supra* note 18, at 312. Following Japan's surrender, American personnel and Chinese nationalist worked closely to coordinate the movement of witnesses and suspects from Japan to China for Chinese war crimes trials. Smith, *supra* note 43.

[114] China was just one of several countries/territories to hold Class B and C prosecutions; Allied military commissions were also conducted in Australia, Guam, and the Philippines, to name a few. PICCIGALLO, *supra* note 13, at xiv.

[115] Although Chiang Kai-shek's government was the internationally-recognized sovereign, the Chinese communists had gained considerable strength in central and north China. Additionally, parts of the country (western and southwestern China) were controlled by local warlords, more or less independent from Chiang Kai-shek's

Chinese needed outside assistance—American financial, military, and humanitarian aid—to rebuild their nation (including their judiciary) and strengthen their national security.[116] Likewise, the United States needed a strong and unified China to balance the growing power of the Soviet Union in Asia,[117] and continued to provide both financial and military support to the Chiang Kai-shek's government until 1949.[118] In furtherance of "the close and friendly Sino-American relationship" developed during the war, the Chinese continued to back American-led post-war efforts in the Pacific—as they had done at the IMTFE in Tokyo.

A. American Military Commissions in Shanghai

The Chinese understood that an enduring partnership with the United States was necessary to achieve their post-war justice efforts.[119] In an extraordinary yet calculated decision, Chang Kai-shek granted the United States "temporary authority" to conduct war-crimes trials within China's borders.[120] Conducted in Shanghai, the American-led commissions consisted of at least three members with proper qualifications (e.g., professional competency and strict impartiality)[121] and followed China-

---

government. *See generally* RANA MITTER, FORGOTTEN ALLY: CHINA'S WORLD WAR II, 1937–1945 (2013).

[116] At the time of Japan's surrender, in addition to the threats posed by the Chinese communists, the Soviets occupied all of Manchuria. Chiang Kai-shek's government simply could not enforce post-war orders throughout the country without American support. *See generally* U.S. DEP'T OF STATE, *supra* note 18, at 311–13.

[117] *See id*.

[118] *See id*.

[119] PICCIGALLO, *supra* note 13, at 68–69.

[120] *Id.* at 68. The U.S. position during the latter stages of the war held that "in the absence of any agreement to the contrary," the invitation of U.S. forces to enter the country and repel the enemy "includes" the right and duty to conduct war crimes trials. *Id*. at 22 (citing U.S. DEP'T OF THE ARMY, REPORT OF THE JUDGE ADVOCATE, UNITED STATES FORCES, CHINA THEATER, UNITED STATES ARMY FORCES CHINA, NANKING HEADQUARTERS COMMAND AND ADVISORY GROUP CHINA (JAN. 1, 1945–JUNE 10, 1947)). However, Chiang Kai-shek actually granted such authority to remain in the good favor of the United States after the war. Chiang Kai-shek also recognized the advantages of an enduring partnership with the United States, which included joint investigations, pooled resources (such as housing and office space), and assistance with witness and suspect transportation. The Chinese were also the primary benefactor of an American-constructed courtroom on the top floor of a modern Shanghai jail. But perhaps no benefit was greater than China's ability to use the SCAP's authority and personnel to extradite suspects and witnesses from Japan to China for trial. PICCIGALLO, *supra* note 13, at 69.

[121] PICCIGALLO, *supra* note 13, at 36–37.

specific SCAP regulations.[122] In total, the United States tried eleven cases involving seventy-five defendants.[123] Eight of the seventy-five defendants were acquitted; ten were sentenced to death and subsequently executed.[124]

B. Chinese Domestic Trials

In addition to the U.S. commissions in Shanghai, China established thirteen of its own tribunals to prosecute war criminals not previously tried in Tokyo.[125] However, China's approach to war crimes fundamentally differed from that of the United States (and the rest of China's allies).[126] China's "Law Governing the Trial of War Criminals of October 24, 1946" ("Law of 24 October 1946"), which defined the applicable rules, offenses to be tried, and the jurisdiction of the court,[127] provided Chinese courts with very broad jurisdiction.[128] Article I explicitly stated that the courts would follow, in order of precedence,

---

[122] *Id.* at 36. These SCAP regulations defined war crimes in language nearly identical to Article 5 of the IMTFE but did not permit the commissions operating in China to prosecute crimes against peace (only crimes against humanity and conventional war crimes), and they did not permit mixed inter-allied military tribunals. *Id.* at 36, 39. The regulations also established specific safeguards to ensure that every defendant received a fair trial. These safeguards included: open/public trial; complete and clear record of proceedings submitted to the convening authority after trial; notice, clear and complete, of all charges and specifications "well in advance of trial"; the right to counsel prior to and during the trial (which allowed court-appointed counsel, counsel of own choice, or self-representation); the right to testify on one's own behalf, present evidence, rebut evidence, and cross-examine; discovery (the required "the production of documents and other evidentiary material"); and finally, all sentences required approval by the convening authority prior to execution. *Id.* at 36.

[123] Almost all of the early trials in Shanghai involved the prosecution of Japanese troops who had participated in the mock trials and executions of the American pilots shot down over mainland China. Smith, *supra* note 43. The two most notable trials were the Hankow Airmen trial (eighteen Japanese charged with the humiliation, beating, torturing, and "cremation" of three pilots) and the Doolittle Raid Fliers trial (four Japanese officers responsible for the execution of eight U.S. pilots of the famous Doolittle Raid). PICCIGALLO, *supra* note 13, at 71–72; *see also* ALFRED E. CORNEBISE, THE SHANGHAI STARS AND STRIPES: WITNESS TO TRANSITION TO PEACE, 1945–1946, at 55 (2010).

[124] PICCIGALLO, *supra* note 13, at 74.

[125] THE POSTWAR JUDGMENT: II. NANKING WAR CRIMES TRIBUNAL, THE NANKING ATROCITIES, http://www.nankingatrocities.net/Tribunals/nanjing_02.htm (last visited Oct. 31, 2014).

[126] PICCIGALLO, *supra* note 13, at 159.

[127] 14 LAW REPORTS OF THE TRIALS OF WAR CRIMINALS, at 152 (UN War Crimes Commission ed., 1949) [hereinafter LAW REPORTS].

[128] PICCIGALLO, *supra* note 13, at 159.

international law, special war crimes rules (i.e., the present document), and provisions of the Criminal Code of the Republic of China.[129] In other words, the Chinese domestic courts were actually instructed to apply both international and domestic law to their war crimes proceedings, albeit with international law in the lead. China also incorporated (broad) definitions of war crimes, which reflected the circumstances "peculiar to China and the events she [had] gone through during the [previous] two decades."[130] Although the Chinese courts convicted considerably more Japanese war criminals than they acquitted, the most significant element of these domestic tribunals was how "frequently, broadly, [and] assertively" Chinese judges applied international law.[131]

C. Enhancing Post-War Justice Through Domestic Trials

The inability of Sierra Leone and the United Nations to fully appreciate the need to pursue the prosecution of low- and mid-level perpetrators through a supplemental forum was one of the SCSL-centric system's greatest deficiencies. Although prosecuting defendants in multiple forums may not be ideal,[132] in cases where the international forum is unwilling or unable to prosecute a larger number of perpetrators, an additional forum must be used. Given the limited scope and resource of the IMTFE, China (and the other allied nations) recognized that the Tokyo Tribunal could (and would) only handle a

---

[129] LAW REPORTS, *supra* note 127, at 152.

[130] PICCIGALLO, *supra* note 13, at 159 (citing LAW REPORTS, *supra* note 127, at 152). Specifically, the Law of October 24, 1946, permitted prosecution of crimes against peace (in language similar to the IMTFE), conventional war crimes (in the narrower sense, "violations of the laws and customs of war,"), crimes against humanity (for instance, starvation, rape, and enforced collective torture), offenses involving narcotic drugs or poisons (crimes particular to China's past), and offenses as defined in Chinese common penal law. PICCIGALLO, *supra* note 13, at 159–60.

[131] PICCIGALLO, *supra* note 13, at 163. In total, the Chinese tried 883 individuals for war crimes, convicted 504, and sentenced 149 to death. *Id.* at 173.

[132] Doing so limits (or even eliminates) the possibility of replication and increases the likelihood of inconsistent results. Similar to the argument that "a patchwork of hybrid courts" are likely to apply different substantive rules in different areas of the world (*see* Higonnet, *supra* note 106, at 413–14), national courts will apply their own domestic laws in the ways they see fit. Domestic criminal laws are often highly codified, thus, limiting judicial discretion. Conversely, international law often grants judges broad discretionary powers to deal with the complexities of prosecuting war crimes. *See* Morss & Bagaric, *supra* note 17, at 25–26.

small percentage of war-crimes prosecutions.[133] However, the Chinese took affirmative steps to create domestic tribunals to try the remaining Japanese war criminals. By relinquishing, for a brief time, part of its sovereignty to the United States (to try cases on Chinese soil), China was able to secure the American support needed to successfully prosecute war criminals in its own domestic tribunals. Ultimately, the Chinese did what was necessary to ensure that a greater number of war criminals were brought to justice. In doing so, China presented Sierra Leone, specifically, and the international community more generally, with a template (however rudimentary) to address war crimes and increase the perception of post-war justice—a multi-forum approach in which the international tribunal is enhanced by domestic courts.

In contrast, Sierra Leone and the United Nations were so fixated on the SCSL (and its ability to apply both national and international law) that they neglected to properly rebuild and use Sierra Leone's national judiciary to supplement the SCSL.[134] Based on the language in the SCSL Statute, the purpose of the hybrid court was to apply domestic law in addition to international law—not completely replace Sierra Leone's national court system.[135] Thus, the SCSL Statute considers the possibility that the national courts *could* prosecute war criminals. And, by charging only thirteen perpetrators for war crimes, the SCSL essentially confirmed that the national courts *should* prosecute war

---

[133] As previously discussed, the IMTFE Charter limited prosecution to only class A ("crimes against peace") offenses. PICCIGALLO, *supra* note 13, at 12. *See* IMTFE Charter, *supra* note 44, art. 5.

[134] In analyzing a hybrid court's impact on the local legal system, Etelle Higonnet, a former Bernstein Fellow in the Africa Division of Human Rights Watch, acknowledges that "in post-conflict states, seeing the local judicial system at least partially involved in important trials may be critical to rebuilding a sense of faith in the courts. *Besides* restoring the legitimacy of devastated legal systems, local connections with well-run, high-profile trials may benefit transitional governments' credibility." Higonnet, *supra* note 106, at 362 (emphasis added). Higonnet then explains that "on a day-to-day basis, more people rely on the protection and viability of their own local law and institutions than on international law or the U.N." *Id.* (citing Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 403 (1999)). The SCSL made an effort to include local judges and employ local staff, and held its trials on Sierra Leonean soil (with Charles Taylor's trial being the lone exception). However, a critical component in rebuilding the rule of law in Sierra Leone was omitted—the SCSL judges and staff were not required to interact and communicate with the judges and staff of the national courts. *Id.* at 388.

[135] The SCSL Statute explicitly states that the court "shall have primacy over the national courts of Sierra Leone." Special Court Statute, *supra* note 87, art. 8(1).

criminals.[136]

While Sierra Leone's judiciary was clearly affected by the civil war, assertions that the post-war climate in Sierra Leone did not support domestic trials are not persuasive.[137] Similar internal instability followed World War II in China. Just as Sierra Leone continued to fight with the RUF, the Chinese national government fought against the communist Red Army. Just as Sierra Leone required UN support to hold individuals accountable for their war crimes, China required assistance from the United States to do the same. Sierra Leone had the right idea when requesting UN support to create a special court: the prosecution of war crimes must employ both international and domestic law. China's model implemented this same concept. However, while China used three separate and distinct systems to effectuate justice (finding ways to resource and build its own war crimes courts through mutual cooperation), the SCSL combined international and domestic law under one roof and channeled its resources into that one forum to the detriment of Sierra Leone's national court system.

V. Conclusion

To date, none of the international criminal courts established to prosecute war crimes could be described as the perfect template. While some (Nuremberg) have enjoyed more international acceptance than others (Tokyo), each was created out of a unique set of circumstances, which makes duplication almost impossible. The Nuremberg Charter was only conceived after fifty million deaths, the total and unconditional surrender of a sovereign power, and an unlikely agreement between four major nations linked by a common enemy.[138] While the deaths of civilians and mass atrocities still dot the front pages of major media

---

[136] As previously discussed, the SCSL's jurisdiction was limited to those persons bearing the "greatest responsibility." *Id.* Ideally, the national courts would be used to prosecute those perpetrators who fell outside of this threshold.

[137] After a decade of internal conflict, the Sierra Leonean government was concerned about the potential fallout from conducting purely domestic trials. Furthermore, Sierra Leone did not have the funds to investigate and try war crimes, and the existing national laws did not encompass war crimes or crimes against humanity. However, the government was able to provide considerable assistance to the SCSL (e.g., the site for the court, police assistance, etc.) and expeditiously integrated the SCSL Statute into domestic law. Perriello & Wierda, *supra* note 68, at 12–13.

[138] *See generally* Griffin, *supra* note 51, at 410–13.

outlets,[139] the likelihood of achieving unconditional surrender or seeing multiple sovereign nations—each with their own strong (and often opposing) political views—agree to a single forum and charter to prosecute war crimes is almost unimaginable.

For better or worse, the SCSL may be the best modern attempt at a standardized replicable model that blends international and domestic law and is convened in the country where the atrocities occurred. However, in order to avoid repeating the same failures, any future international hybrid court must ensure that: (1) jurisdiction is broad enough to include the greatest number of perpetrators and offenses feasible; (2) every interested State (i.e., party to the conflict) is adequately represented at the proverbial table; and (3) domestic courts are used to prosecute any remaining perpetrators who fall outside of the international court's jurisdiction. As a final and critical element, countries must be prepared to work through a litany of factors—political, social, and economic, as well as judicial—to build a legitimate venue to address war crimes and achieve post-war justice for their people.

Without question, the Chinese faced significant challenges in the aftermath of World War II, and their approach to effectuating post-war justice was not perfect. However, China's decision to work with other interested nations and to use multiple forums—international and domestic—proved to be an effective method for prosecuting war criminals. Future war crimes tribunals may incorporate more hybrid characteristics like the SCSL—sanctioned to apply both international and domestic law. Nevertheless, the three-system approach employed by the Chinese, despite its flaws, earned and deserves its due consideration.

---

[139] In February 2014, the UN Commission of Inquiry on Human Rights released a 400-page report detailing the "murder, torture, slavery, sexual violence, mass starvation and other abuses" by North Korea. *See* Michael Pearson, Jason Hanna & Madison Park, *'Abundant Evidence' of Crimes Against Humanity in North Korea, Panel Says*, CNN, http://www.cnn.com/2014/02/17/world/asia/north-korea-un-report/ (last visited Oct. 31, 2014). On the day this article was submitted for publication, *The Washington Post* published an article calling for the International Criminal Court to take action against North Korea's leaders for the human rights abuses identified in that report. *See* Editorial Board, *North Korea's Leaders Must Be Held to Account for Human Rights Abuses*, WASH. POST, http://www.washingtonpost.com/opinions/ north-koreas-leaders-must-be-held-to-account-for-human-rights-abuses/2014/10/30/7e6026d4-603f-11e4-9f3a-7e28799e0549_story.html (last visited Oct. 31, 2014).

A PRECARIOUS BALANCE: MANAGING STIGMA, CONFIDENTIALITY, AND COMMAND AWARENESS IN THE MENTAL HEALTH ARENA

MAJOR CARA-ANN M. HAMAGUCHI*

I. Introduction

A. The Secret that Killed Major (Maj) Ruocco

On February 7, 2005, Marine Corps Maj John Ruocco hung himself in a hotel room near Camp Pendleton, California. By all outward appearances, Maj Ruocco lived a charmed life. He was a devoted family man who loved his wife and two young boys. As a pilot in the Marines, he was a respected leader who dedicated his life to serving for the good of others. He was the life of every party, a pillar in his community, and a die-hard Boston sports fan. But Maj Ruocco had a terrible secret—he suffered in silence from untreated depression and post-traumatic stress.[1]

After returning home from a deployment to Iraq where he flew more than seventy-five combat missions, Maj Ruocco was a different man. Once fun and joyful, he became withdrawn, easily agitated, and sullen. He was plagued with nightmares and insomnia, and struggled to

---

* Judge Advocate, U.S. Army. Presently assigned as Executive Officer, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. L.L.M., 2014, The Judge Advocate Gen.'s Sch., U.S. Army, Charlottesville, Virginia; J.D., 2009, University of North Carolina at Chapel Hill; B.A., 2001, Washington University in Saint Louis. Previous assignments include Complex Litigation Attorney, I Corps, Joint Base Lewis-McChord, Washington, 2012–2013; Trial Counsel and Operational Law Attorney, 3d Stryker Brigade Combat Team, Joint Base Lewis-McChord and Afghanistan, 2011–2012; Brigade Judge Advocate, 3d Stryker Brigade Combat Team, Joint Base Lewis-McChord, Washington, 2010–2011; Administrative Law Attorney, I Corps, Joint Base Lewis-McChord Washington, 2010; S-4, 112th Signal Battalion (Special Operations) (Airborne), Fort Bragg, North Carolina, 2005–2006; Executive Officer and Company Commander, B Company, 3d Psychological Operations Battalion, Fort Bragg, North Carolina, 2003–2005; Platoon Leader, 304th Signal Battalion, Camp Humphreys, Korea, 2001–2003. Member of the bars of North Carolina, the U.S. Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 62d Judge Advocate Officer Graduate Course.

[1] *See* Kim Ruocco, *Finding Hope Amid Devastating Loss: A Military Widow Who Lost Her Marine to Suicide Shares Her Story*, HUFFINGTON POST, http://www.huffingtonpost.com/kim-ruocco/finding-hope-amid-devasta_b_4004046.html (last visited Dec. 10, 2014) (sharing the story of Major Ruocco's suicide and the circumstances leading up to it).

reconnect with his family. Eventually, his performance at work deteriorated. He had difficulty concentrating while flying his helicopter and failed a routine flight test. And then one night, when he could no longer bear the weight of his secret, he took his own life.[2]

According to his wife, Maj Ruocco was unable to bring himself to seek help despite her pleading:

> He thought that people would think he was weak, that people would think he was just trying to get out of [deploying again] or trying to get out of service, or that he just couldn't hack it—when, in reality, he was sick. He had . . . suffered from depression and let it go untreated for years. And because of that, he's dead today.[3]

B. An Inherent Tension

Sadly, Maj Ruocco's reluctance to seek help and his fear of being judged is a common attitude among servicemembers suffering from mental-health issues. In today's military, the stigma of mental-health treatment is a "pervasive barrier to care."[4] According to a study published in 2009 by the Office of the Army Surgeon General's Mental Health Advisory Team (MHAT), more than half of the servicemembers surveyed in Afghanistan felt that they would be seen as weak if they sought psychological health services.[5] As such, rather than admitting their perceived "weaknesses," many Soldiers choose to forgo professional help.[6] There is also a stigma built upon skepticism

---

[2] *Id.*

[3] Associated Press, *Suicides Among U.S. Troops Averaging One a Day in 2012*, USA TODAY (Jun. 7, 2012), http://usatoday30.usatoday.com/news/military/story/2012-06-07/military-troops-suicide/55453990/1.

[4] Crosby Hipes, *The Stigma of Mental Health Treatment in the Military: An Experimental Approach*, CURRENT RES. IN SOC. PSYCH. (Dec. 20, 2011), http://www.uiowa.edu/~grpproc/crisp/crisp.html.

[5] U.S. ARMY MED. COMMAND, JOINT MENTAL HEALTH ADVISORY TEAM (MHAT) 6, OPERATION ENDURING FREEDOM AFGHANISTAN 35 (2009) [hereinafter MHAT 6] (reporting that 52.9% of the more than 1,580 respondents felt they would be seen as weak if they asked for help).

[6] Hipes, *supra* note 4, at 1 ("Seeking treatment is stigmatized as a 'weak' act in the military, violating the norm or individual strength in coping with the demands of military service. Due in large part to fear of stigma from fellow soldiers, some personnel

regarding the use of mental-health records. The same MHAT study found that over a third of servicemember respondents avoided seeking help because they believed that doing so would harm their careers.[7]

While stigmas associated with mental-health treatment are not limited to the military,[8] the military's culture presents unique challenges.[9] After more than a decade of persistent combat, there has been an alarming trend of increased suicides and rising rates of mental-health issues among servicemembers.[10] In light of these trends, access to quality care is critical, and reliable assurances of privacy and confidentiality are necessary, especially when stigma is a barrier to care.[11] A Soldier is more likely to seek help if he knows that he can do

---

returning from deployments with mental illness symptoms may forgo professional help." (citing Charles Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED 13 (2004); McFarling et al., *Stigma as a Barrier to Substance Abuse and Mental Health Treatment*, 23 MIL. PSYCHOL. 1 (2011); Deborah A. Gibbs et al., *Dynamics of Stigma for Alcohol and Mental Health Treatment among Army Soldiers*, 23 MIL. PSYCHOL. 224 (2011)).

[7] MHAT 6, *supra* note 5, at 35 (reporting that 33.6% of respondent feared that seeking psychological health services would harm their careers).

[8] See Patrick W. Corrigan & David L. Penn, *Lessons from Social Psychology on Discrediting Psychiatric Stigma*, 54 AM. PSYCHOL. 765, 765 (1999) for a discussion of the impact of stigma on the general civilian population.

[9] *See* Def. Ctrs. of Excellence for Psych. Health and Traumatic Brain Injury (DCoE), *Background*, REAL WARRIORS, http://realwarriors.net/campaignmedia/factsheets/RW_Background.pdf [hereinafter *Background*, REAL WARRIORS] ("Asking for help can be challenging for anyone, but there are particular concerns that may prevent servicemembers and veterans from seeking support or care for invisible wounds."); Lieutenant Colonel Anderson B. Rowan et al., *A Multisite Study of Air Force Outpatient Behavior Health Treatment-Seeking Patterns and Career Impact*, 171 MIL. MED. 1123, 1123 (2006) ("[T]he lower rates of treatment-seeking in the military, despite equivalent levels of psychological distress, suggest the presence of additional barriers or greater intensity of barriers in the military population.").

[10] *See generally* KATHERINE BLAKELY & DON J. JANSON, CONG. RESEARCH SERV., POST TRAUMATIC STRESS DISORDER AND OTHER MENTAL HEALTH PROBLEMS IN THE MILITARY: OVERSIGHT ISSUES FOR CONGRESS 1 (2013), *available at* http://www.fas.org/sgp/crs/natsec/R43175.pdf (last visited Dec. 10, 2014) [hereinafter CRS Report] (providing statistics regarding the rising rate of mental health diagnoses in the military). In particular, the Army has consistently led the other services in instances of mental disorder diagnosis and suicide rates. *Id.* at 4, 50 (reporting incidence rates of mental disorder diagnosis among the different services from 2007 through 2010 and rates of suicide by service between 1998 through 2011).

[11] RAND CORP., INVISIBLE WOUNDS: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY 282 (Terri Tanielian & Lisa H. Jaycox eds., 2008) [hereinafter INVISIBLE WOUNDS] ("[F]ears of negative career

so privately without repercussions to his career or judgment from others.

However, absolute confidentiality in a military context is not possible. Commanders and leaders are responsible for ensuring readiness. They are also ultimately responsible for the health and well-being of their Soldiers and are expected to know the issues of the Soldiers within their formations. To this end, it is critical for commanders to have broad access to information, including information regarding their Soldiers' mental health. This presents a conundrum that is unique to the military: A commander's interest in having information is seemingly at odds with an individual Soldier's interest in seeking confidential mental-health services.[12]

The recent Washington Naval Yard shooting illustrates this conflict. In September 2013, Aaron Alexis—a contractor with a secret clearance working at the Washington Naval Yard—stalked and executed twelve unarmed employees.[13] Following the incident, investigators learned that Alexis had been discharged from the Navy Reserves under honorable conditions despite several instances of minor misconduct on his record.[14] They also found indications of mental-health issues in his record.[15]

---

consequences could be alleviated by allowing servicemembers with less-severe mental health issues to easily and confidentially receive mental health services.").

[12] *See id.* ("Encouraging use of confidential mental health services runs counter to prevailing views that command should have access to information about all mental health service use to evaluate individual readiness.").

[13] *See Rampage at the Navy Yard: What Happened in Building 197?*, WASH. POST, Sept. 25, 2013, http://www.washingtonpost.com/wp-srv/special/local/navy-yard-shooting/scene-at-building-197/ (detailing the events of the shooting); Michael D. Shear & Michael S. Schmid, *Gunman and 12 Victims Killed in Shooting at D.C. Navy Yard*, N.Y. TIMES (Sept. 16, 2013), http://www.nytimes.com/2013/09/17/us/shooting-reported-at-washington-navy-yard.html?page
wanted%3Dall (recounting the details of the shooting and describing the injuries of the victims).

[14] *See* Trip Gabriel, Joseph Goldstein & Michael S. Schmidt, *Suspect's Past Fell Just Short of Raining Alarm*, N.Y. TIMES (Sept. 17, 2013), http://www.nytimes.com/2013/09/18/us/washington-navy-yard-
shootings.html?pagewanted=all&_r=0 (providing a detailed account of Aaron Alexis's "history of infractions as a Navy reservist, mental health problems and run-ins with the police over gun violence").

[15] *Id.* (noting that just a month before he opened fire at the Washington Navy Yard, Alexis had complained to police about "hear[ing] voices speaking to him" and on a separate occasion, he had also confided to a friend that he suffered from "post-traumatic stress disorder," which caused him to be withdrawn and made it difficult for him to sleep). Approximately a month before the shooting, on August 7, 2013, Aaron Alexis

The fact that Alexis maintained a secret clearance in the face of his misconduct and mental-health issues sent a wave of concern throughout Washington.[16] During a post-incident press briefing on September 18, 2013, reporters peppered Secretary of Defense Chuck Hagel and Joint Chiefs of Staff Chairman General Martin Dempsey with questions about the security-clearance process. In particular, one such question scrutinized a change made to security-clearance applications in 2008:

> [A] few years back, they took off mental health questions on security clearance reviews in order to de-stigmatize PTSD. Do you think that mental health questions should be returned to the security reviews because they are relevant? Do you think you're in a difficult position, having tried to de-stigmatize mental health reviews on the one hand and remove these questions from security clearance forms?[17]

In response to this question, General Dempsey zealously defended the change to the security-clearance forms: "I actually was one of those with [former Army Vice Chief of Staff] [General] Peter Chiarelli and others who believed that men and women should have the opportunity to overcome their—their mental disorders or their mental challenges or their—clinical health challenges and shouldn't be stigmatized."[18] This dialogue highlights the inherent tension between two equally important interests—that of the individual Soldier and that of his commander.

C. Roadmap

The Army is currently looking at effecting a culture shift to dispel

---

called the police in Newport, Rhode Island, because he was convinced that he was being followed and harassed by a "microwave machine." *Id.*

[16] *See id*. (reporting that Senator Susan Collins, a Republican from Maine, declared that the incident suggested "a very flawed system for granting security clearances," and called for a "Congressional investigation into the granting of security clearances to government contractors" and that "President Obama ordered the White House budget office to conduct a governmentwide [sic] review of policies for security clearances for contractors and employees in federal agencies").

[17] *News Transcript: Defense Department Press Briefing by Secretary Hagel and General Dempsey in the Pentagon Briefing Room*, U.S. DEP'T OF DEFENSE (Sept. 18, 2013), http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5305.

[18] *Id.*

the stigma regarding mental health and to remove barriers to care.[19] However, until then, the privacy needs of individual Soldiers must be balanced with the rights and duties of commanders and leaders. The key to achieving this balance is two-fold: (1) ensuring that commanders understand and respect a Soldier's interest in receiving confidential mental-health treatment; and (2) promoting transparency regarding the use of mental-health records so that Soldiers can seek help without fear of negative repercussions on their careers. Put simply, Soldiers would be more likely to seek mental-health treatment if they had assurances that their privacy would be protected and if the stigma was largely dispelled.

This article examines the conflict between privacy and the military mission, and advocates for a better balance between the two by centralizing information for commanders and establishing specific administrative consequences for commanders and leaders who fail to respect established privacy standards. This article also examines the current uses of mental-health information for mission and readiness requirements, and calls for more transparency for Soldiers. While parts of this article apply to the entire spectrum of mental conditions and disorders, this article focuses specifically on combat-stress and Post Traumatic Stress Disorder (PTSD).[20]

To facilitate this discussion, Part II provides background information on the history of mental-health treatment in the Army and the current state of mental-health issues in today's Army. Part III addresses the

---

[19] *See* Def. Ctrs. of Excellence for Psych. Health and Traumatic Brain Injury (DCoE), REAL WARRIORS, http://realwarriors.net/ (last visited Dec. 10, 2014) (promoting resilience amongst servicemembers and awareness "to encourage help-seeking behavior among servicemembers . . . coping with invisible wounds"); *see also* George W. Casey, Jr., *Comprehensive Soldier Fitness: A Vision for Psychological Resilience in the U.S. Army*, 66 AM. PSYCHOLOGIST 2 (2011) ("My vision is that [Comprehensive Soldier Fitness] becomes a part of our culture over time, with our Soldiers understanding the positive dimension of psychological fitness much like professional athletes do."); U.S. DEP'T OF DEF., DEFENSE SUICIDE PREVENTION OFFICE ANNUAL REPORT—FY 2012, at 15 (2012) [hereinafter SUICIDE PREVENTION OFFICE ANNUAL REPORT 2012] (outlining efforts to Improve Strategic Messaging and Stigma).

[20] In 2011, Department of Defense (DoD) officials dropped the word "disorder" from PTSD in order to de-stigmatize the term. Within the DoD, the condition is now known as simply Post-Traumatic Stress (PTS) or Post-Traumatic Stress Injury (PTS "I"). *See infra* notes 54–55 and accompanying text. This article will continue to use the term PTSD for the sake of consistency, as the American Psychiatric Association's current *Diagnostic and Statistical Manual of Mental Disorders* still uses the term "PTSD." *See infra* note 66. The author intends no disrespect or disparagement by the use of "PTSD" over "PTS" or "PTS 'I'."

stigma associated with receiving mental-health treatment in the military that stems from the military's culture and from beliefs regarding negative career impact. Then, Part IV discusses why confidentiality is critical to overcoming stigma-related barriers to care, and discusses privacy policies and regulations at the federal-government wide, Department of Defense (DoD), and Army levels. Part V shifts focus to the military mission and discusses the rights and responsibilities of commanders in ensuring readiness and in knowing their Soldiers, and the duty of commanders to protect confidential information. To this end, Part VI discusses tools that allow commanders to access protected information. Part VII discusses the delicate balance between privacy and readiness, and proposes administrative consequences for commanders who perpetuate stigma or disrespect privacy. Finally, Part VIII of this article looks at the impact that mental-health issues can have on a Soldier's career and argues for more transparency regarding the use of mental-health information to reduce that impact.

II. Background

A. History of PTSD: From Shell Shock to Dropping the "Disorder"[21]

The history of PTSD reveals an early misunderstanding of combat stress, and even disdain, toward Soldiers who were suffering from combat-related psychiatric symptoms.[22] In an austere military culture where courage and unflinching resolve were prized virtues, there was little sympathy for Soldiers who could "no longer cope and who [broke] down."[23] Many military officials considered these Soldiers to be cowards and weaklings, and they sought to punish afflicted Soldiers rather than help them.[24] Thus, "military morality was the first hurdle that had to be cleared before a beginning could be made in giving

---

[21] This article focuses on the history of PTS beginning with the concept of "shell shock" in World War I. For a pre-World War I history of PTS, see Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 191 MIL. L. REV. 67 (2007); F. Don Nidiffer & Spencer Leach, *To Hell and Back: Evolution of Combat-Related Post Traumatic Stress Disorder*, 29 MENTAL HEALTH L. 1 (2010).

[22] *See* Major Tiffany Chapman, *Leave No Soldier Behind: Ensuring Access to Health Care for PTSD-Afflicted Veterans*, 204 MIL. L. REV. 1, 6 (2010) (citing Hans Pols & Stephanie Oak, *War and Military Mental Health: The U.S. Psychiatric Response in the 20th Century*, 97 AM. J. PUB. HEALTH 2132, 2132–33 (2007)).

[23] HANS BINNEVELD, FROM SHELL SHOCK TO COMBAT STRESS: A COMPARATIVE HISTORY OF MILITARY PSYCHIATRY 84 (1997).

[24] *Id.*

assistance."[25]

During World War I, many of the Soldiers who were constantly exposed to exploding artillery shells while fighting in trenches exhibited PTSD symptoms, such as memory loss, speech disorders, exhaustion, and irritability.[26] At the time, mental illness was thought to be a result of actual physical damage to the brain, which manifested in behavioral disorders.[27] Given these beliefs, "the underlying assumption was that the senses and brain could be injured by the explosion of artillery shells."[28] As such, medical providers used the term "shell shock" to describe the afflicted Soldier's condition. In many cases, Soldiers suffering from shell shock had to be taken out of the fight.[29] Military authorities who had little understanding and "appreciation of the magnitude of wartime psychiatric disorders" believed that these individuals were weaker than others and were thus "predisposed to situational stress."[30] Some officials even believed that suffering Soldiers were cowards who were malingering to shirk their duties.[31] As a result, rather than developing treatment and prevention methods, the Army focused on weeding shell-shocked Soldiers out of the ranks and tightening initial entry screening to "exclude vulnerable Soldiers from entering military service."[32]

Many of the early assumptions and beliefs regarding shell shock that were established in World War I were challenged during World War II. As World War II progressed, the Army Medical Department observed that psychiatric breakdowns were not exclusive to Soldiers exposed to

---

[25] *Id.*

[26] *Id.* at 85 (noting that other symptoms included blindness, paralysis, and hearing and speech disorders).

[27] *See id.* at 84. Prior to the war, venereal disease and excessive alcohol use were believed to be the leading causes of the brain damage that led to mental illness. *Id.*

[28] *Id.* at 86.

[29] 1 U.S. ARMY, MED. DEP'T, NEUROPSYCHOLOGY IN WORLD WAR II: ZONE OF THE INTERIOR, at xiii (Colonel Robert S. Anderson et. al. eds., 1966) [hereinafter NEUROPSYCHOLOGY IN WWII] (claiming that these Soldiers were unable to tolerate stress or make any "useful contribution to the military effort").

[30] *Id.*

[31] Chapman, *supra* note 22, at 6 (noting that commanders were further convinced that some Soldiers were shirking their duties because not all Soldiers were affected).

[32] NEUROPSYCHOLOGY IN WWII, *supra* note 29, at xiii; Pol & Oaks, *supra* note 22, at 2133 (reporting that one psychoanalyst who consulted for the Armed Forces claimed that "individuals who had been unable to adjust to the demands of American society would never adjust to the demands of army life").

exploding artillery shells.[33] By this time, the somatic[34] theory that connected mental illness to physical brain injuries had lost support within the psychiatric community.[35] Rather, the prevailing theory was that experiences, suggestions, and unresolved psychic conflicts could cause mental disorders within Soldiers.[36] Over time, the term "wartime neurosis" replaced the term "shell shock."[37]

During World War II, Army officials also learned that combat psychiatric breakdowns "could originate from normal or previously stable personnel as well as from those of weaker predisposition."[38] In light of these observations, some medical professionals came to believe that grueling physical demands of combat coupled with chronic sleep deprivation could stress and fatigue even stable Soldiers to the point of nervous breakdown.[39] Around this time, the term "combat exhaustion" gained popularity. Many Soldiers endorsed this term because it offered them the possibility of treatment without being stigmatized and labeled with disparaging terms such as "psycho." Unfortunately, the "combat exhaustion" concept wrongly created a belief that rest was the only treatment that Soldiers needed before returning to combat.[40]

Despite the breakthroughs in psychiatry that World War II brought, there was huge disparity among medical professionals in diagnosing and treating Soldiers who presented psychiatric symptoms.[41] Due to the lack

---

[33] BINNEVELD, *supra* note 23, at 87 (noting that even Soldiers on leave were known to suffer from the symptoms previously associated with shell shock).

[34] Defined as "of, or relating to, or affecting the body especially as distinguished from the . . . psyche." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1188 (11th ed. 2004).

[35] BINNEVELD, *supra* note 23, at 87 (reporting that at the end of WWI, "the need for explanations other than the physical effects of shelling became even greater").

[36] *See id.* at 88–89. There were three prevailing points of view that replaced the original concept of shell shock. The first point of view was that traumatic experiences could shape emotions and cause behavioral disorders. The second point of view was that behavioral disorders were the result of suggestion and conscious or unconscious desires. Finally, the third point of view, influenced by Sigmund Freud, was that functional disorders were the result of unresolved psychic disorders within Soldiers' minds. *Id.*

[37] *Id.* at 94 (discussing the shift away from the term "shell shock").

[38] NEUROPSYCHOLOGY IN WWII, *supra* note 29, at xiii.

[39] *See* BINNEVELD, *supra* note 23, at 95 (explaining that infantry Soldiers fought the war on foot and were required to walk long distances loaded down with supplies, weapons, and ammunition, which led to exhaustion by the end of the war).

[40] Hayes, *supra* note 21, at 72 ("[T]he introduction and widespread use of such terms as 'battle fatigue' and 'mental exhaustion' reinforced the belief that a little rest would be all that was required to return the Soldier to the front.").

[41] BINNEVELD, *supra* note 23, at 95–96.

of psychiatric experience among many military doctors, Soldiers who exhibited psychiatric symptoms often received purely somatic diagnoses.[42] Unfortunately, misdiagnoses were sometimes driven by commanders because "[p]sychiatric cases were bad for the reputation of the [unit] as well as for the career of the [commander] involved."[43] The Army often used the number of psychological breakdowns in a unit as a gauge for the unit's morale, and it was in the best interest of commanders to find alternate explanations for Soldiers leaving the fight.[44] As a result, many Soldiers did not receive proper care and mental-health issues became further stigmatized.

Nevertheless, the Army made serious efforts to handle the vast number of Soldiers afflicted by psychological issues. And as a result, the field of military psychiatry grew quickly during World War II and became a major component of the Army Medical Service.[45]

Even with the large increase in Army mental-health professionals, rates of "psychiatric casualties" during the Korean War were extremely high.[46] In response, the Army attempted to "implement early intervention and treatment procedures for combat stress during the Vietnam War."[47] Facially, these new procedures seemed to be effective. The number of Soldiers treated for combat stress during Vietnam was

---

[42] *See id.* (explaining different reasons for the disparities in diagnoses). In addition, "[s]ometimes these doctors did not know how to deal with a [S]oldier who had suffered a breakdown and they simply reported that he had a back complaint or that he wet his bed." *Id. See also* NEUROPSYCHOLOGY IN WWII, *supra* note 29, at 736 ("A frequent comment by frustrated and harassed psychiatrists during World War II was that responsible authorities failed to heed the lessons learned by psychiatry in World War I."); OFFICE OF THE SURGEON GEN., OFFICE OF MED. HISTORY, REHABILITATING THE WOUNDED: HISTORICAL PERSPECTIVE ON ARMY POLICY 57 (2008) [hereinafter REHABILITATING THE WOUNDED] ("The Army started the war with only 35 physicians in psychiatric positions; of those only 20 had psychiatric training, and only 4 were board-certified.").

[43] BINNEVELD, *supra* note 23, at 96.

[44] *See id.*

[45] *See* NEUROPSYCHOLOGY IN WWII, *supra* note 29, at xiii; GARY GREENBERG, THE BOOK OF WOE: THE DSM AND THE UNMAKING OF PSYCHIATRY 31 (2013) (discussing how the influx of Soldiers suffering from "war neuroses" grew the ranks of military psychiatry exponentially, and contributed to the growth of civilian psychiatry as well); REHABILITATING THE WOUNDED, *supra* note 42, at 57 (discussing the Army's efforts to gain new psychiatrists by bringing in civilian psychiatrists and training "ordinary physicians into semi-psychiatrists").

[46] Pol & Oaks, *supra* note 22, at 2136 ("Because of the nature of the conflict, characterized by quickly shifting front lines and widely dispersed battle fields, it was difficult to implement programs of forward psychiatry.").

[47] Chapman, *supra* note 22, at 7.

quite low.[48] However, these numbers are deceiving because they only addressed rates of combat stress that manifested during the actual fighting of the Vietnam War. Due to the enduring belief that combat stress had no adverse long-term effects, military psychiatrists did not focus on combat stress once the war ended.[49] It was not until fifteen years later, when a survey revealed that hundreds of thousands of Vietnam veterans were suffering from service-related mental-health issues, that psychiatrists realized "prolonged exposure to combat experiences had adverse long-term consequences."[50]

This post-Vietnam revelation marked a paradigm shift in how combat stress was viewed by both military and civilian psychiatrists. In 1980, the American Psychiatric Association included PTSD in the third edition of its Diagnostic and Statistical Manual of Mental Disorders (DSM III).[51] The establishment of a PTSD diagnosis was met with controversy. Mental-health professionals could not agree on a definition of PTSD or on specific metrics to evaluate and diagnose PTSD.[52] As such, despite its recognition in the DSM III, PTSD was not widely diagnosed or studied in the 1980s. This lack of focus on PTSD continued through the Gulf War. During the Gulf War, PTSD received very little attention because the media primarily focused on Soldiers returning from combat with unexplainable chronic symptoms that were colloquially labeled "Gulf War Syndrome."[53]

---

[48] Pol & Oaks, *supra* note 22, at 2136 (reporting that the instances of combat stress made up less than 5% of all medical cases). *See also* BINNEVELD, *supra* note 23, at 87 (attributing the lower instances of combat stress in Vietnam to the availability of psychiatric drugs, shorter tours, and the availability of recreational activities). Another reason for the relatively low number of reported cases is that the discontent and reluctance to fight the War made treating Soldiers for psychiatric conditions less of a priority. *Id.*

[49] *See* Pol & Oaks, *supra* note 22, at 2136. Psychiatric disabilities that occurred post-war were "believed to be related to preexisting conditions" rather than related to the war itself. *Id.*

[50] Chapman, *supra* note 22, at 7; Pol & Oaks, *supra* note 22, at 2138.

[51] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 247–51 (3d ed. 1980). This new disorder included the concept of "delayed onset" in its diagnostic categories. Pol & Oaks, *supra* note 22, at 2138.

[52] Pol & Oaks, *supra* note 22, at 2138. Some people went as far as to complain that the establishment of PTSD provided a diagnostic label to veterans who were largely "poor Americans . . . recruited in unusually large numbers" and given entitlements to a pension and medical care. *Id.*

[53] *Id.* For a comprehensive overview of Gulf Illnesses, see U.S. DEP'T OF VETERANS AFF., RES. ADVISORY COMM. ON GULF WAR VETERANS' ILLNESSES, GULF WAR ILLNESS AND THE HEALTH OF GULF WAR VETERANS (2008), *available at*

With the advent of Operation Enduring Freedom (OEF) in 2001 and Operation Iraqi Freedom (OIF) in 2003, PTSD received renewed interest as thousands of Soldiers returned home from combat with invisible wounds. However, with a history marred by misjudgment, misunderstanding, and stigma, many Soldiers were skeptical of the PTSD label. In 2011, due to the negative connotation associated with the term "disorder," and in an effort to de-stigmatize PTSD, top military officials dropped the "disorder"[54] in favor of calling the condition Post-Traumatic Stress (PTS) or Post-Traumatic Stress Injury (PTS "I").[55]

B. Mental Health in Today's Military

Today, the U.S. military is operating in an era characterized by "persistent conflict."[56] While combat-related stress has been present throughout the history of warfare and is by no means unique to combat in Iraq and Afghanistan, these modern conflicts have novel factors that play a role in influencing mental health.[57] First, current military operations require frequent and extended deployments. For over a decade, Soldiers have rotated in and out of combat and endured protracted separations

---

http://www.va.gov/RACGWVI/docs/Committee_Documents/GWIandHealthof GWVeterans_RAC-GWVIReport_2008.pdf.

[54] *See* Mark Thompson, *The Disappearing "Disorder": Why PTSD Is Becoming PTS*, TIME (June 5, 2011), http://nation.time.com/2011/06/05/the-disappearing-disorder-why-ptsd-is-becoming-pts/.

[55] *See* U.S. DEP'T OF THE ARMY, ARMY 2020: GENERATING HEALTH & DISCIPLINE IN THE FORCE AHEAD OF THE STRATEGIC RESET 25 (2012) [hereinafter ARMY GOLD BOOK] ("GEN Chiarelli (among others) has advocated to change the 'D' from 'Disorder' in PTSD to 'I' for injury to dispel the perception that the word 'disorder' reflects an individual weakness."). This report does note that the "change will require close collaboration with national medical organizations (e.g. , American Psychiatric Association) to assess the impact of diagnoses of mental illnesses on help-seeking behavior, treatment, and care. *Id.* The *Gold Book* is an expansion of the *Red Book*, which was published in 2010. *Infra* note 82. Both reports are nicknamed according to the color of their respective covers.

[56] Casey, *supra* note 19, at 1 ("Persistent conflict is defined as protracted confrontation among state, nonstate, and individual actors who are increasingly willing to use violence to accomplish their political and ideological objectives.").

[57] *See* ARMY GOLD BOOK, *supra* note 55, at 3 ("The wars in Iraq and Afghanistan are unique in many ways. They represent not only the longest wars fought by our Army, but also the longest fought by an all-volunteer force. Today's wars have placed tremendous and unique burdens on our Soldiers and Families as compared to previous conflicts."); INVISIBLE WOUNDS, *supra* note 11, at 5 (discussing "unique features of current deployments").

from their families while operating for months-on-end in high-stress situations.[58] These deployments are more frequent, longer in duration, and have shorter rest periods in between than in other post-World War II conflicts.[59] Next, there are higher rates of survivability from wounds.[60] Due to advances in medical treatment and protective gear, "[w]ounded Soldiers who likely would have died in previous conflicts are instead saved."[61] However, these surviving Soldiers are frequently left with "significant physical, emotional, and cognitive injuries" long after their physical wounds have healed.[62] Finally, mission requirements in the current conflicts are often complex and extremely stressful. In the modern counterinsurgency, Soldiers are often expected to perform various functions simultaneously under intense conditions. For example "[i]t is not uncommon to find a junior officer or enlisted [S]oldier who serves as a war fighter, counter insurgency expert, public works official, intelligence gatherer, and peacekeeper—all in the same day."[63]

This unique operating environment—marked by extended deployments, higher survivability rates, and complex missions—has taken a toll on the mental health of servicemembers. Since 2001, the overall rate of mental-health diagnoses among active-duty servicemembers has increased dramatically,[64] along with the rates of specific mental disorders, such as depression and anxiety.[65] The most

---

[58] Casey, *supra* note 19, at 2.

[59] *See* INVISIBLE WOUNDS, *supra* note 11, at 5 ("Troops are seeing more-frequent deployments, of greater lengths, with shorter rest periods in between—factors thought to create a more stressful environment for servicemembers."); ARMY GOLD BOOK, *supra* note 55, at 4 ("[T]he [operational tempo] in Iraq and Afghanistan over the past decade has remained persistently high, providing very few opportunities for individuals to rest, either physically or mentally.").

[60] INVISIBLE WOUNDS, *supra* note 11, at 6.

[61] *Id.*

[62] *Id.* Combat in Iraq and Afghanistan has led to the "highest ratio of wounded to killed in action in U.S. history." *Id.* Soldiers are surviving serious injuries in the current conflicts, including amputations, severe burns, spinal cord injuries, blindness, and traumatic brain injuries. *Id.*

[63] Casey, *supra* note 19, at 2.

[64] BLAKELY & JANSON, *supra* note 10, at 7 ("Between 2001 and 2011, the rate of mental health diagnoses among active duty servicemembers increased approximately 65%."). These diagnoses included adjustment disorders (26%), depression (17%), anxiety (10%), PTSD (6%), alcohol abuse and dependence disorders (13%) and substance abuse and dependence disorders (4%). *Id.* at 2.

[65] *Id.* at 3 (reporting changes in incidence rates of mental disorder diagnoses from 2001 to 2011). The incidence of some specific diagnoses including schizophrenia, personality disorders, and alcohol abuse and dependence have decreased, but the overall trend is one of increase. *Id.*

significant increase is with the reported incidence of PTSD,[66] which has increased approximately 650 percent since 2000.[67]

The stress of modern combat has also led to other disturbing trends. Several studies have linked combat stress to increased alcohol and drug abuse among servicemembers.[68] In addition, suicides among active-duty servicemembers have risen dramatically in the last decade, and are at an all-time high.[69] In fact, "beginning in 2010, suicide has been the second-leading cause of death for active duty servicemembers, behind only war injuries."[70]

Despite these staggering statistics, experts suggest that these numbers are just the tip of the iceberg; they do not account for the estimated thousands of Soldiers who require, but do not seek, mental-

---

[66] The DSM-V still includes PTSD as the official diagnosis, rather than PTS. *See* Am. Psychiatric Ass'n, *Posttraumatic Stress Disorder*, DSM-5 DEVELOPMENT, http://www.dsm5.org/Documents/PTSD %20Fact%20Sheet.pdf (last visited Dec. 10, 2014) (acknowledging the urging of military leaders to rename the disorder to reduce stigma but concluding that "[i]n DSM-5, PTSD will continue to be identified as a disorder").

[67] BLAKELY & JANSON, *supra* note 10, at 3 ("The reported incidence of PTSD has increased approximately 650%, from about 170 diagnoses per 100,000 person years in 2000, to approximately 1,110 diagnoses per 100,000 person years in 2011.").

[68] *See e.g.*, Joshua E. Wilk et al., *Relationship of Combat Experiences to Alcohol Misuse Among U.S. Soldiers Returning from the Iraq War*, 108 DRUG & ALCOHOL DEPENDENCE 115 (2010) (finding a correlation between combat experiences and alcohol misuse); Karen H. Seal et al., *Substance Use Disorders in Iraq and Afghanistan Veterans in VA Healthcare, 2001–2010: Implications for Screening, Diagnosis, and Treatment*, 116 DRUG & ALCOHOL DEPENDENCE 93 (2011) (finding that alcohol use disorder and drug use disorder diagnoses were "highly comorbid with PTSD and depression"); INVISIBLE WOUNDS, *supra* note 11, at 129. *But see* BLAKELY & JANSON, *supra* note 10, at 3 (finding that the rates of diagnoses of alcohol abuse and dependence have decreased).

[69] Casey, *supra* note 19, at 2 ("The suicide rate among our [S]oldiers is at an all time high."); *see generally* Robert H. Pietrzak et al., *Risk and Protective Factors Associated with Suicidal Ideation in Veterans of Operations Enduring Freedom and Iraqi Freedom*, 123 J. OF AFFECTIVE DISORDERS 102 (finding that PTSD, depression, and psychosocial difficulties are strong indicators of suicidal ideation).

[70] BLAKELY & JANSON, *supra* note 10, at 48. There is also some evidence that suggests that as the military reduces its footprint in combat, suicides may overtake war injuries as the leading cause of death among active duty servicemembers. *See* Greg Zoroya, *Suicides in the Army Declined Sharply in 2013*, USA TODAY (Jan. 31, 2014), http://www.usatoday.com/story/news/nation/2014/01/31/suicide-----military----army----numbers-----decline/5057337/ ("During periods of weeks or months, more troops were dying by their own hand than were killed in combat.").

health treatment.[71] According to the Walter Reed Army Institute of Research, "[r]oughly half of the [S]oldiers who return from war with post-traumatic stress disorder don't seek treatment."[72] These findings are paralleled in a *2012 Military Family Lifestyle Survey Report* conducted by Blue Star Families.[73] This survey found that twenty-six percent of the spouse respondents reported that their servicemember "displayed symptoms of PTS."[74] Of these respondents, sixty-two percent reported that their servicemember had not sought medical help or treatment.[75]

The biggest barrier to seeking mental health care services is not due to a shortage of available services.[76] In fact, over the past decade, the

---

[71] BLAKELY & JANSON, *supra* note 10, at 24 ("[T]hese data likely underestimate the true incidence and prevalence numbers and rates among active duty servicemembers of the U.S. Armed Forces."). Another explanation for the lower numbers is that the data does not include "servicemembers who may experience mental health problems but who do not seek treatment for them at a fixed military medical or reimbursable civilian location." *Id.*

[72] *See* Seth Robinson, *Soldiers Fail to Seek PTSD Treatment or Drop Out of Therapy Early, Research Finds*, STARS & STRIPES (May 5, 2012), http://www.stripes.com/news/special-reports/post-traumatic-stress-disorder-ptsd/soldiers-fail-to-seek-ptsd-treatment-or-drop-out-of-therapy-early-research-finds-1.177275 (reporting the findings of Major Gary H. Wynn during an American Psychiatric Association annual meeting).

[73] BLUE STAR FAMILIES, OFFICE OF RESEARCH AND POLICY, 2012 MILITARY FAMILY LIFESTYLE SURVEY (2012) [hereinafter Blue Star Families]. This survey was administered online to family members representing "a diverse cross section of military family members from all branches of services, ranks and regions, both within the United States and overseas military installations." *Id.* at 6. "Of the 4,234 military family members that started the survey, seventy-nine percent (2,891) completed the entire questionnaire." *Id.*

[74] *Id.* at 22–23. Notably, the respondent's observations of their servicemembers are from a laypersons' perspective; not all the servicemembers necessarily have PTSD. However, the survey still illustrates the prevalence of servicemembers who do not seek treatment.

[75] *Id.* at 23.

[76] *E.g.*, MHAT 6, *supra* note 5, at 56 (reporting that in a survey of 1,580 Soldiers in Afghanistan, only 6.5% of respondents cited lack of mental-health services, difficulty getting an appointment, availability of appointments, or not knowing where to go as factors affecting their decision to receive medical care, whereas more than 25% of surveyed Soldiers cited a stigma-based factor that affected their decision to receive medical care); INVISIBLE WOUNDS, *supra* note 11, at 104 (reporting that "logistical" barriers to care were cited less frequently when compared with "institutional and cultural" barriers to care). *But see* BLUE STAR FAMILIES, *supra* note 73, at 23 (citing "lack of confidentiality" as the biggest reason for seeking treatment, but ranking "good services were not conveniently available" as a larger factor than "negative image of seeking treatment" and "fear negative impact to career). Significantly, the Blue Star Families Respondents were Family members rather than the servicemembers themselves.

DoD and the mental-health community at large have taken steps to improve access to mental health services.[77] Rather, the biggest barrier preventing Soldiers from seeking mental health care is the perceived stigma associated with receiving mental health treatment.[78]

III. Stigma Regarding Mental Health Treatment

In social science literature, stigma is defined as "a negative and erroneous attitude about a person, a prejudice, or a negative stereotype."[79] The Army Suicide Prevention Task Force specifically defines stigma from a military perspective: "the perception among Leaders and Soldiers that help-seeking behavior will either be detrimental to their career (e.g., prejudicial to promotion or selection to leadership positions) or that it will reduce their social status among their peers."[80] Due to stigma, individuals with mental illnesses are often doubly challenged. In addition to struggling with the symptoms and disabilities resulting from their mental conditions, they are also "challenged by the stereotypes and prejudice that result from misconceptions about mental illness."[81] The fear of judgment and prejudice often prevents individuals with mental-health concerns from seeking professional help.[82]

The military culture presents unique challenges with regards to stigma as a barrier to care. Strengths and attributes that are central to the military culture often conflict with the notion of seeking help or admitting struggles with invisible wounds. This section will discuss both

---

In addition, these Family members were affiliated with veterans and National Guard and Reserve Soldiers rather than just active-duty Soldiers. *Id.* at 6.

[77] *See, e.g.*, ARMY GOLD BOOK, *supra* note 55, at 14–15 (detailing the efforts of the Army's Medical Command in responding to the increase in behavioral health issues).

[78] *See supra* note 71.

[79] INVISIBLE WOUNDS, *supra* note 11, at 275 (citing Patrick W. Corrigan & David L. Penn, *Lessons from Social Psychology on Discrediting Psychiatric Stigma*, 54 AM. PSYCHOL. 765, 765 (1999)).

[80] U.S. ARMY SUICIDE PREVENTION TASK FORCE, ARMY HEALTH PROMOTION RISK REDUCTION SUICIDE PREVENTION REPORT A-13 (2010) [hereinafter ARMY RED BOOK].

[81] Patrick W. Corrigan & Amy C. Watson, *Understanding the Impact of Stigma on People with Mental Illness*, 1 WORLD PSYCHIATRY 16 (2002).

[82] Nicola Fear et al., *Does Anonymity Increase the Reporting of Mental Health Symptoms?*, BMC PUBLIC HEALTH (2012), http://www.biomedcentrl.com/1471-2458/12/797 ("There is no doubt that the perceived stigma of having a mental disorder acts as a barrier to help seeking.").

aspects of stigma according to the military-specific definition: the "warrior culture" of the Army, where Soldiers sometimes equate mental-health issues with weakness, and the common belief amongst Soldiers that seeking help or receiving treatment will adversely impact their careers.

A. Stigma Bred in the Warrior Culture

The Army's warrior culture "is one that values strength, resilience, courage, and personal sacrifice."[83] Soldiers are groomed to embody the Army Values and the Warrior Ethos, which champion attributes such as duty and selfless service.[84] These values are instilled in Soldiers from their first day in the Army,[85] and they are essential to "develop[ing] and maintain[ing] an effective fighting force."[86] However, this culture can sometimes prove detrimental to the mental-health needs of individual Soldiers.[87] Soldiers often feel an obligation to master their problems and shake off ailments; "[t]he prevailing view within [the] ranks is that

---

[83] Craig J. Brian & Chad E. Morrow, *Circumventing Mental Health Stigma by Embracing the Warrior Culture: Lessons Learned from the Defender's Edge Program*, 42 PROF. PSYCHOL. RES. & PRAC. 16, 16 (2011).

[84] *Warrior Ethos*, U.S. DEP'T OF ARMY, http://www.army.mil/values/warrior.html (last visited Feb., 22, 2015) ("I will always place the mission first. I will never accept defeat. I will never quit. I will never leave a fallen comrade."); *Army Values*, U.S. DEP'T OF ARMY, http://www.army.mil/values (last visited Feb. 22, 2015) [hereinafter ARMY VALUES] (listing the seven Army Values: Loyalty, Duty, Respect, Selfless Service, Honor, Integrity, and Personal Courage); *see* Casey, *supra* note 19, at 2 ("Our Army Values and Warrior Ethos play a significant role in how we see ourselves, and therefore, in how we chose to behave.").

[85] ARMY VALUES, *supra* note 84 ("Soldiers learn these values in detail during Basic Combat Training (BCT) from then on they live them every day in everything they do—whether they're on the job or off. In short, the Seven Core Army Values . . . are what being a Soldier is all about.").

[86] INVISIBLE WOUNDS, *supra* note 11, at 276.

[87] *See id.* at 276; Hipes, *supra* note 4, at 1 ("While these norms help to maintain a unified fighting force, their enforcement may foster divisions between individuals seen as fit for duty and individuals seen as too weak to handle the stressors of military service."); *see also* Shaun M. Burns & James R. Mahalik, *Suicide and Dominant Masculinity Norms Among Current and Former United States Military Servicemen*, 42 PROF. PSYCHOL. RES. & PRAC. 347 (2011) (discussing how masculine norms such as self-reliance an emotional control or stoicism are barriers to seeking help and can ultimately lead a servicemember to suicide).

having problems with stress or seeking help is not only inconsistent with being a warrior but also a sign of weakness."[88]

Studies of deployed active-duty Soldiers have consistently found that beliefs rooted in the Army culture often prevent Soldiers from seeking mental-health care. For example, in the 2009 MHAT survey of 1,580 Soldiers in Afghanistan, many of the respondents believed that if they sought mental-health treatment they would be seen as weak (29.0%), members of their unit would have less confidence in them (29.5%), they would be embarrassed (25.8%), or their leaders would treat them differently (29%).[89] These beliefs regarding stigma were equally prevalent in maneuver units and in support-and-sustainment units.[90] The fear of judgment and embarrassment is common in many Soldiers throughout the Army—from infantrymen to mechanics to cooks.

B. Fear of Career Impacts

The second stigma-based barrier prevalent in the military is the fear that seeking help will have adverse career impacts. Specifically, Soldiers believe that admitting their mental-health struggles will negatively impact their security clearances, potential for career progression, or even their ability to continue to serve in the Army altogether.[91] In an open-

---

[88] Casey, *supra* note 19, at 2; *see also* INVISIBLE WOUNDS, *supra* note 11 at 276; *Invisible Casualties: The Incidence and Treatment of Mental Health Problems by the U.S. Military: Hearing Before the H. Comm on Oversight and Gov't Reform*, 110th Congress 43 (2007) (statement of Army Specialist Michael Bloodworth) (agreeing with the notion that coming forth with a mental illness in the military is seen as a sign of weakness).

[89] *See* MHAT 6, *supra* note 5, at 56. Earlier MHAT studies conducted between 2003 and 2006 parallel these results—"[a]pproximately half of the servicemembers who screened positive for mental disorders cited concerns about appearing weak, being treated differently by leadership, and losing confidence of members of the unit as barriers to receiving behavioral health care." INVISIBLE WOUNDS, *supra* note 11, at 277 (compiling the data from various Mental Health Advisory Team surveys).

[90] MHAT 6, *supra* note 5, at 5 ("No differences in stigma rates were found between maneuver and support and sustainment units.").

[91] *See* Invisible Wounds, *supra* note 11, at 280 ("Receiving a mental health diagnosis may also have significant career implications, particularly in some career tracks that require higher fitness standards. . . . Evidence of a mental health problem may also result in questioning of a military servicemember's security clearance and hinder promotion."); *Invisible Casualties: The Incidence and Treatment of Mental Health Problems by the U.S. Military: Hearing Before the H. Comm on Oversight and Gov't Reform*, 110th Congress 43 (2007) (statement of Army Specialist Thomas Smith) ("I believe that there are a lot of people that are afraid it is going to hurt their career to step forward.").

ended survey that asked spouses to explain reasons why their servicemembers did not seek help, some of the responses included: "My husband did not want to be labeled or somehow 'excused' from the military after 16 years with no retirement"; "If our soldier were to be actually diagnosed with PTSD, we know it could affect his career"; and "It affects job evaluation."[92] Similarly, in the 2009 MHAT study, nearly a quarter (24.2%) of the respondents indicated that the belief that doing so would be detrimental to their careers in some fashion was a factor that affected their decision not to seek mental-health care.[93] As one officer summed up in sharing his struggle with PTSD, he feared that "Big Army" would find out about his condition and tag him as "broken" and that the "very act of seeking help from a mental health professional could be information that could be used against [him] to target [him]."[94]

C. Stigma as a Barrier to Care

In light of the prevalent stigma associated with seeking mental-health treatment, many Soldiers are reluctant to seek help.[95] Rather than face real or perceived judgment for their conditions, they choose instead to suffer in silence. Without treatment, these Soldiers often turn to drugs or alcohol in an attempt to self-medicate.[96] Their work performance and family life often deteriorates, and in the most tragic cases, when all hope is lost, they turn to suicide.[97] Major Ruocco's tragic story illustrates this destructive pattern. As a proud Marine Officer, his fears of judgment

---

[92] BLUE STAR FAMILIES, *supra* note 73, at 24.

[93] MHAT 6, *supra* note 5, at 56. Notably, the percentage of Soldiers who believed that seeking treatment would harm their careers has gone down significantly since the MHAT study in 2004 of Soldiers in Iraq. *Background*, REAL WARRIORS, *supra* note 9, at 1 (reporting that in 2004, 50 percent of the Soldier-respondents from Operation Iraqi Freedom held the belief that seeking help would harm their careers (citing Hoge et al., *supra* note 6, at 13–22)).

[94] Chaplain (Major) Carlos Huerta, *Leaving the Battlefield: Soldier Shares Story of PTSD*, U.S. DEP'T OF ARMY, http://www.army.mil/article/78562/ Leaving_the_battlefield_Soldier_shares_story_of_PTSD.

[95] SUICIDE PREVENTION OFFICE ANNUAL REPORT 2012, *supra* note 19, at 15 ("Some servicemembers do not access behavioral health care because of such perceptions [of being viewed as weak], along with concerns that seeking care will ruin their career."); *see also* ARMY GOLD BOOK, *supra* note 55, at 69 ("[T]he biggest barrier to progress in the diagnosis and treatment of behavioral health conditions is the long-standing stigma associated with seeking and receiving treatment.").

[96] *See supra* text accompanying note 68.

[97] *See* SUICIDE PREVENTION OFFICE ANNUAL REPORT 2012, *supra* note 19, at 15 (citing stigma reduction as a major goal of the Suicide Prevention Office).

and career repercussions made him unwilling to reach out for help.[98]

To compound the problem, the very individuals who need the most help are the ones more likely to hold stigmatizing beliefs.[99] Servicemembers who meet screening criteria for a psychological health concern are approximately two times more likely to express anxiety about reaching out for care than servicemembers who did not meet screening criteria for a psychological health concern.[100]

IV. Overcoming Stigma-Related Barriers to Care with Confidentiality

Confidentiality is critical to overcoming barriers to care associated with stigma.[101] Soldiers who are otherwise too embarrassed or scared to seek treatment are more likely to do so with strict assurances of privacy.[102] Many of them seek out mental-health providers and chaplains "off the record,"[103] and they are often wary of even being seen talking to these professionals.[104] As such, over the past decade, several professional organizations have recommended that the government and military support confidential reporting of mental-health issues to overcome to the stigma-based barrier to care.[105] In response, the DoD

---

[98] *See supra* text accompanying notes 1–3.

[99] Fear et al., *supra* note 81, at 1 ("[I]ndividuals who have a mental problem are more likely to experience barriers to care and hold stigmatizing beliefs.").

[100] Hoge et al., *supra* note 6.

[101] *See* INVISIBLE WOUNDS, *supra* note 11, at 282 ("Such fears of negative career consequences could be alleviated by allowing servicemembers with less-severe mental health issues to easily and confidentially receive services.").

[102] *See generally* Fear et al., *supra* note 81 (discussing the impact of anonymity on mental-health reporting).

[103] *See* Sadie F. Dingfelder, *The Military's War on Stigma*, 40 MONITOR ON PSYCHOL. 52 (2009) (presenting the experience of Navy Lieutenant Justin D'Arienzo, PsyD, who was often approached in the lunchroom of the U.S.S. Kitty Hawk aircraft carrier "off the record" about issues).

[104] Interview with Major (Chaplain) David Beavers, Chaplain, The Judge Advocate Gen.'s Legal Ctr. & Sch., in Charlottesville, Va. (Jan. 9, 2014) (sharing that he has sometimes been asked to meet off-duty hours away from the office to preserve confidentiality).

[105] *See, e.g.*, INVISIBLE WOUNDS, *supra* note 11, at xxviii (recommending that the military implement policies that "will require creating new ways for servicemembers . . . to obtain treatments that are confidential"); *APA's Advice to the Military*, AMERICAN PSYCHIATRIC ASS'N, http://www.apa.org/monitor/2009/06/stigma-war.aspx (last visited Jan. 9, 2014) (recommending "[i]ncreased confidentiality concerning mental health treatment). *See also* BLUE STAR FAMILIES, *supra* note 73, at 24 (advocating for confidential avenues for spouses to express their concerns about their servicemembers

and the Army have enacted programs and policies to protect confidentiality.

A. Department of Defense Initiatives to Protect Confidentiality

Looking first at the efforts made by the DoD, the most significant change came in May of 2008, when former Secretary of Defense Robert Gates announced a change to the security-clearance application-and-renewal process that eliminated "the requirement for individuals to report if they have sought out counseling related to service in combat."[106] In particular, Question 21 of the Standard Form 86 (SF-86) now reads:

> Mental health counseling in and of itself is not a reason to revoke or deny a clearance. In the last 7 years, have you consulted with a health care professional regarding an emotional or mental health condition or were you hospitalized for such a condition? Answer "No" if the counseling was for any of the following reasons and was not court-ordered: 1) strictly marital, family, or grief not related to violence by you; or 2) strictly related to adjustments from service in a military combat environment.[107]

Additionally, resources such as the Defense Centers of Excellence for Psychological Health and Traumatic Injury's Real Warrior Program,[108]

---

who are exhibiting symptoms of PTS). In the Blue Star Families *Lifestyle Survey Report*, an astounding eighty-six percent of the spouse respondents who reported that their servicemembers suffered from symptoms of PTSD cited "lack of confidentiality" as the primary reason for not seeking medical help. *Id.*

[106] ARMY GOLD BOOK, *supra* note 55, at 25. *See* Memorandum from Sec't of Def. to Sec'ys of the Military Dep'ts et al., subject: Policy Implementation—Mental Health Question, Standard Form (SF) 86, Questionnaire for National Security Positions (18 Apr. 2008) [hereinafter SF 86 Policy Implementation Memo].

[107] SF 86 Policy Implementation Memo, *supra* note 106 (publishing the revised question). By way of comparison, the previous SF-86 question read: "In the last 7 years, have you consulted with a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health related condition?"

[108] *See Background*, REAL WARRIORS, *supra* note 9, at 2 (promoting a toll-free Military Crisis Line, which is a confidential resource "that connects servicemembers in crisis and their families and friends with qualified, caring responders"); ARMY GOLD BOOK, *supra* note 55, at 71 (reporting that the Real Warriors Campaign's DCoE Outreach Center

Military One Source (MOS), and the Military and Family Life Consultant Program (MFLC) offer confidential services to military personnel and their family members.[109] These resources were specifically created to "implement privacy and confidentiality policies to promote participation and reduce stigma."[110] Notably, while the programs handle issues including "stress and anger management, grief and loss, the deployment cycle, parent-child relationships, couples communication, marital issues, relationships, and relocations," they are explicitly "non-medical" in nature and are not meant to be a substitute for medically-based mental health diagnoses and treatment.[111] Nevertheless, the confidential approach to counseling and stress management has been attractive to many servicemembers; the MFLC program saw an increase in use of about twenty-five percent between 2003 and 2010.[112] Finally, the DoD provides explicit direction to protect Soldier information and confidentiality.[113]

"provides access to psychological health information and resources 24 hours a day, seven days a week").

[109] *See generally* U.S. DEP'T OF DEF., INSTR. 6490.06, COUNSELING SERVICES FOR DOD MILITARY, GUARD AND RESERVE, CERTAIN AFFILIATED PERSONNEL, AND THEIR FAMILY MEMBERS (21 Apr. 2009) (C1, 21 July 2011) [hereinafter DoDI 6490.06] (discussing Military One Source and Military and Family Life Consultant (MFLC) Program).

[110] *Id.* encl. 3, para. 1.a. To further protect confidentiality, MFLCs are not military personnel, do not keep military records, and are available to meet with Soldiers and their Family members off post and after duty hours if desired. *See* MIL. CMTY. & FAMILY POL'Y (MC&FP), MC&FP FACT SHEET: MILITARY AND FAMILY COUNSELOR PROGRAM, [hereinafter MFLC FACT SHEET], *available at* http://www.militaryonesource.mil/12038/MOS/Factsheets/Factsheet _MFLC.pdf.

[111] *See* DoDI 6490.06, *supra* note 109, encl. 3, para. 1 (discussing the parameters of the MFLC and MOS programs).

[112] MFLC FACT SHEET, *supra* note 110, at 1. The rate of satisfaction for the MFLC services appears to be very high. In a survey of the program, "98% of [the 2,791] respondents rated the MFLC services they received as good or excellent, 99% would recommend MFLC to a friend, and 96% said MFLC services met most or almost all of their needs." *Id.*; Kaytrina Curtis, *Military, Family Life Consultants Offer Coping Skills at Stewart-Hunter*, U.S. DEP'T OF ARMY (Apr. 19, 2012), http://www.army.mil/article/78142/Military__Family_Life_Consultants _offer_coping_skills_at_Stewart_Hunter/. Another testament to the success of the MFLC program is its growing popularity: "35% of active duty servicemembers reported using non-medical counseling services in 2010 compared to 10% in 2003." MFLC FACT SHEET, *supra* note 110, at 1.

[113] *See* U.S. DEP'T OF DEF., INSTR. 6490.08, COMMAND NOTIFICATION REQUIREMENTS TO DISPEL STIGMA IN PROVIDING MENTAL HEALTH CARE TO SERVICE MEMBERS (17 Aug. 2011) [hereinafter DoDI 6490.08] (establishing a presumption that healthcare providers "are not to notify a [servicemember's] commander when the [servicemember] obtains mental health care or substance abuse education services").

B. Army Initiatives to Protect Confidentiality

The Army has also made significant progress toward fostering confidentiality in recent years. In 2009, the Army initiated an experimental program to allow Soldiers to seek treatment for drug and alcohol abuse without their commander's knowledge. This program, called the Confidential Alcohol Treatment and Education Pilot (CATEP), was initially implemented at three Army posts, with the goal of allowing Soldiers to receive treatment for substance abuse without any subsequent damage to their military careers.[114] Although CATEP is limited to Soldiers seeking treatment for substance-abuse disorders, it is significant in the mental-health arena because of the comorbidity[115] between substance abuse and other mental-health issues.[116] It also shows the Army's recognition of the importance of confidential treatment.[117] After all, "[a]ll of the Army's healthcare services and resources will be ineffective as long as Soldiers suffer from stigma-associated with help-seeking behavior."[118]

V. Duties of Commanders and Leaders

A. Concerns with Confidentiality

The increased push for confidentiality is not without concern. In fact, "feedback from commanders indicates growing concern that they are left out of the loop on critical information pertaining to Soldier

---

[114] *See* Dr. Charles S. Milliken, *Access to SUD Care: Confidentiality and Stigma Issues*, WALTER REED ARMY INST. OF RESEARCH 18 (May 3, 2011), http://www.iom.edu/~/media/Files/Activity%20Files/MentalHealth/MilitarySubstance Disorders/5-3-11ppt2.pdf (describing the CATEP program and its purposes). The CATEP program was initially started at: Joint-Base Lewis McChord, Washington, Fort Richardson, Alaska, and Schofield Barracks, Hawaii. *Id. See also* ARMY GOLD BOOK, *supra* note 55, at 33–34 (discussing the CATEP program and how the Army plans to expand "confidential treatment access and delivery").

[115] "Comorbidity of conditions refers to two or more conditions co-occuring simultaneously." INVISIBLE WOUNDS, *supra* note 11, at 125.

[116] *See* Milliken, *supra* note 114, at 7 (reporting that about half of the Soldiers who screen for PTSD, depression, suicidal ideations or risky behavior (such as driving too fast) also have a drinking problem); INVISIBLE WOUNDS, *supra* note 11, at 134 ("Substance use disorders often co-occur with other mental disorders.").

[117] *See* ARMY GOLD BOOK, *supra* note 55, at 72.

[118] *Id.* at 72.

performance and readiness."[119] In a 2011 survey of the Army's CATEP program, leaders at the first-line supervisor level through commanders indicated that while they supported Soldiers getting treatment, they opposed not being informed of their Soldiers' participation in the treatment.[120] Many specifically felt that not knowing what was going on with their Soldiers hindered their ability to effectively lead and help those Soldiers. They also felt that the absolute confidentiality detracted from overall unit readiness.[121]

In the Army, "commanders [and leaders] have a duty to ensure the safety and well-being of their Soldiers while also making sure their units are trained and ready to conduct the missions assigned to them on behalf of the Nation."[122] In this decade of persistent combat and increasing demands on Soldiers, this dual responsibility has become especially challenging.[123] To accomplish their duties and make critical decisions concerning well-being and readiness, commanders and leaders require information about their Soldiers, including certain mental-health information. Total confidentiality is not feasible.

B. Safety and Well-Being of Soldiers

Soldiers are the single most important asset in the Army.[124] As General Creighton W. Abrams Jr. articulated, "Soldiers are not in the Army, Soldiers are the Army."[125] A commander's primary duty,

---

[119] *Id.* at 34.

[120] *See id.* (discussing the commander's concerns). Notably, this survey also "posed a contrary view." Many commanders who initially opposed the CATEP program's confidential nature admitted that they would rather Soldiers receive treatment without command notification than for the Soldier not to receive any treatment at all. *Id.*

[121] *Id.* at 345 ("[L]eaders support Soldier getting treatment, however, they oppose not being informed of Soldiers' participation in treatment; many feel that confidentiality detracts from their ability to effectively help and lead Soldiers and diminishes overall readiness.").

[122] *Id.* at 64–65.

[123] *Id.* at 11 (quoting the Honorable John M. McHugh, Secretary of the Army, as saying "The most important thing we do is take care of our Soldiers, Civilians, and Families. However, the obvious stress of ten years of war in two theaters, inadequate dwell time at home to recover . . . and a rising number of non-deployable Soldiers have real implications for the Army today and in the future").

[124] U.S. DEP'T OF ARMY, TRADOC PAM. 525-97, SOLDIER AS A SYSTEM foreword (24 Feb. 2006) [hereinafter TRADOC PAM. 525-97].

[125] ARMY GOLD BOOK, *supra* note 55, at 4 (quoting General Creighton W. Abrams Jr., 26th Chief of Staff of the Army).

therefore, is to take care of his Soldiers. In a mental-health context, this includes being vigilant for high-risk behavior and ensuring their Soldiers receive proper care and treatment.

With the troubling suicide rate over the past decade, the Army has put special emphasis on the importance of leaders knowing their Soldiers.[126] Commanders are expected to monitor the psychological health of their troops and recognize symptoms or unusual behavior that could be considered warning signs of self-injurious behavior.[127] For example, a commander should watch for a "disturbance or change in behavior, such as a [S]oldier being late to formation when previously the [S]oldier was on time for formation, or a [S]oldier becoming belligerent toward their chain of command."[128] This responsibility extends to all leaders, including non-commissioned officers (NCOs). In a video message aimed at preventing suicide, now-retired Sergeant Major of the Army (SMA) Raymond F. Chandler III called on leaders and NCOs to remain vigilant: "I am calling on each of our leaders, but specifically our NCOs to make a difference. As the backbone of our Army, you are in the best position to be our first line of defense. It is vital that you know your Soldiers."[129]

Commanders also need to be aware of the "complexity of comorbidity and its impact on Soldier populations."[130] Mental-health conditions are often associated with a myriad of other conditions that affect Soldier wellness.[131] For example, Soldiers with PTSD often simultaneously suffer from chronic physical pain and other somatic

---

[126] *Id.* at 26 ("Leaders at all level must increase awareness of changes in behavior that may indicate a general decline in mental and physical health.").

[127] *See* Ellen Nakashima, *Q&A: How the Army Handles Behavior Health Issues*, WASH. POST (May 8, 2011), http://www.washingtonpost.com/lifestyle/magazine/qanda-how-the-army-handles-behavioral-health-issues/2011/05/02/AF5f6lrF_story.html (reporting an interview with Army Colonel Rebecca I. Porter, Chief of Behavior Health Division of the Office of the Army's Surgeon General) ("Ultimately the command is responsible for monitoring the health and well-being of its soldiers.").

[128] *Id.* (adding that "[o]ther indicators [may include] a drunken driving accident [or] getting into arguments and fights").

[129] *Video Profile: SMA Raymond Chandler*, REAL WARRIORS, http://www.realwarriors.net/multimedia/profiles/chandler.php.

[130] ARMY GOLD BOOK, *supra* note 55, at 45.

[131] *Id.* at 42–43 (discussing comorbidity and describing comorbidity as "unquestionably the most complex health issue confronting a post-war force").

symptoms, such as shortness of breath, fever, nausea, and dizziness.[132] Poor mental health may also "contribute to poor physical health through altered biological functions (e.g., increased immune function) or by influencing individual health risk behavior (e.g., smoking, poor diet)."[133] In fact, mental-health conditions have been associated with health-compromising behaviors, such as alcohol dependence, risky sexual behaviors, and illicit drug use.[134] In a related matter, commanders must also be aware of the correlation between disciplinary issues and untreated mental-health issues.[135] Each of these issues has the potential to affect the safety and well-being of individual Soldiers and the unit as a whole.

Commanders are often held personally responsible for their Soldiers' actions.[136] This is because the Army expects them to "have an active role in the care and well-being of their Soldiers."[137] When a Soldier acts out or deviates from acceptable behavior, leaders at higher levels often want to know if that Soldier's chain of command was aware of any warning signs and if the incident could have been prevented. Two high-profile cases demonstrate this point. After an investigation revealed that Private First Class Bradley Manning—the Soldier convicted in July of 2013 of various charges relating to the leaking of classified material to *WikiLeaks*—was possibly "experiencing an intense personal crisis and deteriorating mental health in the months he was leaking large amounts of classified data,"[138] there was an inquiry into whether his supervisors

---

[132] *See* INVISIBLE WOUNDS, *supra* note 11, at 132 (noting some of the somatic complaints associated with Soldiers who screen positive for PTSD).

[133] *Id.* at 131.

[134] *Id.* at 133–35 (describing various studies relating to mental-health issues and associated consequences).

[135] ARMY GOLD BOOK, *supra* note 55, at 4 ("[T]he Army—from senior leaders to frontline supervisors—must foster a culture that facilitates a 360 degree awareness of the interactions of health and disciplinary issues on individual Soldiers, units and Army communities.").

[136] Nakashima, *supra* note 127, at 2 ("In general, those who are in a soldier's chain of command are considered to be responsible for what the soldiers do or don't do . . . .").

[137] ARMY GOLD BOOK, *supra* note 55, at 69.

[138] Julie Tate, *Army Ignored Manning's Deteriorating Mental Health, Defense Attorney Says*, WASH. POST (Aug. 13, 2013), http://www.washingtonpost.com/world/national-security/army-ignored-mannings-deteriorating-mental-health-de fense-attorney-says/2013/08/13/56dd9e70-0451-11e3-a07f-49ddc7417125_story.html (citing the sentencing argument of Manning's defense attorney). According to his defense counsel, Manning sent an e-mail to his NCO supervisor with the subject line of "My Problem." In the email, Manning told his NCO that he was "suffering from a gender-identity disorder" that was causing problems with his family. He also attached a photograph of himself wearing a blonde wig and makeup. In a separate incident that

properly handled his case.[139] Similarly, there was also an investigation after Staff Sergeant Robert Bales walked off his post in southern Afghanistan in March of 2012 and murdered sixteen Afghan civilians. Among the questions that the investigating officer was tasked with answering was whether Sergeant Bales's chain of command recognized any warning signs or mental-health issues.[140] These inquiries stemmed from the expectation that commanders and leaders know their Soldiers.

Finally, and perhaps most significantly, Soldiers are likely to get the best possible care if commanders are aware of their mental-health issues and can collaborate with the Soldier and the Soldier's mental-health providers.[141] The combination of the healthcare provider, the Soldier, and the commander is called the "health triad," and it has been effective in properly diagnosing and treating mental-health issues.[142] When they are aware of a Soldier's issues, commanders and supervisors can support treatment by ensuring the Soldier gets to appointments, checking in with the Soldier, and even assisting the Soldier's family. After all, despite seemingly opposing interests, commanders and individual Soldiers do have a common goal: healthy and resilient Soldiers.

C. Soldier Readiness and Fitness

Commanders also have a duty to ensure readiness within their

---

occurred the month after sending this e-mail, "Manning was found in the fetal position in a storeroom with a knife at his feet." *Id.*

[139] Nakashima, *supra* note 127, at 1 ("Pfc. Bradley Manning's mental and emotional health was an issue for his supervisors. Whether they properly handled his case was the subject of an investigation . . . .").

[140] This is based on the author's personal experience as a trial counsel for the case of *United States v. SSG Robert Bales*. Just a few days after the crime occurred, the Commanding General of U.S. Forces-Afghanistan initiated an investigation that included several lines of inquiry, including whether there were any early indications or warning signs prior to the crime.

[141] *See Release of Protected Health Information to Commanders, Stand-To!*, U.S. DEP'T OF ARMY (Oct. 8, 2010), http://www.army.mil/standto/archive/2010/10/08/print.html ("Collaborative communication between commanders and healthcare providers is essential for Army readiness and the health and wellness of Soldiers.").

[142] *See, e.g.*, *id.* at 21 (crediting the collaboration of the health triad with the successful diagnosis and treatment of over 126,000 cases of traumatic brain injury (TBI) since the beginning of the war); Interview with Chaplain (Major) Beavers, *supra* note 104 (agreeing that collaboration is extremely effective in treatment for Soldiers).

units.[143] The Army measures the readiness level of a unit in "three key areas: manning, training, and equipping."[144] Manning or personnel readiness "reflects not only the number of individuals assigned, but more importantly, their level of physical and mental fitness."[145] When Soldiers suffer from untreated mental-health issues, including cumulative stress from multiple and prolonged deployments, there are often consequences to their performance and readiness.[146]

Just as a physical injury such as a broken leg can affect a Soldier's ability to accomplish a mission, invisible wounds can also hinder mission accomplishment. In 2011, "mental disorders accounted for more hospitalizations for servicemembers than any other illness."[147] In particular, PTSD has been associated with "lower ratings of general health, more sick call visits, [and] more missed work days."[148] These prolonged treatments and hospitalizations result in lost duty time that commanders must account and to which they must adjust.[149] In some cases, mental-health issues like PTSD may even affect a Soldier's ability to deploy.[150]

Even if a Soldier's mental-health issues do not rise to the level of hospitalization, mental issues and high levels of stress can affect his work performance and quality.[151] Anecdotally, Soldiers with PTSD

---

[143] *See, e.g.*, Casey, *supra* note 19, at 2 (noting that readiness is an operational issue, and thus in the purview of commanders).

[144] ARMY GOLD BOOK, *supra* note 55, at 64.

[145] *Id.*

[146] *See* Casey, *supra* note 19, at 1 ("American soldiers have rotated between combat and home for more than nine years, incurring cumulative levels of stress that are impacting their performance, their readiness, and—in many cases—their personal relationships.").

[147] BLAKELY & JANSON, *supra* note 10, at 1 (citing *Mental Disorders and Mental Health Problems, Active Component, U.S. Armed Forces*, 2000–2011, MED. SURVEILLANCE MONTHLY REP., June 2012, at 11–17).

[148] ARMY GOLD BOOK, *supra* note 55, at 24.

[149] *See* BLAKELY & JANSON, *supra* note 10, at 5 ("Calculated by lost duty time, the Army has been the service most affected by hospitalizations of active duty servicemembers for mental disorders."). Between 2006 and 2009, the rate of hospitalizations increased by more than fifty percent as a result of increased instances of PTSD, depression, and substance abuse. *Id.*

[150] *See* ARMY GOLD BOOK, *supra* note 55, at 24 ("Soldiers with PTSD may continue to be more susceptible to episodic recurrences of severe symptoms based on stressful events associated with military life (e.g. deployments, extended family separations, and continued high OPTEMPO).").

[151] *See* INVISIBLE WOUNDS, *supra* note 11, at 138 (discussing the impact of poor mental health on employment).

often admit that they are unable to concentrate on their daily duties.[152] This is because some of the hallmark symptoms of PTSD, such as hyper-arousal and avoidance,[153] can cause poor social functioning in an individual, and adversely affect the individual's performance and ability to work on a team.[154] This is especially true in "the high stress occupation and environment associated with military service."[155] Alcohol dependence and illicit drug use, which are frequently associated with mental-health issues, are also linked to productivity losses.[156]

D. Critical Information for Commanders

A commander's task of measuring mental fitness and readiness is particularly challenging because the psychological wounds that affect behavior and cognitive function are invisible.[157] As such, to care for Soldiers and maintain readiness, commanders must have broad access to relevant Soldier information, which may include information regarding a Soldier's mental health in some specific circumstances.[158] First, a commander needs to know if a Soldier is prescribed medication that could impair duty performance. For example, if a Soldier's medication hinders his ability to operate a vehicle, the commander should not compromise safety by assigning that Soldier as a driver in a convoy, but the commander cannot take that step if the commander does not know of the medication. Next, commanders should also be aware of mental-health conditions that impair duty performance, such as hallucinations, significant impulsivity, or delusions. This is especially true for deployment-limiting conditions. Finally, commanders need to know if a

---

[152] *See, e.g.*, *Video Profile: Staff Sgt. Megan Krause*, REAL WARRIORS, http://www.realwarriors.net/multimedia/profiles/krause.php (explaining that as a result of PTSD, SSG Krause began to sleep during duty hours, was often late to work, became irritable with coworkers, and was not a team player).

[153] *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS code 309.81 (5th ed. 2013).

[154] ARMY GOLD BOOK, *supra* note 55, at 24.

[155] *Id.*

[156] *See id.* at 44 ("Alcohol dependence and illicit drug use were associated with impairments in output and physical demands.").

[157] *Id.*

[158] *See* Major Temidayo L. Anderson, *Navigating HIPAA's Hidden Minefields: A Leader's Guide to Using HIPAA Correctly to Decrease Suicide and Homicide in the Military*, ARMY LAW., Dec. 2013, at 15 ("Leaders desire immediate access to accurate, relevant and timely information regarding Soldier behavior and performance to manage risk within their organizations.").

Soldier indicates that he is thinking of hurting himself or another person.

As a practical matter, commanders and leaders must also account for a Soldier's whereabouts. Accountability is a critical component of safety and good order and discipline.[159] If a Soldier has to be hospitalized or will require several appointments over an extended period of time, his chain of command must be aware of the missed duty time. In the same way, commanders can also ensure that Soldiers attend their medical appointments.[160] Finally, if the Soldier's condition interferes with his ability to continue to serve in the military, the commander must know in order to initiate an administrative discharge[161] or refer the Soldier to a Medical Evaluation Board (MEB).[162]

VI. Commander's Tools to Access Protected Health Information

To assist commanders in caring for Soldiers and ensuring readiness, there are various tools available that allow commanders to access information regarding a Soldier's mental health. Such tools include special exemptions to privacy laws, as well as command-directed mental health evaluations.

A. HIPAA and the Privacy Rule

Mental-health records are protected health information (PHI). In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA)[163] to protect the use and disclosure of

---

[159] Under the Uniform Code of Military Justice (UCMJ), it is a crime for a Soldier to fail to be at his required place of duty. UCMJ art. 86 (2012) (criminalizing "absence from unit, organization, or place of duty").

[160] *See* ARMY GOLD BOOK, *supra* note 55, at 65 (discussing the requirement for "doctors to provide commanders with a list of Soldiers' medical appointments without disclosing the reason or the clinic" and reporting that this policy change has cut down on the no-show rate dramatically).

[161] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS paras. 5-13, 5-17 (14 Dec. 2007) (RAR 4 Aug. 2011) (discussing administrative discharges for personality disorders).

[162] U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS para. 4-23 (14 Dec. 2007) (RAR 4 Aug. 2011) [hereinafter AR 40-501] (establishing standards for psychological fitness); ARMY GOLD BOOK, *supra* note 55, at 66.

[163] Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104-91, 110 Stat. 1936 (1996) [hereinafter HIPAA].

PHI.[164] Subsequently, under the authority of HIPAA, the Department of Health and Human Services promulgated the Privacy Rule[165] to "set limits and conditions on the uses and disclosures" of PHI without patient authorization.[166] The military health system is subject to HIPAA and the Privacy Rule,[167] and the DoD has a Health Information Privacy Regulation—based on HIPAA—that governs the use and disclosure of PHI in the military.[168]

The default rule under HIPAA and DoD policy is that PHI cannot be released unless the patient authorizes release or an exception to HIPAA applies.[169] Nevertheless, there is a HIPAA exception that accounts for the unique nature of the military mission.[170] This "Military Command Authority" exception allows military and civilian treatment facilities to provide appropriate command authorities with access to a Soldier's PHI

---

[164] *See* Anderson, *supra* note 158, at 16–17; Major Kristy Radio, *Why You Can't Always Have It All: A Trial Counsel's Guide to HIPAA and Accessing Protected Health Information*, ARMY LAW., Dec. 2011, at 4–5 (providing more information regarding the background and legislative history of HIPAA). Prior to the enactment of HIPAA, "there was no national healthcare privacy law and there were no limits on how healthcare providers, employers, and insurers shared healthcare information." *Id.* (citing DEVEN MCGRAW, CTR. FOR DEMOCRACY & TECH, HIPAA AND HEALTH PRIVACY: MYTHS AND FACTS 2 (Jan. 2009), *available at* https://www.cdt.org/healthprivacy/20090109muthsfacts2.pdf).

[165] 45 C.F.R. pt. 160 (2007).

[166] *The Privacy Rule*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/ (last visited Jan. 21, 2014).

[167] *See* ARMY GOLD BOOK, *supra* note 55, at 64 ("The military health system must comply with the requirements of HIPAA, both as a healthcare provider through [Military Treatment Facilities] and as a 'health plan' through TRICARE.").

[168] U.S. DEP'T OF DEF., REG. 6025.18-R, DOD HEALTH INFORMATION PRIVACY REGULATION (24 Jan. 2003) [hereinafter DoDR 6025.18-R].

[169] *Id.* C1.2.3 ("Except for purposes of treatment, payment, and healthcare operations . . . and other exceptions . . . other uses and disclosures of protected health information are generally prohibited without the written authorization of the patient."); DoDI 6490.08, *supra* note 113, at 3.b ("It is DoD policy that: Healthcare providers shall follow a presumption that they are not to notify a servicemember's commander when the servicemember obtains mental health care or substance abuse education services.").

[170] 45 C.F.R. § 164.512(k) (2007) ("A covered entity may use and disclose the protected health information of individuals who are Armed Forces personnel for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission."); DoDR 6025.18-R, *supra* note 168 (implementing the HIPAA Privacy Rule and providing notice of who constitutes "appropriate command authorities" and notice of the purposes for which PHI may be used or disclosed).

to facilitate decisions pertaining to medical fitness and readiness.[171]

To further clarify the HIPAA exception for military readiness, and to control the release of PHI to commanders, the Army's Medical Command (MEDCOM) issued a policy memo in 2012 reminding military healthcare providers of the specific circumstances in which an individual's PHI may be used or disclosed to the individual's chain of command.[172] These circumstances include: to determine a Soldier's fitness for duty; to determine a Soldier's fitness to perform a specific mission; and to "carry out any other activity necessary to the proper execution of the mission of the Armed Forces."[173] The policy also directs military treatment providers to proactively inform a Soldier's commander of mission-related medical conditions and concerns, such as: medications and conditions that may impair duty performance, and circumstances where notification is necessary to "avert a serious and imminent threat to [the] health or safety or a person."[174] Finally, commanders or their designees may also access general information, such as a Soldier's profile status, adherence to scheduled appointments, and general health status.[175]

Notably, the exception to HIPAA does not provide commanders with unlimited access to a Soldier's PHI. Rather, the information released

---

[171] U.S. DEP'T OF ARMY, REG. 40-66, MEDICAL RECORD AND ADMINISTRATION AND HEALTHCARE DOCUMENTATION para. 2-4a(1)(k) (17 June 2008) (RAR 4 Jan. 2010) [hereinafter AR 40-66]. According to this regulation:

> Part 164, Title 45, Code of Federal Regulations (45 CFR 164) and DOD 6025.18–R allow a covered entity (including a covered entity not part of or affiliated with the DOD) to use and disclose the PHI of individuals who are Armed Forces personnel for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission.

Id.

[172] Policy Memorandum 12-062, Office of the Surgeon Gen./Med. Command, U.S. Army, subject: Release of Protected Health Information (PHI) to Unit Command Officials (24 Aug. 2012) [hereinafter OTSG/MEDCOM Policy 12-062]. This policy implements guidance from DoDR 6025.18-R, *supra* note 168.

[173] OTSG/MEDCOM Policy, *supra* note 172, encl.1.A.

[174] *Id.* encl.1.C.

[175] Information Paper, subject: HIPAA and Command Access to Soldier's Protected Health Information (PHI) (30 Apr. 2013) [hereinafter HIPAA Information Paper]. This information paper was drafted by Mr. Charles Orck, an attorney at the U.S. Army Medical Command's Staff Judge Advocate's Office, and is an excellent resource for judge advocates.

must be the minimum amount of information necessary for mission accomplishment.[176] Nevertheless, out of deference to commanders and for the sake of mission completion, this exception can be quite broad in practice.[177]

B. Command-Directed Mental Health Evaluations

Another tool available for commanders is the command-directed mental-health evaluation.[178] If a commander or supervisor has a sincere belief that a subordinate Soldier requires a mental-health evaluation, that commander or supervisor may direct that the Soldier be evaluated.[179] A non-emergency command-directed evaluation may be initiated to address a variety of concerns, including "fitness for duty, occupational requirements, safety issues, significant changes in performance, or behavioral changes that may be attributable to possible mental status changes."[180] Alternatively, emergency mental-health examinations are available if a commander suspects that a Soldier is suffering from a severe mental disorder or feels that there is likelihood that the Soldier

---

[176] OTSG/MEDCOM Policy, *supra* note 172, encl. 1.A (directing that "only the minimum necessary PHI of an individual may be used or disclosed to unit command officials "); AR 40-66, *supra* note 171, para. 2-4a.(4) ("Only the minimum necessary PHI will be provided to satisfy the intended purpose.").

[177] *See* ARMY RED BOOK, *supra* note 82, at 208 ("The reality of the law is that exceptions to HIPAA allow release of relevant PHI to commanders without the Soldier's consent."). *See* Anderson, *supra* note 158 (providing guidance to leaders to use HIPAA to decrease suicides and homicides in the military). Major Anderson's article also discusses other non-medical sources of information for commanders that may be indicators of high-risk behavior, such as blotter reports, Army Substance Abuse Program admissions, and Army Emergency Relief loans. *Id.* at 20.

[178] U.S. DEP'T OF DEF., INSTR. 6490.04, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE MILITARY SERVICES (4 Mar. 2013) [hereinafter DoDI 6490.04] (discussing command-directed mental health evaluations).

[179] *Id.* para. 3.b ("Commanders and supervisors who in good faith believe a subordinate Service member may require a mental health evaluation are authorized to direct an evaluation under this instruction . . . ."). A supervisor may only direct a mental-health examination if it is impractical for the Soldier's actual commander to direct the mental health examination and if they meet the qualifications in DoDI 6490.04. Simply stated, the supervisor must be in the Soldier's official chain of command and have supervisory authority over the Soldier. *Id.* glossary. In addition, a designated senior enlisted servicemember is authorized to order an emergency evaluation for an enlisted servicemember. *Id.* encl. 3.2.a(1).

[180] *Id.* para. 3.c.

will cause serious injury to himself or others.[181] Command-directed referrals are military orders and may be carried out over the objections of the Soldier.[182]

A Soldier's PHI does not have the same protection in a command-referral as it would in a self-referral. After a command-directed mental health evaluation is completed, the mental-health provider must report back to the referring commander or supervisor. The report should:

> [A]dvise the commander or supervisor of any duty limitations or recommendations for monitoring or additional evaluation, recommendations for treatment, referral of the [Soldier] to a Medical Evaluation Board for processing through the Disability Evaluation System . . . or administrative separation of the [Soldier] for personality disorder or unsuitability for continued military service.[183]

When properly utilized, the command-directed evaluations are an important tool that can assist commanders with ensuring readiness, Soldier safety, and Soldier wellness.

VII. Striking a Balance

With valid interests on both sides of the policy debate between confidentiality for Soldiers and commanders' mission requirements, balance is critical. Optimum balance permits commanders access to the necessary information needed to "protect and promote the safety and well-being of the Soldiers under their command" while at the same time recognizing a Soldier's need for privacy to overcome the stigma-based barrier to care.[184] This balance can be achieved if commanders and leaders understand the prevailing stigma of mental-health care and

---

[181] *See id.* para. 3.d (outlining three circumstances where a "commander or supervisor will refer a Service member for an emergency [mental health examination]").

[182] *Id.* para. 3.b ("[A] command-directed mental health evaluation (MHE) has the same status as any other military order.").

[183] *Id.* encl. 3, para. 5.a. Nevertheless, mental-health providers should issue the report using the minimum information necessary to make the disclosure. *Id.* encl. 3, para 5.a.

[184] ARMY GOLD BOOK, *supra* note 55, at 65; *see* Radio, *supra* note 164, at 5–6 ("[G]iven the unique nature of the military, the DoD has the additional burden of balancing privacy goals against the commander's need to execute a mission.").

respect confidentiality to the greatest extent possible. To this end, commanders are subject to the Privacy Act and service policies. However, to provide clarity and simplicity for commanders, and to emphasize the importance of promoting help-seeking behavior, these policies should be distilled into Army Regulation (AR) 600-20, *Army Command Policy*.[185] Furthermore, AR 600-20 should enumerate specific administrative penalties for commanders and leaders who intentionally use PHI in an impermissible manner or who are grossly negligent in safeguarding privacy or who foster stigma against help-seeking in their organizations. This section discusses existing penalties for privacy violations, and proposes that AR 600-20 be revised to address Soldier fitness and emphasize the importance of privacy.

A. Penalties for Privacy Violations

HIPAA and the Privacy Rule govern the release and use of PHI. However, although the Privacy Rule establishes penalties for non-compliance, it applies only to "covered entities" and not to individual commanders. Specifically a covered entity includes "any health provider, health plan, or clearinghouse that transmits health information in electronic form."[186] As such, although military health-care providers and military treatment facilities would be subject to the civil and criminal penalties of the Privacy Rule,[187] the average commander or leader would not be.

However, the Privacy Act[188] (distinguishable from the similarly-titled Privacy Rule) does apply to commanders and leaders. Whereas HIPAA and the Privacy Rule cover PHI, the Privacy Act covers all federally-maintained records. Specifically, in many circumstances, the Privacy Act bars agency disclosure of personally identifiable information (PII)[189] without an individual's consent if that information is maintained

---

[185] *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (6 Nov. 2014) [hereinafter AR 600-20].

[186] Anderson, *supra* note 158, at 17 (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF CIVIL RTS., *Summary of the HIPAA Privacy Rule* 4 (2003), *available at* http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary .pdf).

[187] *See* Anderson, *supra* note 158, at 17 (discussing the civil and criminal penalties for failure to comply with the Privacy Rule).

[188] 5 U.S.C. § 552a (2006).

[189] As defined by the Privacy Act, PII includes information such as the name, social security number, or photograph of an individual. *Id.* § 552a(4).

in a system of records.[190] The Privacy Act provides for both civil remedies and criminal penalties for violating the disclosure rules. Privacy Act civil remedies are aimed at agency compliance,[191] while the criminal penalties are applicable to individual federal agency employees, such as individual leaders and commanders.[192] Willful violation of the Privacy Act is a misdemeanor, which could result in a maximum penalty of $5,000.[193] Nevertheless, there are several exceptions to the general rule that are commonly invoked in the military.[194] In practice, these exceptions are very broad and do not impede most information-sharing within the Army and DoD.[195]

B. Regulatory Guidance to Protect Confidential Information

In 2011, the DoD published an instruction aimed at providing "guidance for balance between patient confidentiality rights and the commander's right to know for operation and risk management decisions."[196] Under DoDI 6490.08, there is a presumption that health-

---

[190] *Id.* § 552a(b) ("No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a request by, or with the prior written consent of, the individual to whom the record pertains . . . .").

[191] *Id.* § 552a(g) (discussing civil remedies for complaining individuals). The civil remedies are aimed at enforcing compliance with the Privacy Act but may also include "reasonable attorney fees and other litigation costs." *Id.*

[192] *Id.* § 552a(i) (applying to "any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information . . . ").

[193] *Id.* (stating that an individual who "knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000").

[194] *Id.* § 552a(b) (outlining twelve conditions of disclosure). There are five exceptions that are commonly used in the military: (1) "Need to know" for the performance of duties; (2) "Routine Use" as published in the Federal Register; (3) "Law enforcement" for disclosure to a law-enforcement agency; (4) "Public Safety" for compelling circumstances affecting the health or safety of an individual; and (5) "Research." ARMY RED BOOK, *supra* note 82, at 209.

[195] *See* ARMY RED BOOK, *supra* note 82 at 209 ("In short, privacy laws are not as limiting as often believed . . . ."). For risk reduction and suicide prevention, information sharing between healthcare providers, commanders, law enforcement agencies, judge advocates, and other entities is extremely beneficial: "Leadership must rely on communication, collaboration and experience of this full range of leaders to provide situational awareness and inform decisions regarding mitigation of environmental risk and individual high risk behavior." *Id.* at 35.

[196] DoDI 6490.08, *supra* note 113.

care providers should not notify a servicemember's commander when that servicemember voluntarily seeks mental-health care or services for substance abuse.[197] Rather, commanders are only to be notified in specific instances that are enumerated in the instruction.[198] These instances include: harm to self; harm to others; harm to mission; a special assignment or job that requires disclosure;[199] required inpatient care; acute medical conditions interfering with duty; entry or discharge from a formal substance abuse treatment program; and command-directed mental health examinations.[200] There is also a generalized exception that allows health-care providers to release information in special circumstances where "proper execution of the mission outweighs the interests served by avoiding notification."[201] However, this determination must be made on a case-by-case basis by a health-care provider or commanding officer in the grade of O-6 or above.[202] Disclosures are to be made only to the servicemember's commander or the commander's designated representative,[203] and such disclosures must be limited to the "minimum amount of information necessary to satisfy the purpose of the disclosure."[204]

---

[197] *Id.* para 3.

[198] *See id.* encl. 2 ("Command notification by healthcare providers will not be required for Service member self and medical referrals for mental health care of substance misuse education unless disclosure is authorized for one of the reasons listed in . . . this enclosure.").

[199] Special Personnel are described in U.S. DEP'T OF DEF., INSTR. 5210.42, NUCLEAR WEAPONS PERSONNEL RELIABILITY PROGRAM (16 July 2012) [hereinafter DoDI 5210.42]. This category can also include a person in a "position that has been pre-identified by Service regulation or the command as having mission responsibilities of such political sensitivity or urgency that normal notification standards would significantly risk mission accomplishment." DoDI 6490.08, *supra* note 113, encl. 2.

[200] DoDI 6490.08, *supra* note 113, encl. 2.

[201] *Id.*; *see also* U.S. DEP'T OF DEF., INSTR. 6025.18, PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION IN DOD HEALTH CARE PROGRAMS para. 4.b (2 Dec. 2009) [hereinafter DoDI 6025.18] ("Health care entities shall, as authorized by and consistent with the procedures of [HIPAA] ensure the availability to appropriate command authorities of health information concerning military personnel necessary to ensure the proper execution of the military mission.").

[202] DoDI 6490.08, *supra* note 113, encl. 2 (adding that the decision may also be made by another "authorized official of the medical treatment facility involved").

[203] *Id.* (noting that the commander's representative must be designated in writing).

[204] *Id.* The instruction explains that the minimum amount of information necessary to accomplish the mission is typically: "[t]he diagnosis; a description of the treatment prescribed or planned; impact on duty or mission; recommended duty restrictions; the prognosis; any applicable duty limitations; and implications for the safety of self or others." Such disclosures will also generally consist of "ways that the commander can support or assist the Service member's treatment." *Id.*

The Army also has a policy to protect PHI while accommodating mission requirements.[205] This policy provides specific guidance to military health-care providers on what information may be released.[206] It emphasizes compliance with HIPAA and the DoD policy to disclose only the minimum required information but also mandates that medical commanders provide "timely and accurate information to support unit commander's decision-making pertaining to the health risks, medical fitness, and readiness of their Soldiers."[207]

C. Preventing Stigma through Leaders

In addition to respecting and protecting PHI, military leaders at all levels are responsible for working toward eliminating stigma within their units.[208] In a memo addressed to the Pentagon's top civilian and military leaders, Secretary of Defense Leon Panetta wrote: "commanders and supervisors cannot tolerate any actions that belittle, haze, humiliate, or ostracize any individual, especially those who require or are responsibly seeking professional services."[209] Similarly, DoDI 6490.08 instructs commanders to "reduce stigma through positive regard for those who seek mental health assistance to restore and maintain their mission readiness, just as they would view someone seeking treatment for any other medical issue."[210]

---

[205] OTSG/MEDCOM Policy Memo 12-062 shows the Army's efforts to achieve a balance between mission requirements and confidentiality. ARMY GOLD BOOK, *supra* note 55, at 65 ("This memo closed one of the most critical gaps impeding communication and collaboration among the health triad.").

[206] *See supra* notes 173–75 and accompanying text (detailing the specific conditions for release according to OTSG/MEDCOM Policy Memo 12-062).

[207] OTSG/MEDCOM Policy Memo 12-062, *supra* note 172, at 2.

[208] *See, e.g.*, ARMY GOLD BOOK, *supra* note 55, at 69 ("The key to eliminating stigma is engaged, involved leadership at every level."); U.S. DEP'T OF ARMY, PAM. 600-24, HEALTH PROMOTION, RISK REDUCTION, AND SUICIDE PREVENTION para. 2-5(a)(8) (17 Dec. 2009) (RAR 7 Sep. 2010) [hereinafter DA PAM 600-24] (charging commanders with reducing stigma and building "a command climate that encourages and enables Soldiers . . . to seek help").

[209] Memorandum from Sec'y of Def. to Sec'ys of the Military Dep'ts et al., subject: Suicide Prevention for Department of Defense Personnel (10 May 2012). He also added that "we must continue to fight to eliminate stigma from those with post-traumatic stress and other mental health issues." *Id.*

[210] *Id.* Commanders are also directed to protect privacy of information in accordance with DoDI 6490.08 and DoD Directive 5400.11, *DoD Privacy Program*. *Id.*

The Army also cautions leaders not to engage in well-intended efforts that may be counterproductive or may perpetuate stigma. Army Regulation 600-63, *Army Health Promotion*, prohibits commanders from identifying Soldiers with suicide-risk symptoms or behaviors through special markings or clothing.[211] For example, leaders should not identify Soldiers undergoing treatment or counseling on a "high-risk" roster by name or restrict a Soldier to the unit's common area because he is considered to be at-risk of harming himself.[212] While these actions might be intended to care for or protect the targeted individuals through increased supervision, they often serve to further isolate these Soldiers and perpetuate the stigma associated with mental-health issues.[213] Furthermore, these actions might deter other Soldiers in the unit from seeking help or admitting a problem because they are fearful of being subjected to a similar experience.[214]

In order to better inform commanders on fostering stigma-free environments, AR 600-63 prescribes training for commanders "on how to create an atmosphere within their commands that reduces stigma and encourages help-seeking behavior."[215] Additionally, DA PAM 600-24, *Health Promotion, Risk Reduction, and Suicide Prevention*, requires commanders to educate "leaders regarding policy to eliminate belittling Soldiers who seek behavioral health assistance."[216]

D. Recommendation to Centralize Soldier Fitness Policies into AR 600-20

The regulations and policies discussed above are positive steps forward in addressing the issue of mental health in the Army and overcoming barriers to care. However, these policies are not consolidated in one source, and they are sometimes misunderstood by

---

[211] U.S. DEP'T OF ARMY, REG. 600-63, ARMY HEALTH PROMOTION para. 1-25(e) (7 May 2007) (RAR 7 Sep. 2010) ("[Commanders shall:] Ensure that Soldiers identified with suicide-risk symptoms/behaviors are not belittled, humiliated, or ostracized by other Soldiers and are not identified through special markings or clothing (that is, Soldiers' wear reflective training vests with signs identifying them as high-risk individuals.)").

[212] *See* ARMY GOLD BOOK, *supra* note 55, at 70 (providing other examples of actions that single out Soldiers).

[213] *Id.*

[214] *Id.*

[215] AR 600-63, *supra* note 211, para. 4-4j(3).

[216] DA PAM 600-24, *supra* note 208, para. 4-4.

commanders and leaders.[217] This confusion can be detrimental. Leaders and commanders may either use PHI incorrectly, thereby reaffirming the stigma-based fears of Soldiers, or they may be too conservative in using PHI and hinder unit wellness or readiness.[218]

Because the mental fitness of the force is of critical importance and is the responsibility of leaders and commanders, the Army should include a section summarizing commander responsibilities regarding mental fitness in its commander's regulation—AR 600-20, *Army Command Policy*. The stated purpose of AR 600-20 is to "prescribe the policies and responsibilities of command, which include the Army Ready and Resilient Campaign . . . , military discipline and conduct, the Army Equal Opportunity . . . Program, and the Army Sexual Harassment/Assault Response and Prevention . . . Program."[219] Looking specifically at the Well-being of the Force, which is covered in Chapter 3 of AR 600-20, commanders have an overarching responsibility to take care of people. Well-being is: "the personal—physical, material, *mental*, and spiritual state of the Army Family, including Soldiers . . . and their Families, that contributes to their preparedness to perform and support the Army's mission."[220] Therefore, mental fitness and policies related to eliminating stigma are surely appropriate material for this regulation. And the inclusion of these policies into AR 600-20 would show commanders the Army's emphasis on and commitment to mental fitness and resiliency.

Army Regulation 600-20 has entire chapters devoted to Equal Opportunity (EO), Prevention of Sexual Harassment (POSH), and the Sexual Assault Prevention and Response Program.[221] A chapter for "Mental Fitness" (or "Soldier Fitness" to emphasize the importance of

---

[217] *See* ARMY RED BOOK, *supra* note 82, at 207 ("[T]here appears to be confusion in the field as to the scope of these laws and the limitations they impose.").

[218] *See id.* at 207–08 (discussing perceived legal limitations regarding release of PHI and commenting that these misperceptions impede valuable information sharing).

[219] AR 600-20, *supra* note 185, para. 1-1. Although there are many important regulations that leaders should know and use, AR 600-20 is one of the most useful because it covers a myriad of fundamental topics. To name a few, AR 600-20 addresses topics such as: open-door policies; informal funds; successors in command; fraternization; family care plans; accommodating religious practices; and hazing. *See id.* at i–iv (complete table of contents).

[220] *Id.* para. 3-2 (emphasis added).

[221] The Equal Opportunity Program is in Chapter 6, Prevention of Sexual Harassment is in Chapter 7, and the Sexual Assault Prevention and Response Program is in Chapter 8. *Id.*

both mental and physical fitness) could parallel these chapters. It would distill the relevant information for commanders from the numerous statutes, instructions, policy memos, pamphlets, and regulations into one consolidated source. Specifically, this chapter could cover proper use of PHI, training requirements for Soldiers and commanders, and policies promoting stigma-free units. This addition to AR 600-20 would provide commanders with a streamlined source of information and cut down on confusion regarding PHI and privacy issues.

In addition, AR 600-20 could establish a specific penalty for commanders who intentionally disregard privacy or who promote or tolerate stigma in their formations. As discussed previously in section VII, the penalties associated with HIPAA do not apply to commanders because commanders are not "covered entities" under HIPAA. In addition, although commanders are subject to criminal penalties under the Privacy Act, the likelihood and feasibility of a criminal prosecution is minimal.[222] There are also no specific enumerated penalties for leaders or commanders who promote or tolerate stigma.[223] While there are various policies that caution against promoting stigma,[224] none of them are explicitly punitive in nature. To fill the gap, the addition of a Soldier Fitness chapter into AR 600-20 should include a penalty modeled after the penalties for EO and sexual-harassment policy violations.

Currently, under AR 600-20, commanders must process and investigate EO and sexual-harassment complaints according to specific guidance with strict timelines.[225] To this end, AR 600-20 *requires* supervisors to record significant deviations from EO or POSH policy in

---

[222] *See supra* notes 188–95 and accompanying text.

[223] This is not to say that commanders who tolerate or promote stigma are not subject to punitive UCMJ articles in a broad sense. While the specific provisions of the various privacy policies and regulations discussed in this article (with the exception of the Privacy Act) are not punitive in nature, commanders who promote or tolerate stigma may be in violation of the following articles: UCMJ art. 92 (2012) (dereliction of duty); *id.* art. 93 (cruelty and maltreatment, such as belittling a subordinate Soldier); *id.* art. 133 (conduct unbecoming an officer); or *id.* art. 134 (conduct prejudicial to good order and discipline and/or service discrediting). Rather, in comparison to Equal Opportunity violations or Prevention of Sexual Harassment violations, there are no regulations that prescribe specific penalties relating to privacy or stigma.

[224] *See supra* Part VII.

[225] AR 600-20, *supra* note 185, para. 6-9 ("For filing and processing of EO or sexual harassment complaints, follow the procedures outlined in appendix D."). Appendix D is extremely detailed and addresses issues such as "[a]ctions of the commander upon receipt of complaint" and "[c]onduct of the investigation." *Id.* app. D.

the offending individual's evaluation report.[226] In order to show that a stigma-free environment is just as important as a discrimination-free and harassment-free environment, AR 600-20 should include similar provisions for Soldier Fitness. Commanders and leaders who tolerate or show blatant disregard for confidentiality and PHI, or who belittle Soldiers who seek help for mental-health conditions, should be penalized for their actions.[227] This could be achieved by requiring negative comments on the evaluation reports of individuals who deviate significantly from Soldier Fitness policies.[228]

The purpose of using an evaluation report annotation is that "[t]he performance evaluation process provides commanders and supervisors an excellent opportunity to discuss their goals, objectives, and expectations of the [respective] programs."[229] This puts command emphasis on the issue, and it presents an opportunity for counseling, discussion, and mentorship.[230] After all, the goal of the Soldier Fitness policy should not be to punish commanders but to promote a stigma-free environment that encourages Soldier wellness. In contrast, merely articulating a standard and then using a General Officer Memorandum of Reprimand (GOMOR) or non-judicial punishment to punish violations of

---

[226] *Id.* para. 6-11 ("Substantiated EO complaints as a result of an AR 15-6 investigation *require* a 'Does not support EO' on the noncommissioned officer evaluation report or a 'No' in Part IV—Performance Evaluation Professionalism, A. Army Values, 5. Respect, on the officer evaluation report.") (emphasis added). For more information on evaluations, see U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM (31 Mar. 2014) [hereinafter AR 623-3].

[227] However, this policy would have to be carefully crafted to only punish blatant disregard for Soldier PHI, as commanders should not be hesitant to use the valid policy exceptions with regard to sharing PHI for the benefit of safety, readiness, or Soldier wellness. An example of an appropriate circumstance for an administrative penalty is for a leader who disparages a Soldier with PTSD by calling him names such as "whack-job" or "head case," or other disparaging terms.

[228] Arguably, this is already possible under existing evaluation systems. However, as with the EO and POSH programs, *mandatory* language in the evaluation reports shows the importance of the policy, the seriousness of deviations from the policy, and the Army's commitment to its values. In this era of force reductions, such negative language on an evaluation report will likely prevent the individual from being assigned to subsequent leadership positions, and may even jeopardize that individual's future in the Army. In addition to requiring supervisor involvement and mentorship, the threat of mandatory language is one that leaders and commanders will surely take seriously.

[229] AR 600-20, *supra* note 185, para. 6-11.

[230] *Id.* ("In counseling session [sic], commanders and supervisors should discuss these programs as expressions of the Army's values and encourage support of these programs and how they intend to evaluate individual behaviors and actions.").

that standard does not afford the same opportunity for leadership emphasis and involvement.

For ease of administration, the Soldier Fitness policy could use the procedures and timelines already established in Appendix D of AR 600-20 to receive, process, and investigate Soldiers' complaints. Requiring strict compliance would assure Soldiers that their concerns are taken seriously. As an added benefit, the very existence of a policy and penalties may also provide some level of assurance for Soldiers who would otherwise be afraid to come forward with mental-health issues.

VIII. Career Effects of Mental-Health Issues

In addition to fears of being ridiculed and judged for their mental-health issues, many Soldiers also believe that seeking help or receiving mental-health treatment will harm or even end their careers.[231] In particular, these Soldiers fear that they will lose their security clearances or be medically or administratively discharged from the Army if they seek professional mental-health treatment.[232] However, although there is certainly some risk of career impact associated with mental-health issues, the reality is that the circumstances of adverse career impact are rare. As discussed below, the regulations and procedures in place for security clearances and discharges strike a balance between the Army's mission and the protections for individual Soldiers. As such, to mitigate Soldier's fears regarding career impact, there should be greater institutional transparency to, and education for, Soldiers regarding these policies, the uses of PHI, and the actual consequences (or lack thereof) of seeking help from mental-health professionals.

A. Security Clearances

Army Regulation 380-67, *Personnel Security Program*, "prescribes the investigative scope and adjudicative standards and criteria" for access

---

[231] As discussed in Part III of this article, the Army Suicide Prevention Task Force defines stigma as "the perception among Leaders and Soldiers that help-seeking behavior will either be detrimental to their career (e.g., prejudicial to promotion or selection to leadership positions) or that it will reduce their social status among their peers." ARMY RED BOOK, *supra* note 82, at 13.

[232] *See supra* Part III.B.

to classified information in the Army.[233] While the ultimate decision whether a person can access classified information is based on a common-sense consideration of all available facts, there are several enumerated criteria that investigators look at to determine eligibility for a security clearance.[234] With regard to mental health, mental issues or disorders are of concern only to the extent that they hinder judgment or reliability. Pursuant to AR 380-67, investigators must specifically consider: "Any behavior or illness, including any mental condition, which, in the opinion of competent medical authority, may cause a defect in judgment or reliability with due regard to the transient or continuing effect of the illness and the medical findings in such case."[235]

The criteria regarding mental conditions is further divided into three disqualifying factors including: "Behavior that casts doubt on an individual's judgment, reliability, and trustworthiness that is not covered under any other guideline, including . . . emotionally unstable, irresponsible, dysfunctional, violent, paranoid, or bizarre behavior"; a "duly qualified mental health professional['s]" opinion that an individual has a condition that may impair judgment, reliability, trustworthiness; or the "individual has failed to follow treatment advice."[236] An individual who satisfies one or more of these factors could be disqualified from obtaining or maintaining a security clearance.[237] However, there are circumstances that could mitigate the disqualifying factors. Such mitigating factors include responsiveness to medication, elimination of any underlying factors that contributed to the bizarre behavior, and conditions that are cured with little to no probability of recurrence.[238]

---

[233] *See* U.S. DEP'T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM, at i (24 Jan. 2014) [hereinafter AR 380-67].

[234] *Id.* para. 2-4 (listing and explaining all seventeen factors); *see also* U.S. DEP'T OF DEF., DIR. 5200.2-R, PERSONNEL SECURITY PROGRAM (Jan. 1987) (C3, 3 Feb. 1996) [hereinafter DoDD 5200.2-R] (outlining the same factors for the DoD).

[235] *See* AR 380-67, *supra* note 233, para. 2-4j. Notably, although there is only one factor that specifically mentions mental conditions, there is a separate factor for "[h]abitual or episodic use of intoxicants to excess." *Id.* para. 2-4m. Mental issues can be comorbid with substance abuse, which could also be disqualifying.

[236] *See id.* para. I-11 (listing the factors).

[237] *Id.* The CCF "serves as the U.S. Army's executive agency for personnel security determinations in support of Army world-wide missions." *See* U.S. Army Intelligence & Sec. Command, Central Clearance Facility, U.S. DEP'T OF THE ARMY, http://www.inscom.army.mil/MSC/CCF.aspx. If information in an individual's medical records or application indicates a mental condition that would impair judgment, reliability, or maturity, the Central Clearance Facility (CCF) will request a mental health evaluation of that individual. AR 380-67, *supra* note 233, para. 5-7.

[238] AR 380-67, *supra* note 233, para. I-6.

Notably, even if a Soldier has a valid security clearance and is not due for a renewal, a commander may still suspend the Soldier's security clearance for suspected or actual psychological problems.[239] Under these circumstances, the commander may only reinstate access to classified information if each of the six conditions listed in AR 380-67 are met.[240] However, if a Soldier's security clearance was suspended for a suicide attempt, only the Commander of the Central Clearance Facility (CCF) can reinstate his clearance.[241]

Although the regulation certainly allows for mental health to be considered when evaluating the trustworthiness and reliability of an individual, the act of seeking mental-health treatment in and of itself is not disqualifying. In 1995, President Clinton issued Executive Order 12968, which prohibited the drawing of any negative inference concerning an individual's trustworthiness based solely on mental-health counseling.[242] In fact, the Executive Order noted that counseling could actually be viewed as a positive factor for eligibility determinations.[243] Similarly, as discussed previously, the DoD amended the security-clearance application in 2008 so that servicemembers do not even have to report counseling related to adjustments from serving in a combat zone.[244] In the memorandum implementing this change, DoD officials specifically noted: "Seeking professional care for these mental health

---

[239] *Id.* para. 8-3 (allowing commanders or heads of organizations to suspend security clearances if "information exists which raises serious questions as to the individual's ability or intent to protect classified information").

[240] *Id.* para. 8-3b(2) (describing the factors, including: a medical evaluation that "indicates the condition was a one-time occurrence"; the condition will not have lasting effects on the individual's judgment; there is no requirement for further medical consultation on the condition; the examining physician recommends a full return to duty status; the individual's behavior after the favorable evaluation is acceptable; and the commander "firmly believes the person does not pose a risk to the security of classified information").

[241] *Id.* ("Only the [Commander], CCF, may reinstate access in cases where the person attempted suicide.").

[242] Exec. Order No. 12,968, 60 Fed. Reg. 40,250 (Aug. 7, 1995) ("No negative inference concerning the standards in this section may be raised solely on the basis of mental health counseling."). However, the Executive Order does note that counseling could be a basis for further inquiry. *Id.*

[243] *Id.* ("Such counseling can be a positive factor in eligibility determinations.").

[244] *See supra* text accompanying notes 17–18, 106–07; Tamara Haire, *Financial Problems or PTSD Need Not Affect Security Clearance*, U.S. DEP'T OF ARMY, http://www.army.mil/article/24053/financial-problems-or-ptsd-need-not-affect-security-clearance/.

issues should not be perceived to jeopardize an individual's security clearance."[245]

In reality, the fears associated with seeking treatment are undue because seeking treatment for mental-health issues rarely affects an individual's security clearance.[246] Rather, it is the failure to seek care that can actually jeopardize an individual's security clearance if that person's psychological distress escalates to serious mental conditions that would "preclude them from performing sensitive duties."[247] One report from the CCF found that "99.8 percent of cases with psychological concerns obtained [or] retained their security clearance eligibility."[248] The majority of the individuals who had their clearance denied or revoked had other issues accompanying their psychological concerns.[249] Indeed, as argued in President Clinton's Executive Order, investigators often view counseling for mental-health issues as a positive factor in the security-clearance process.[250]

Finally, pursuant to a rapid action revision dated January 24, 2014, AR 380-67 now affords individuals an opportunity to appeal adjudicative decisions to a higher level authority before the adjudicative decision is final. If a Soldier's security clearance or access determination is acted upon unfavorably, the Soldier will receive written notice of this adverse determination from the CCF. Within sixty days of receiving the CCF determination, the Soldier can either request a personal appearance before the Defense Office of Hearings and Appeals (DOHA) or appeal in writing directly to the Army's Personnel Security Appeals Board

---

[245] SF 86 Policy Implementation Memo, *supra* note 106, at 2 (containing a memorandum to "All Individuals Completing the SF86 Questionnaire for National Security Positions" from the Under Secretary of Defense for Personnel and Readiness and the Under Secretary of Defense for Intelligence).

[246] *See* Haire, *supra* note 244, at 1 (quoting the commander of the CCF as saying, "All Army personnel should understand that they can obtain counseling service for financial and mental health issues without undue concern of placing their security clearance status in jeopardy").

[247] SF 86 Policy Implementation Memo, *supra* note 106, at 2.

[248] Haire, *supra* note 244, at 2 (reporting statistics based off of "CCF's adjudicative history"); *see also* MILITARY PSYCHOLOGY: CLINICAL AND OPERATIONAL APPLICATIONS 45–46 (Carrie H. Kennedy & Eric A. Zillmer eds., 2006) [hereinafter MILITARY PSYCHOLOGY] (reporting that in 2004 "only 74 clearances were denied or revoked on the basis of mental health issues—out of nearly 500,000 investigations conducted by the Army" (citing personnel communications with LTC S. Harvey)).

[249] MILITARY PSYCHOLOGY, *supra* note 248, at 46.

[250] *Id.* ("Professional mental health counseling is not a threat to an individual's security clearance; rather it can be a positive factor in the security clearance process.").

(PSAB). This ability to appeal before a determination is final adds another level of protection for the Soldier.[251]

B. Discharges from the Army

1. Medical Boards

If a Soldier is unable to perform military duties because of a behavioral-health condition, he may be referred for processing through the Army's Disability Evaluation System (DES) and may potentially face medical separation or retirement. Army Regulation 40-501, *Standards of Medical Fitness*, prescribes specific physical and mental standards that Soldiers must meet.[252] Under the standards established by AR 40-501, a diagnosis of PTSD may result in a referral to the DES.[253] However, in practice, most medical professionals only refer Soldiers with behavioral-health conditions such as PTSD, depression, and panic disorders if they affect a Soldier's ability to perform duties and after all treatment methods have been exhausted with no improvement.[254] With regard to PTSD, Soldiers who receive early intervention and treatment benefit greatly, and they are often able to significantly reduce or eliminate their symptoms of PTSD without career consequences.[255]

As part of the DES process, if a Soldier's behavioral-health condition is found not to meet retention standards, a Soldier with a behavioral-

---

[251] AR 380-67, *supra* note 233, para. 8-6(d). If the Soldier chooses to make a personal appearance to the DOHA, "[t]he DOHA will review the facts of the case and make a recommendation to the PSAB." *Id.* The determination of the PSAB (whether considering the DOHA recommendation or a written appeal directly from the individual in question) is final. *Id.*

[252] AR 40-501, *supra* note 162.

[253] *Id.* para. 8-24. For more information on personnel separations relating to physical evaluations, see U.S. DEP'T OF ARMY, REG. 635-40, PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION (8 Feb. 2006) (RAR 20 Mar. 2012) [hereinafter AR 635-40].

[254] *See* MILITARY PSYCHOLOGY, *supra* note 248, at 42 ("The consensus from the field is that if there is no or minimal improvement after 8 to 12 months of treatment and/or all levels of care have been offered without results . . . and/or the illness has demonstrable and detrimental impact on the member's ability to perform military duties, an MEB should be initiated.").

[255] *See Dispelling Myths About Post Traumatic Stress Disorder*, REAL WARRIORS, http://www.realwarriors.net/ active/treatment/ptsdmyths.php#_end6 (citing U.S. DEP'T OF DEF., DEPLOYMENT HEALTH CLINICAL CTR., TBI AND PTSD QUICK FACTS, *available at* http://www.pdhealth.mil/downloads/ TBI_PTSD_Final04232007.pdf).

health condition will be referred to a Physical Evaluation Board (PEB). In making its determination, the PEB will consider evidence such as a commander's statements, letters from family members, and evaluation reports to determine whether the Soldier can perform his military occupational specialty (MOS).[256] The existence of a behavioral-health condition "does not necessarily mean that [a] Soldier is incapable [of] performing [his] assigned duties or that the PEB must find [his behavioral-health] condition unfitting."[257] Of note, Soldiers who are deemed to be unfit to continue military service are retired or separated with benefits if their conditions are incurred as a result of military service.[258]

Soldiers undergoing DES processing are entitled to legal services from the Office of Soldier's Counsel (OSC).[259] Attorneys assigned to that office provide "case-specific legal advice and advocacy designed to help Soldiers formulate and achieve their specific goals from the DES."[260] To this end, OSC attorneys advocate for "fit for duty" determinations for Soldiers who do not wish to be separated from service. To best serve Soldiers' interests, OSC attorneys are insulated; they "do not advise or represent [c]ommanders, medical personnel, or the MEB."[261] Rather, they are advocates for the individual Soldier.

2. *Administrative Discharges*

Even if a Soldier's condition does not warrant DES processing, a commander may still administratively discharge a Soldier for the "Convenience of the Government" pursuant to Army Regulation 635-

---

[256] Information Paper, subject: Behavioral Health Conditions 1 (5 Mar. 2014), *available at* https://www.jagcnet.army.mil/8525740300753073/0/0373E37B596BA094852573F4005520F9?opendocument (follow "Psychiatric Conditions (5 Mar 14).pdf" hyperlink).

[257] *Id.* However, "[i]f the PEB determines that a Soldier cannot perform military duties because of a medical condition, then the PEB will generally find that condition unfitting for continued military service." *Id.*

[258] ARMY GOLD BOOK, *supra* note 55, at 66.

[259] *Legal Services Available During the MEB and PEB Process*, U.S. DEP'T OF ARMY, https://www.jagcnet.army.mil/8525740300753073/0/56C016A9D039C927852573F000552C3B?opendocument (providing basic information on the role of the Office of Soldier's Counsel).

[260] *Id.*

[261] *Id.*

200, Active Duty Enlisted Separations.[262] Specifically, paragraph 5-17 allows Soldiers to be separated for "physical or mental conditions not amounting to disability [under AR 635-40] . . . that interfere with assignment to or performance of duty."[263] There are several conditions that may qualify a Soldier for an administrative discharge, including, sleepwalking, dyslexia, and severe nightmares. However, if a Soldier has been deployed to a combat zone but presents with certain specific conditions, that Soldier must be referred under the Physical Disability System and may not be discharged under paragraph 5-17.[264] As a final note, Soldiers who are separated pursuant to paragraph 5-17 are normally separated with an honorable characterization of service.[265]

Soldiers with less than twenty-four months of active-duty service may be separated under the provisions of chapter 5-13 for personality disorders if their condition "interferes with assignment or with performance of duty."[266] This chapter is aimed at new Soldiers who may have an onset of a personality disorder that becomes evident in their inability to adapt to the military environment.[267] However, even if a Soldier with less than twenty-four months of active-duty service is diagnosed with a personality disorder, he will not be administratively discharged if "PTSD, TBI and/or other comorbid illness are significant factors to a diagnosis of personality disorder."[268] Rather, this Soldier would be processed under the Physical Disability System.[269]

Soldiers undergoing administrative separations are afforded due process and are entitled to legal counsel from the Army's Trial Defense

---

[262] *See* AR 635-200, *supra* note 161, ch. 5. The authority to approved separations under Chapter 5 is reserved for commanders who are special courts-martial convening authorities (typically at the brigade level or equivalent). *See id.*, para. 1-19 (outlining separation authorities). However, subordinate commanders may initiate separation proceedings.

[263] *Id.* para. 5-17.

[264] *Id.*; AR 40-501, *supra* note 162, para. 8-24 ("A Soldier will not be processed for administrative separation under AR 635–200, paragraph 5-17, if PTSD or mTBI are contributing factors to the diagnosis of [personality disorders], but will be evaluated under the physical disability system in accordance with AR 635–40.").

[265] AR 635-200, *supra* note 161, para. 5-1 (noting that Soldiers being separated under chapter 5 will be awarded honorable or under honorable conditions and commenting that under honorable conditions is an inappropriate characterization for most Soldier separated under paragraph 5-17).

[266] *See id.* para. 5-13.

[267] *Id.*

[268] *Id.*

[269] *Id.*

Service (TDS).[270] Like OSC attorneys, TDS attorneys are insulated from the Soldier's chain of command and represent their client's interests.[271] In addition, there are procedural protections built into the administrative-separation process, such as administrative boards for qualifying individuals, specific approval authorities above the company commander level, and opportunities for Soldiers to submit matters to the separation authority for consideration.[272]

C. Summary of Career Impact

Overall, although there is no guarantee that seeking mental-health treatment will not have any adverse career impacts, the chances of harm to a career for seeking mental-health treatment are exceptionally slim.[273] As previously discussed, the regulations and procedures governing security clearances and discharges from the military strike a balance between advancing the Army's mission and protecting individual Soldiers through specific due-process rights.

In fact, a Soldier is actually more likely to harm his career if he lets a mental issue go untreated. A 2006 Air Force study found that servicemembers who sought out mental-health assistance were significantly less likely to experience negative impacts on their careers

---

[270] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 6 (3 Oct. 2011) [hereinafter AR 27-10] (discussing the role of the U.S. Army Trial Defense Service, including representation in administrative separation proceedings).

[271] *See id.* para. 6-11 ("Nothing in this chapter limits a [TDS] counsel's duty to exercise independent professional judgment on behalf of a client."); *see generally* Lieutenant Colonel Peter R. Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, ARMY LAW., Mar. 2001, at 1.

[272] AR 635-200, *supra* note 161, ch. 2 (outlining "Procedures for Separation"); *see* Masterton, *supra* note 271, at 10–13 (discussing the role of a TDS attorney in administrative separations).

[273] This conclusion is based on the regulations, guidance, policies, and statistics discussed in this section. However, there may be certain opportunities for special schools and assignments that could be affected. Because the assessment and selection of high risk operational personnel is necessarily kept close-holds, it is difficult to determine how, if at all, help-seeking behavior affects an individual's eligibility and competitiveness for such units. For more information on the assessment and selection of high-risk operational personnel from a military psychology standpoint, see MILITARY PSYCHOLOGY, *supra* note 248, at 353–68. Finally, it is important to note that this impacts only an extremely small percentage of Soldiers.

than those who were command referred.[274] Servicemembers in this study were thirteen times "more likely to experience a career impact by avoiding or delaying professional assistance."[275] One explanation relates to comorbidity. These PTSD-related issues, such as alcohol abuse, increased irritability, and inability to focus, can worsen if not identified and treated in a timely matter.[276] Left untreated, mental-health issues can escalate and result in misconduct or poor work performance. Put simply, the failure to seek necessary mental-health assistance is often more detrimental to an individual's career than the actual psychiatric issues.[277]

Finally, perhaps the best evidence that a Soldier can seek help without harming his career are the examples of Soldiers who have actually received mental-health treatment and gone on to have successful careers. For example, now-retired Sergeant Major of the Army Raymond Chandler sought treatment for PTSD and was in counseling every week for two years. His extensive counseling did not stop him from being selected for that position.[278] There have also been general officers, such as General Carter Ham,[279] Major General David Blackledge,[280] and

---

[274] Rowan et al., *supra* note 9, at 1126 (finding that 3% of self-referred individuals reported impact to career, while 39% of commander-directed individuals reported career impact).

[275] *Id.*

[276] *See supra* Part V.C.

[277] *See* MILITARY PSYCHOLOGY, *supra* note 248, at 46 (noting observations from military mental health practitioners); Dingfelder, *supra* note 103, at 2 ("Seeking mental health care doesn't harm your career . . . . It's not being able to do your job because of personal issues that can harm your career." (quoting the chief of the Air Force's Mental Health Division)).

[278] *Video Profile: Sgt. Maj. of the Army Raymond Chandler*, REAL WARRIORS, http://www.realwarriors.net/multimedia/. On a previous deployment before becoming Sergeant Major of the Army, SMA Chandler had been working at his desk in his room. He got up from his desk to stretch his legs when a rocket came through the wall of his room and destroyed his desk. Although SMA Chandler is an infantryman and was no stranger to combat, being so close to death in his own room made him feel extremely vulnerable and shook him to the core. After he returned home from the deployment, he started drinking a lot more, and his relationships with his wife and family deteriorated. He finally decided to seek help and received counseling for many years. During his interview for the Sergeant Major of the Army position, General Casey asked SMA Chandler if there was anything that General Casey should know prior to hiring him. Sergeant Major of the Army Chandler disclosed his counseling and said that it may be an embarrassment. General Casey responded by saying that it was not an embarrassment and that it was a good-news story. *Id.*

[279] General Carter Ham was in command in Iraq in 2004 when a suicide bomber killed twenty-two people in a mess hall at a base in Mosul. The devastation of this event (General Ham arrived on the scene within twenty minutes) and other experiences during the deployment affected him deeply, and when he returned from the deployment, he

Brigadier General Gary S. Patton,[281] who have suffered from PTSD and had successful careers after seeking help.[282] Finally, Staff Sergeant Ty Carter recently received the Medal of Honor for his heroic actions at Forward Operating Base Keating, Afghanistan, in 2009, after being treated for PTSD resulting from the same battle.[283]

D. Transparency for Soldiers

Despite overwhelming evidence that seeking professional mental-health treatment is not career-ending, many Soldiers continue to believe that it is. As such, transparency is critical. To mitigate a Soldier's concerns, there should be institutional transparency and Soldier education on the uses of their PHI and on the due-process safeguards available to them. Without this factual and credible information, Soldiers will be left to assume the worst, and many will consequently

---

struggled to adjust. Rather than let the stress of his combat service fester and ruin his career, he sought help for PTSD, received counseling, and went on to have an extremely successful career. Tom Vanden Brook, *General's Story Puts Focus on Stress Stemming from Combat*, USA TODAY (Nov. 24, 2008), http://usatoday30.usatoday.com/news/military/2008-11-24-general_N.htm.

[280] Major General David Blackledge was in command of a Civil Affairs unit in Iraq in 2004 when his convoy was ambushed. His interpreter was shot in the head, and he sustained several injuries from the attack. As a result, he was evacuated back to the Walter Reed Army Medical Center where he was able to talk to a psychiatrist over the course of eleven months while he received physical therapy for his other injuries. Pauline Jelinek, *General Bucks Culture of Silence on Mental Health*, USA TODAY (Nov. 8, 2008), http://usatoday30.usatoday.com/news/washington/2008-11-08-3632490803_x.htm.

[281] Brigadier General Gary Patton was a Brigade Commander in the Anbar province of Iraq in 2004. During the course of this deployment, he recalls being exposed to various forms of trauma: "You . . . have the trauma of seeing loss of life, Iraqi citizens, innocents, being blown up by suicide bombs . . . . You had the trauma of killing another human being. We killed a lot of terrorists and insurgents in direct combat and gunfights." Tom Vanden Brook, *supra* note 279. Upon returning home, Brigadier General Patton was affected by hyper-vigilance and insomnia. After being able to talk about his experiences with a counselor, he was able to adjust to being home, and was eventually promoted to Brigadier General. *Id.*

[282] Dingfelder, *supra* note 103, at 2.

[283] Elizabeth M. Collins, *In the Aftermath of Keating, MOH nominee Carter gets help for PTSD*, U.S. DEP'T OF ARMY, http://www.army.mil/article/109617/In_aftermath_of_Keating__MOH_nominee_Carter_gets_help_for_PTSD/ (recounting Staff Sergeant Carter's story).

refrain from seeking help.[284]

1. Institutional Transparency

Looking first to institutional transparency, the DoD and the Army should take steps to be completely transparent on the actual effects of help-seeking behavior. In addition to general assurances from ranking officials that seeking help for mental-health issues will not harm a Soldier's career,[285] the DoD and the Army should publish evidence to support these assertions. For example, to mitigate concerns that seeking help will affect a Soldier's security clearance, the CCF could publish annual statistics on the number or percent of clearances that were actually revoked for reasons purely relating to mental health. Although limited statistics regarding clearances are available in scattered research or news articles, there is currently no centralization of this data.[286] These concrete statistics may give Soldiers the assurance they need to seek treatment. In the same way, similar statistics regarding how many Soldiers are medically or administratively discharged involuntarily due to mental-health issues may also be reassuring and encouraging.

2. Soldier Education

Next, education is also critical in mitigating Soldiers' concerns about detriments to their careers. Soldiers should understand exactly how information concerning mental health treatment is or is not used. This includes knowing the parameters of the regulations and policies discussed previously. Currently, MEDCOM has a policy to keep Soldiers informed of the circumstances in which their commander will receive notification of their mental-health treatment.[287] While this notification is a step in the right direction, it is not enough. The MEDCOM policy concerns information that medical providers give to their patients. This necessarily implies that the Soldier receiving the information is a patient and has already taken the first big step of seeking help. Unfortunately, the stigma regarding career impact stops many

---

[284] *See* Rowan et al., *supra* note 9, at 1123 ("S[ervice] M[ember]s' misconceptions may be corrected in the short term by disseminating factual, credible information regarding the impact on one's career and confidentiality.").

[285] *See supra* note 277 (quoting the Chief of the Air Force's Mental Health Division).

[286] If these statistics are already maintained, they are not published in a manner that is easily accessible to Soldiers or the general public.

[287] OTSG/MEDCOM Policy Memo 12-062, *supra* note 172, at 4.

Soldiers from even asking for help in the first place.[288] Education should not be left to medical providers, as the point of increasing transparency is to reach Soldiers who have not yet seen any professional help.

There are other opportunities to inform and educate Soldiers on the potential uses of their private mental-health information and the due-process safeguards available to them. Rather than creating all new training, this information can be efficiently dovetailed with the existing training requirements in AR 350-1, *Army Training and Leader Development*.[289] Specifically, training regarding the use of mental-health information could be a part of the mandatory training on Soldier Resilience or the Army Suicide Prevention Program.[290] An added benefit of incorporating this information into existing programs under AR 350-1 is that the information and presentation would be standardized and consistently presented throughout the Army.[291] All Soldiers would receive the message that seeking help is not a career-killer.

IX. Conclusion

Soldiers are the Army's most important resource. For over a decade, they have fought and made personal sacrifices to protect America. But this fighting has come with a high cost and the wounds of Soldiers are often invisible. Many Soldiers have sought and received treatment for their invisible wounds but many more suffer in silence because they fear judgment or harm to their careers. While the military is working on eliminating stigma from its ranks, this requires a major cultural shift and will take time. In the mean time, assurances of confidentiality are extremely important to overcome stigma-based barriers to care.

Since total confidentiality is not possible with the military's mission, finding a balance between a Soldier's interests and a commander's interests is critical. To this end, leaders and commanders must understand their rights and the limits in accessing and using information. They must respect confidentiality and create environments that

---

[288] *See supra* notes 95–100 and accompanying text.

[289] U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT (19 Aug. 2014) [hereinafter AR 350-1].

[290] *Id.* at tbl.G-1 (listing "Resilience training" as an ongoing training requirement and "Army Suicide Prevention Program" training as an annual and re-deployment training requirement).

[291] *See id.* para. 1-9 (discussing training objectives).

encourage and applaud efforts to seek help. Promoting a stigma-free environment requires involvement from leaders at all levels, and there should be consequences for leaders and commanders who disregard privacy interests or who tolerate stigma in their formations.

In addition, the DoD and the Army should ensure complete transparency regarding the use of mental-health information to assuage fears of career detriment. Soldiers should be able to seek mental-health treatment without fearing that their careers will be harmed in the process. This also involves educating Soldiers on the current regulations and policies regarding the uses of their mental-health information, as well as on the due-process rights afforded to them by many of these regulations.

Perhaps if Maj John Ruocco had assurances that he would not be ridiculed for seeking professional help, that his private information would only be shared if absolutely necessary, and that he could receive treatment and continue to serve honorably in the Marine Corps, he would still be alive today. It might be too late for Maj Ruocco, but there are still thousands of Soldiers suffering from invisible wounds. Although their wounds may be invisible, they should not have to suffer silently. No Soldier should ever have to bear the burden of a secret like Maj Ruocco's.

A COMPENSATION SYSTEM FOR MILITARY VICTIMS OF SEXUAL ASSAULT AND HARASSMENT©

JULIE DICKERSON*

I. Introduction

After an alarming Pentagon Report[1] extrapolated that 26,000 active-duty servicemembers had been the victims of unwanted sexual contact by other active-duty servicemembers in 2012, the U.S. media turned its scrutiny on what President Barack Obama called "a scourge"[2] and General Martin Dempsey called "a crisis"[3] in the ranks.[4] Concerned with the purported "epidemic"[5] rates of sexual assault in the Department of Defense (DoD) and the corresponding impact on personnel health and

---

* Member of the Harvard Law School J.D. Class of 2015 and previously a Senior Editor on the *Harvard National Security Journal*. The author would like to thank Professors Lisa M. Schenck and Mark W. Harvey for their encouragement and thoughtful comments and Major Sarah Sykes for guiding this article through the publication process.

[1] U.S. DEP'T OF DEF., 1 FISCAL YEAR 2012 DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY exec. summary, at 3 (Apr. 15, 2013), http://www.sapr.mil/media/pdf/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf [hereinafter 2012 DOD SEXUAL ASSAULT REPORT]. Unwanted Sexual Contact (USC) is defined as follows:

> The term "unwanted sexual contact" (USC) is the survey term for contact sexual crimes between adults prohibited by military law, ranging from rape to abusive sexual contact. USC involves intentional sexual contact that was against a person's will or occurred when the person did not or could not consent. The term describes completed and attempted oral, anal, and vaginal penetration with any body part or object, and the unwanted touching of genitalia and other sexually-related areas of the body.

Id. at 2. The survey extrapolation of 26,000 victims should be viewed with great caution for a variety of reasons. *See* Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, 11. OHIO ST. J. OF CRIM. L. 579, 580-82 (Spring 2014).

[2] Robert Burns & Lolita C. Baldor, *Obama Vows to End 'Scourge' of Military Sex Abuse*, ASSOCIATED PRESS, May 17, 2013, http://news.yahoo.com/obama-vows-end-scourge-military-sex-abuse-073251406.html.

[3] *Id.*

[4] *Id.*

[5] Moolly O'Tolle, *Military Sexual Assault Epidemic Continues to Claim Victims As Defense Department Fails Females*, HUFFINGTON POST (Oct. 6, 2012 9:36 A.M.), http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department_n_1834196.html.

military readiness, Congress called for reform.[6] Some members proposed statutory changes to the Uniform Code of Military Justice (UCMJ),[7] while others suggested an overhaul of the commander's role in the military justice system.[8]

In addition to altering the accountability and reporting environments, in May 2013, in a meeting with Pentagon leaders and service chiefs at the White House, President Obama demanded justice for victims and consequences for perpetrators, saying that "[w]hen victims do come forward, they deserve justice. Perpetrators have to experience consequences."[9] In response to President Obama's call for justice and

---

[6] *See, e.g.*, Congresswoman Loretta, Sanchez, *The Forty-First Kenneth J. Hodson Lecture in Criminal Law*, 218 MIL. L. REV. 265, 267-68 (Winter 2013); Tom Brune, *Gillibrand: Reform Military Sex Assault Prosecution*, LONG ISLAND NEWS DAY (June 29, 2013), http://www.newsday.com/long-island/gillibrand-reform-military-sex-assault-prosecution-1.5595241.

[7] *See, e.g.*, S. 1917, 113th Cong. (2d Sess. 2014) (Victims Protection Act of 2014). The bill, if passed by the House, would have stopped commanders from overturning jury convictions in sexual assault cases, erased the statute of limitations for military rapes, and provided independent counsel to victims of sex crimes. *See also* S. 967, 113th Cong. (1st Sess. 2013) (Military Justice Improvement Act of 2013) (proposing the modification of, among other elements, "the factor relating to character and military service of the accused on initial disposition" and the "clemency authority of the convening authority"). R. CHUCK MASON, CONG. RESEARCH. SERV., R43213, SEXUAL ASSAULTS UNDER THE UNIFORM CODE OF MILITARY JUSTICE (UCMJ): SELECTED LEGISLATIVE PROPOSALS 16 (2013); Chris Carroll, *Hagel: Change to UCMJ to Deny Commanders Ability to Overturn Verdicts*, STARS & STRIPES, Apr. 8, 2013, http://www.stripes.com/hagel-change-ucmj-to-deny-commanders-ability-to-overturn-verdicts-1.215629.

[8] "Both the House and Senate versions of the FY2014 NDAA [National Defense Authorization Act] include language addressing the ability of the commander to consider the character and military service of the accused in the initial disposition of alleged offenses." MASON, *supra* note 7, at 10; H.R. 1960, § 546, 113th Cong., 1st Sess. (2013) (Amendment to Manual for Courts-Martial to Eliminate Considerations Relating to Character and Military Service of Accused in Initial Disposition of Sex-Related Offenses); S. 1197, § 565, 113th Cong., 1st Sess. (2013) (Modification of Manual for Courts-Martial to Eliminate Factor Relating to Character and Military Service of the Accused in Rule on Initial Disposition); s*ee also* Jillian Weinberger, *Sexual Assault in the Military: Sen. Kirsten Gillibrand's Proposals for Change*, THE TAKE AWAY (May 16, 2013), http://www.thetakeaway.org/2013/may/16/sexual-assault-military-sen-kirsten-gillibrands-proposals-change/.

[9] Bryant Jordan, *Obama: Sexual Assault Threatens National Security*, MILITARY.COM (May 17, 2003), http://www.military.com/daily-news/2013/05/17/obama-sexual-assault-threatens-national-security.html; *see also* Donna Cassata & Richard Lardern, *House Oks 2-year Sentence for Military Sex Assault*, YAHOO NEWS, June 13, 2013, http://news.yahoo.com/house-oks-2-sentence-military-sex-assault-201755582.html (noting a new measure endorsed by the House that would punish perpetrators with "a mandatory

punishment, this article proposes the creation of a Military Crime Victims Compensation Board (military compensation board or MCB), which would provide military victims of sexual assault and harassment monetary compensation by fining perpetrators.

In outlining such a system, the article first provides a brief background on how the military justice system has traditionally handled and currently handles sexual assault and harassment claims, the current options for victims to seek compensation, and an overview of reforms proposed by legal scholars and professionals. The article then discusses the states' crime victim compensation boards, which provide a basic framework for the proposed MCB. Drawing on a variety of federal, state, and military laws, the article next explains how the MCB would function practically within the military, outlining a potential system of compensation floors and ceilings. Finally, the article examines the benefits of compensating victims through the MCB, as opposed to state compensation boards, and it delineates the benefits of creating the MCB rather than implementing other more disruptive remedies.

II. Military Justice System: Sexual Assault and Harassment

A. A Separate System—A Brief Overview of the U.S. Military Justice System

Society has long recognized that the military, as a "specialized community," [10] requires a justice system fitting to its unique responsibilities: fighting and winning the nation's wars. As a consequence, the Constitution treats differently criminal cases that arise from the military services than those from civilian life. The Fifth Amendment states, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces*, or in the Militia, when in actual service in time of War or public danger." [11] Indeed recognizing the military's "fundamental necessity for obedience . . . [and] the consequent necessity for imposition of discipline,"[12] courts

---

minimum sentence of two years in prison for a member of the armed services convicted of rape or sexual assault in a military court").

[10] Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

[11] Dana Michael Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment in Today's Army*, 30 HARV. L. REV. 151, 176 (2007).

[12] Parker v. Levy, 417 U.S. 733, 758 (1974).

have also traditionally deferred to the military concerning military matters. As Justice Jackson said in 1974, "judges are not given the task of running the Army."[13]

In general, as part of its Article I, Section 8, power to make "rules for the Government and Regulation of land and naval Forces," in 1950, Congress enacted the UCMJ. Specifically, the UCMJ "contains the substantive and procedural laws governing the military justice system," while the *Manual for Courts-Martial* (*MCM*)—which is derived from the President's executive orders—expands on these laws.[14]

Military criminal investigative agencies, such as the Army Criminal Investigation Command (CID), conduct investigations into allegations of criminal acts by military personnel. Once these investigations are complete, a commander decides how to dispose of offenses, through adverse administrative action, non-judicial punishment,[15] or trial by court-martial. Throughout this process, military lawyers (judge advocates) advise those commanders, and they prosecute the cases referred to courts-martial. While the military justice system has retained this basic structure for decades, its responses to sexual assault and harassment claims have changed greatly since the integration of women into the armed services.

B. Sexual Assault and Harassment Claims

1. The Women's Army Corps and the Equal Opportunity Program

When the United States first permitted women to serve as regular, permanent members of the armed forces, the military quickly built additional sexual assault and harassment protections into the women's chain of command. Just three years after 30,000 women joined the Army

---

[13] *Willoughby*, 345 U.S. at 93.

[14] OFFICE FOR VICTIMS OF CRIME, SPECIFIC JUSTICE SYSTEMS AND VICTIMS' RIGHTS (Grace Coleman et al., 1999), https://www.ncjrs.gov/ovc_archives/nvaa99/chap3-3.htm [hereinafter COLEMAN REPORT].

[15] Article 15 of the UCMJ provides a means of handling minor offenses requiring immediate corrective action. These are non-adversarial hearings over which the commander presides. Punishment is limited to sixty days of restriction, forty-five days of extra duty, forfeiture of half of one month's pay for two months, correctional custody for thirty days (for the ranks E-5 and below only), and a reprimand. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V (2012).

in World War I, Congress passed the Women's Armed Services Integration Act of 1948, granting women permanent status in the gender-segregated Women's Army Corps (WAC).[16] While the Army remained segregated, the WAC chain of command and staff advisors—known as the "Petticoat Connection"—advocated for and helped women resolve sexual harassment issues.[17] During the late 1970s and after more than twenty years, this advocacy system fell apart when the WAC was dissolved after the service academies began admitting females.[18]

The Army, however, in response to "violent confrontations that erupted between racial and ethnic groups at posts and installations . . . in 1969 and 1970," had already created an alternative reporting system called Equal Opportunity (EO).[19] Today, the EO "strives to ensure fair treatment of all soldiers based solely on merit, fitness, capability, and potential in support of readiness."[20] The EO offers an avenue through which complainants may report discrimination and seek sexual harassment processing and resolution.[21] Providing both male and female servicemembers with an avenue for redress is significant because although women—who now comprise 15% of the military[22]—remain "more likely to be sexually assaulted in the military than men, experts say assaults against men are vastly underreported."[23] Men, who are more reluctant to report sexual assault, may comprise 53% of sexual assault victims.[24]

---

[16] THE WILLIAMSBURG COLONIAL FOUNDATION, TIME LINE: WOMEN IN THE U.S. MILITARY (2008); The Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356, 356–57 (repealed 1967).

[17] Hollywood, *supra* note 11.

[18] *Id.*

[19] U.S. DEP'T OF THE ARMY, COMMANDER'S EQUAL OPPORTUNITY HANDBOOK 9, *available at* http://www.uscg.mil/hq/cg00/cg00h/History_files/ArmyEOHandbook.pdf [hereinafter ARMY EO HANDBOOK]; U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY ch. 6 (20 Sept. 2012) [hereinafter AR 600-20] (laying out the purpose, contents, and requirements of the Army's EO program).

[20] ARMY EO HANDBOOK, *supra* note 19, at 10.

[21] *Id.*

[22] James Dao, *In the Debate Over Military Sexual Assault, Men Are Overlooked Victims*, N.Y. TIMES, June 23, 2013, http://www.nytimes.com/2013/06/24/us/in-debate-over-military-sexual-assault-men-are-overlooked-victims.html?pagewanted=all.

[23] *Id.*; *see also* 2012 DOD SEXUAL ASSAULT REPORT, *supra* note 1, at 2 (citing 2012 Workplace and Gender Relations Survey of Active-duty Members (Mar. 2013), http://www.sapr.mil/index.php/research [hereinafter 2012 WGRA]) ("6.1 percent of Active-duty women and 1.2 percent of Active-duty men indicated they experienced some kind of USC in the 12 months prior to being surveyed.")

[24] *Id.* On September 30, 2012, the total Department of Defense (DoD) active-duty population was 1,387,488, the female population on active-duty was 204,309, and the

2. Pursuing a Claim

The military defines sexual assault as "intentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent."[25] Under the DoD's Confidentiality Policy, victims of sexual assault may file a restricted or unrestricted report of the incident.[26] If a victim chooses to file a restricted report, the individual may contact a Sexual Assault Response Coordinator (SARC), Victim Advocate, healthcare provider, chaplain, or Special Victims Counsel to receive medical care, treatment, and counseling without triggering an investigation.[27] The SARC informs the installation commander that an assault occurred but does not provide any details that identify the victim.[28] By contrast, unrestricted reporting triggers an investigation, requiring notification to law enforcement, the chain of command, and the SARC.[29] If the allegation is founded (or substantiated), the accused's brigade commander has the power to act on the substantiated allegation and may use non-judicial or administrative processes or, normally through the case's referral to a higher-level commander, court-marital.[30] Should the case reach court-martial stage,[31]

---

male population on active-duty was 1,183,179. DoD Pers. and Procurement Statistics, http://siadapp.dmdc.osd.mil/personnel/MILITARY/miltop.htm (last visited July 10, 2014). Notably, 6.1% of 204,309 (female active-duty population) is 12,463; and 1.2% of 1,183,719 (male active-duty population) is 14,205.

[25] *SAPR – MCCS Lejeune-New River*, MARINE CORPS CMTY. SERVS. LEJEUNE-NEW REVIEW, http://www.mccslejeune.com/sapr/ (last visited July 16, 2014).

[26] *Reporting Options: Restricted/Unrestricted Program*, U.S. DEP'T OF THE ARMY, http://www.sexualassault.army.mil/policy_restricted_unrestricted_reporting.cfm (last visited July 16, 2014); s*ee also* U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES (28 Mar. 2013).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *The Facts*, PROTECT OUR DEFENDERS, http://www.protectourdefenders.com/the-facts/ (last visited July 10, 2014).

[31] There are three levels of court-martials in general use, each with different procedures, rights, and possible punishments: summary, special, and general. A summary court-martial is limited to imposing thirty days of confinement and is not considered a conviction. A special court-martial is limited to imposing one year of confinement and a bad-conduct discharge. A general court-martial is a felony-level court-martial with punishments limited by the *Manual for Courts-Martial*.

military prosecutors pursue a conviction under the applicable UCMJ articles.[32]

The Army's definition of sexual harassment is "a form of gender discrimination that involves unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature between the same or opposite genders . . . ."[33] The filing and processing of sexual harassment complaints follow the same procedures as for EO complaints.[34] Victims of sexual harassment may choose between filing informal or formal complaints.[35]

Informal complaints are not filed in writing and "may be resolved directly by the individual, with the help of another unit member, the commander or other person in the complainant's chain of command."[36] If uncomfortable filing within their chain of command, victims may also turn to a chaplain, provost marshal, medical personnel, and the staff judge advocate, among others.[37] During this process, efforts are made to maintain confidentiality, but confidentiality "will neither be guaranteed nor promised to the complainant by agencies other than the chaplain or a lawyer."[38] Any agency that receives an informal or formal complaint must talk with the victim and attempt to assure resolution of the issue,

---

[32] Depending on the circumstances, sexual assault or harassment can fall under one of several UCMJ charges:

> An act of sexual harassment may constitute "cruelty and maltreatment of a subordinate," extortion, indecent language, provoking words and gestures, disorderly conduct, and/or fraternization. If the harassment involves physical contact, it may constitute assault, assault consummated by a battery, indecent assault, assault with the intent to commit rape or sodomy, rape, or sodomy, as well as cruelty and maltreatment and/or fraternization. In addition, a court-martial could punish an accused under the so-called "general article" for conduct to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces, or as conducting unbecoming an officer.

Michael I. Spak & Jonathan P. Tomes, *Sexual Harassment in the Military: Time for a Change of Forum?*, 47 CLEV. ST. L. REV. 335, 345 (1999) (footnotes omitted).

[33] AR 600-20, *supra* note 19, para. 7-4(a).

[34] *Id.* at 7–9.

[35] *Id.* app. D.

[36] *Id.* para. a(1).

[37] *Id.* a(2)(a–g).

[38] *Id.* a(3).

but commanders are ultimately responsible for "eliminating underlying causes of all complaints."[39]

Formal sexual harassment complaints must be filed in writing within sixty days from the date of the alleged incident[40] with the commander at the lowest echelon of command "at which the complainant may be assured of receiving a thorough, expeditious, and unbiased investigation of the allegations," though that commander need not be in the immediate company or battalion of the victim.[41] Commanders will then conduct an investigation personally or appoint an investigating officer within fourteen days of receiving the complaint, implement a plan to protect the complainant, and consult with a judge advocate or legal advisor should a violation of the UCMJ be suspected.[42] At a minimum, if the allegation is substantiated, an offender will be counseled, but a commander may engage the full range of disciplinary actions to resolve the complaint.[43]

3. Remedies Currently Available Are Limited or Barred

a. Civil Suits in Tort—Barred

While the military provides victims access to necessary medical and mental health care,[44] the *Feres* doctrine prevents servicemembers who are sexually harassed or assaulted by another soldier from holding the government vicariously liable under the Federal Tort Claims Act (FTCA). Essentially, "[a]ny complaint of injury that occurs while the complaining party is in active-duty status, on a military base, or engaged in a military mission will be barred from suit under *Feres*."[45] Courts

---

[39] *Id.* a(4–5).

[40] If a complaint is received after sixty days, commanders may (and in practice often always) still conduct an investigation into allegations as long as they consider "the reason for the delay, the availability of witnesses, and whether a full and fair inquiry or investigation can be conducted." *Id.*

[41] *Id.* b(1).

[42] *Id.* app. D-4.

[43] *Id.* D-4, -5, -6, -7.

[44] The medical needs of servicemembers are mostly provided by DoD hospitals. Some medical services are provided by civilian providers and are paid by TRICARE—the health care program serving the Uniformed servicemembers, retirees, and their families.

[45] Henry Mark Holzer, *The Endless Ordeals of Jacqueline Ortiz: A Dessert Storm Soldier's Unsuccessful Attempt to Recover for a Sexual Attack by Her First Sergeant*, 24 N.M. L. REV. 51, 59 (1994); *see also* Feres v. United States, 340 U.S. 135, 146 (1950) (holding the government is not liable under the FTCA, "for injuries to servicemen where

have liberally interpreted and applied the "incident to service" test to a preclusive degree. For example, a Marine Corps private involved in an automobile accident on a public highway while on leave was held to have been injured "incident to service."[46] Similarly, in *Woodside v. United States*, an Air Force officer, "studying on his own time for a commercial pilot's license, was injured 'incident to service' when the instruction plane crashed."[47]

The *Feres* court's rationale for barring military victims' claims is: (1) the military offers "a separate, uniform, comprehensive, no-fault compensation scheme for injured military personnel," (2) permitting soldiers to sue the government or each other might have a negative effect on "military order, discipline, and effectiveness," and (3) a "corresponding unfairness" would arise if non-uniform local tort law decided service-connected claims.[48]

While *Feres* prevents victims from filing a suit against the government and recovering from its "deep pockets," military victims may sue their perpetrators in those persons' individual capacities in the same way civilian victims may. But military victims may be as unlikely to do so as civilian victims: civil damages are uncertain, victims may be hesitant to pay for lawyers in light of an uncertain outcome, and victims may be emotionally incapable of going through a civil trial after already enduring the previous criminal trial or, in the case of military victims, the previous military judicial process. These concerns are discussed in greater detail in Part III.E of this article.[49]

---

the injuries arise out of or are in the course of activity incident to service."); Lanus v. United States, No. 12-862, 2013 WL 3213613 (2013) (denying a writ of certiorari to review the *Feres* doctrine); Chappell v. Wallace, 462 U.S. 296 (1983) (extending *Feres* to constitutional torts committed by the military). *See also* Rachel Natelson, *The Unfairness of the* Feres *Doctrine*, TIME (Feb. 25, 2013), http://nation.time.com/2013/02/25/the-unfairness-of-the-feres-doctrine/
(noting how U.S. District Judge Amy Jackson dismissed *Klay v Panetta*, a civil lawsuit in which the plaintiff alleged the Pentagon failed to protect the plaintiff and servicemembers from sexual violence).

[46] Sanchez v. United States, 878 F.2d 633 (2d Cir. 1989).

[47] Woodside v. United States, 606 F.2d 134 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980).

[48] *The Feres Doctrine: An Examination of this Military Exception to the Federal Torts Claims Act*: *Hearing before the S. Comm. on the Judiciary*, 107th Cong. 2 (2002) (statement of Paul Harris, Deputy Assoc. Attorney Gen.); *Feres*, 340 U.S. at 140–43 (1950).

[49] *See* discussion *infra* Part III.E.

For those military victims who have already gone through the military judicial process, it would likely be more efficient for the military to distribute compensatory damages based on those military findings rather than for military victims to switch court systems and begin a civil suit from scratch. In addition it is important for the military to internally "own" the meting out of justice and punishment of perpetrators. If that duty is farmed out to civilian courts to a degree, the military will lose an opportunity to send a strong message and change its culture from the inside out.

b. No-Fault Compensation Schemes—Limited in Scope

Though the military has a no-fault compensation scheme for injured military personnel, the current compensation structure does not adequately support victims of sexual assault or harassment, and it fails to provide victims a civil remedy (like a civilian employee would have against their perpetrator's employer) for sexual harassment or assault.[50] Without the option to sue the government under tort law, it is especially important that the compensation scheme functions in a fair, timely, and compelling manner.

The DoD recognizes the important role compensation plays in "recruiting, retaining and motivating" servicemembers and, thus, offers programs that compensate members for their injuries and resulting financial losses.[51] If injured, members may receive active-duty

[50] Several statutory authorities permit civilian employees to hold their employers vicariously liable for a perpetrator's sexual harassment. For example, an employer can be held vicariously liable under Title VII of the Civil Rights of 1964 for creating a hostile work environment. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 802 (1998) ("[I]t makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority. . ."); s*ee also* Burlington Indus. v. Ellerth, 524 U.S. 742, 766 (1998). States have their own statutes that permit similar claims. Under California's Fair Employment and Housing Act (FEHA), for example, "the employer is vicariously and strictly liable for sexual harassment by a supervisor." Fiol v. Doellstedt, 50 Cal. App. 4th 1318, 1327 (Cal. App. 2d Dist. 1996). Some courts also hold employers liable under more traditional tort theories. *See, e.g.*, McLean v. Kirby Co., 490 N.W.2d 229, 236 (N.D. 1992) (holding an employer vicariously liable for rape of a customer by a salesman because a foreseeable risk of physical harm existed when the employer did not investigate the salesman's background); Samuels v. Southern Baptist Hospital, 594 So. 2d 571, 574 (La. App. 1992) (finding the hospital vicariously liable for a hospital assistant's sexual assault of a patient).

[51] THE ELEVENTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION, MAIN REPORT, at xvi (2012), http://militarypay.defense.gov/reports/qrmc/11th_QRMC_Main_Report_(299

compensation during hospitalization or rehabilitation, and upon retirement or separation, members are eligible for Social Security, U.S. Department of Veteran Affairs benefits, or DoD monetary disability compensation.[52] Servicemembers' Group Life Insurance (SGLI) and Traumatic Injury Protection (TSCLI) also "insures service members against a list of specific traumatic injuries, such as amputation, paralysis, burns, sight or hearing loss, facial reconstruction, coma, and traumatic brain injury."[53] Moreover, veterans who have suffered a sexual trauma receive free healthcare and disability compensation from the Veterans Administration (VA), even if they did not report the assault or harassment at the time of the offense, provided they can prove the injury occurred while they were in the service (the service-connection doctrine).[54]

These compensation programs provide relief in many categories, but as Francine Banner notes in her article *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, substantive remedies for military victims of sexual assault and harassment are elusive.[55] The Veterans Legal Services Clinic at Yale Law School recently released a report that found veterans face "a broken bureaucracy, with protracted delays and inaccurate adjudications" when applying for disability claims.[56] The difficulties experienced when filing disability claims are compounded when filing sexual trauma claims due to the difficulty of calculating the injuries caused by in-service sexual trauma, the procedural and evidentiary obstacles of proving that trauma, noticeable

---

pp)_Linked.pdf [hereinafter QRMC REPORT]. The amount of compensation is dependent on a variety of factors such as "a member's duty status, degree of disability, years of service, and other earnings." *Id.* at 94

[52] *Id.* The VA and DoD use similar disability compensation models that depend on data gathered from medical and physical evaluation boards. *Army Integrated Disability Evaluations System (IDES)*, ARMY Physical Disability Evaluation System (PDES), http://usarmy.vo.llnwd.net/e2/rv5_downloads/features/readyandresilient/ARMY_IDES.pdf.

[53] QRMC REPORT, *supra* note 51, at 96. Injured personnel may also receive Social Security Disability Insurance (SSDI) benefits if they have a physical or mental condition that prevents them from engaging in any "substantial gainful activity." *Id.*

[54] Associated Press Staff, *Military Sex Abuse Victims Seek VA Help*, CBS NEWS (May 20, 2013, 12:12 P.M.), http://www.cbsnews.com/military-sex-abuse-victims-seek-va-help/ [hereinafter *VA Help*].

[55] Francine Banner, *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 LEWIS & CLARK L. REV. 723, 764–66 (2013).

[56] VETERANS LEGAL SERVS. CLINIC, YALE LAW SCHOOL, BATTLE FOR BENEFITS: VA DISCRIMINATION AGAINST SURVIVORS OF MILITARY SEXUAL TRAUMA 1 (2013) [hereinafter VLSC REPORT].

gender discrimination in the distribution of monetary awards, and regional disparities in award distribution.[57]

Unlike other injuries, the VA compensation programs are less accurate in detecting and compensating members for the invisible and sometimes latent injuries that victims of sexual assault and harassment face, such as depression, flashbacks, military sexual trauma (MST), substance abuse, or sleep and eating disorders.[58] Unlike burns or broken limbs, the effects of sexual assault are not always obvious, and the rehabilitative and long-term disability costs are difficult to calculate.[59] These "invisible injuries" will increase the difficulty of (1) proving that the victim has a medically diagnosed disability and (2) ensuring that the victim receives a significant enough VA "disability percentage rating" to merit receiving VA compensatory funds.[60] In addition to proving that the victim meets VA-disability standards, victims seeking disability compensation related to sexual trauma must submit proof that the sexual assault or harassment was casually connected to their military service, which places a tough-to-meet evidentiary standard on the majority of victims who do not file a formal or informal report.[61]

Proving military sexual trauma is thus more difficult than proving other types of trauma because the military could ostensibly attribute the

---

[57] *Id.* at 1–14.

[58] *Effects of Sexual Assault*, RAINN, http://www.rainn.org/get-information/effects-of-sexual-assault [hereinafter *Effects of Sexual Assault*]. *See* Holzer, *supra* note 45, at 54 (describing the injuries suffered by a military victim of sexual abuse, as "emotional numbness, ambivalence, feelings of isolation, alienation from family and friends, hopelessness, lack of motivation . . . overall emotional breakdown . . . humiliation, anger and mood swings . . . nauseat[ion] and fatigue[] . . . [inability to] seek employment or return to college.")

[59] Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GENDER 447, 453 (2005) ("It is true that the harm of rape, unlike that of battery, can be primarily emotional and thus difficult to verify with objective evidence, but this does not in any way negate its seriousness.").

[60] PAMELA VILLARREAL & KYLE BUCKLEY, NAT'L CENTER FOR POLICY ANALYSIS, THE VETERANS DISABILITY SYSTEM: PROBLEMS AND SOLUTIONS 4 (2012), *available at* http://www.ncpa.org/pdfs/bg166.pdf.

[61] "To get disability benefits related to sexual trauma, veterans must be diagnosed with a health problem such as . . . PTSD, submit proof that they were assaulted or sexually harassed in a threatening manner and have a VA examiner confirm a link to their health condition." Kevin Freking, *Military Sexual Assault Victims Seek Help from Veterans Affairs*, HUFFINGTON POST (May 20, 2013, at 9:49 a.m.), http://www.huffingtonpost.com/2013/05/20/military-sexual-assault_n_3306295.html. For this reason, a proposed bill by Rep. Chellie Pingree (D-ME) would let "a veteran's word to serve as sufficient proof that an assault occurred" for a disability claim. *Id.*

trauma not to incidents that occurred during military service but to pre-military sexual abuse.[62] Moreover, lay testimony is "often insufficient to prove the occurrence of the trauma," and the VA has not chosen to ease this burden of proof as it has for "veterans with [Post traumatic stress disorder (PTSD)] resulting from combat, [Prisoner of War (POW)] status, and most recently, 'fear of hostile military or terrorist activity.'"[63]

Even if a victim could present the corroboration needed to show causation, obtaining benefits is still an "exercise in bureaucracy requiring [the] filling out of more than 20 documents in different systems."[64] For instance, if, after this application process, a veteran is ultimately denied benefits, he or she may appeal to the U.S. Court of Veterans Claims and, later, to the U.S. Court of Appeals for the Federal Circuit, elongating the claims process.[65] In fact, the average time that a veteran awaits a benefits decision is 260 days, and as of November 2, 2013, the backlog of disability claims in VA regional offices (VAROs) was over 400,000.[66] Perhaps for these reasons, veterans applying for military sexual trauma compensation only have a 50% chance of receiving these benefits;[67] "the grant rate for MST-related PTSD claims has lagged behind the grant rate for other PTSD claims by between 16.5 and 29.6 percentage points every year," and the percentage of erroneously denied claims has risen up to 66% in certain VAROs.[68]

For female victims, however, there is yet another obstacle. Only 22 VA offices "offer clinics employing personnel specifically trained to deal with women's experience of violence."[69] To add insult to injury, women on average receive lower payments than men do for trauma compensation, and VA compensation for servicemembers as a whole is often "dramatically lower than that available in civilian contexts."[70]

---

[62] Banner, *supra* note 55, at 765–66.
[63] VLSC REPORT, *supra* note 56, at 3.
[64] Banner, *supra* note 55, at 765–66.
[65] VLSC REPORT, *supra* note 56, at 2.
[66] *Id.* at 2–3.
[67] *VA Help*, *supra* note 54.
[68] VLSC REPORT, *supra* note 56, at 1, 4. For instance, the St. Paul Regional VA Office "has a particularly bad record of MST-related PTSD disability benefit claims in recent years, granting the lowest percentage of any VARO [VA Regional Office] in 2011 and 2012." *Id.* at 4. The discrepancy in 2012 at the St. Paul Regional Office "between MST-related PTSD and non-MST-related PTSD disability benefit grant rates . . . was a remarkable 35.1 percentage points." *Id.*
[69] *Id.* at 767.
[70] Banner, *supra* note 55, at 765–67.

Moreover, while many of the VA's medical programs for veterans are also available for active-duty servicemembers, the VA's inadequate monetary aid comes to many only after those harassed and abused have left the service, and those responsible for their injuries have no responsibility to pay the government's costs. Banner writes, "for victims of military sexual assault and trauma, the result is often retribution rather than recompense."[71] As a result, victims "not infrequently are discharged themselves or leave the service willingly after suffering retaliation for reporting attacks," and accordingly, 54% of active-duty women do not report incidents for fear of reprisal.[72] That means that for many, victims do not receive adequate compensation because either they never report the incident while in the service or they receive help too late—only after they may have experienced retribution in addition to sexual assault. Such a result evidences a flawed system. It is time for the military to compensate its victims fairly, in a process that considers fully the unique nature of military sexual trauma and during the time when victims most need the support.

For many of the reasons discussed above, Chellie Pinegree (D-ME) sponsored H.R. 671, the Ruth Moore Act of 2013, to, among other things, "improve the disability compensation evaluation procedure of the Secretary of Veterans Affairs for veterans with mental health conditions related to military sexual trauma."[73] This bill, had it passed, would have done much good to reform the VA-compensation system. It is not, however, the complete answer to the problem of sexual assault in the military because it does not place any of the financial responsibility for the victim's needs on the perpetrator. A reformed VA system, while important for later victim compensation, will not, of itself, punish or create a deterrent effect for perpetrators. Furthermore, a military compensation board may help the VA's backlog. It might also help the VA's goal of financially helping injured servicemembers by alleviating victims' immediate financial needs, filling in the financial holes left by the overburdened VA system, and providing funds for those suffering from sexual abuse or harassment but who do not meet the VA's minimum disability rating.

---

[71] *Id.* at 768–71.
[72] *Id*. at 768–79.
[73] H.R. 671, 113th Cong. (2013).

Lastly, the military provides transitional compensation for family members of military personnel who have "received notification of an administrative separation or court-martial conviction for domestic abuse, child abuse or child sexual abuse."[74] The 2014 National Defense Authorization Act (NDAA) also requires the services to investigate the merits and feasibility of providing payments to dependents of soldiers who are convicted by court-martial and separated from active-duty accordingly.[75] These current and contemplated forms of compensation are extremely narrow in focus, however, and provide no relief for military victims who are not dependents or spouses of their abuser.

c. Restitution—An Unlikely Option

Unlike civilian statutes, the UCMJ does not authorize restitution from the offender as a form of sentence although DoD policy allows convening authorities to include restitution as a condition of pretrial agreements or an accused's release from confinement.[76] Under Article 139 of the UCMJ, commanders may direct servicemembers to pay victims for "willful damage or theft of property."[77] Article 139, however, is not used to compensate victims of violent crimes for personal injury, or pain and suffering, and even if it were, it would leave in the hands of the commander the heavy responsibility of converting physical, mental, and emotional injuries into a dollar value. Placing the calculation of monetary compensation with individual commanders would risk horizontally inequitable results and would place a large administrative burden on their time. Furthermore, the idea of considering a victim's body or psyche as "damaged property" could be demoralizing for a victim, and ultimately, it does not textually treat the issues of sexual assault and harassment with the proper level of sensitivity that both require.

---

[74] *Transitional Compensation Program*, ARMY ONESOURCE, https://www.myarmyonesource.com/familyprogramsandservices/familyprograms/familyadvocacyprogram/transitionalcompensationprogram/default.aspx.

[75] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 652 127 Stat. 672, 788 (2013).

[76] COLEMAN REPORT, *supra* note 14; s*ee* MCM, *supra* note 15, R.C.M. 705(c)(2)(C).

[77] UCMJ art. 193 (2011).

d. State Compensation Boards—An Inadequate Remedy

Victims may opt to seek help from state compensation boards, but for reasons that will be discussed later, the state boards fall short of adequately providing for military victims' needs and imposing appropriate consequences on offenders. Additionally, subjecting military victims to a patchwork state system with non-uniform compensation standards seems inherently unfair, especially when thousands of DoD active-duty personnel are assigned outside the United States where no state compensation systems are available.[78]

4. Proposed Changes and Why They Will Not Work

a. Overturning the Feres *Doctrine—Not a Realistic Choice*

Some legal scholars and practitioners claim that overturning the *Feres* doctrine would solve the inequities in the compensation system by giving military victims the ability to hold the government vicariously liable for the incident-to-service tortious actions of servicemembers under the FTCA.[79] Unfortunately, even in the unlikely event Congress were to legislatively overturn the affirmed, and entrenched, *Feres* doctrine, the FTCA precludes liability unless the claimant can show that the servicemember's wrongful acts or omissions happened while he or she was "acting within the scope of his office or employment."[80] The "scope of employment" standard still precludes claims of sexual assault and harassment because sexual assault and harassment "cannot be considered performing the employer's work."[81]

---

[78] Military members have a "home of record," which is almost always the state where they first joined the military, and a "legal residency." OFFICE OF THE STAFF JUDGE ADVOCATE LEGAL ASSISTANCE OFFICE, INFORMATION PAPER—STATE OF LEGAL RESIDENCE 1 (2012). A "home of record" is used by the military to "determine a number of military benefits" and could potentially serve as the basis for applying for state compensation funds when abroad. *Id.* However, this does not solve the other problems associated with having military victims apply to state compensation boards, nor is it clear that using a "home of record" would be superior to using a legal residence as a basis for application.

[79] Spak & Tomes, *supra* note 32, at 335.

[80] *Id.* The FTCA also bars military members from bringing cases arising from (a) combat activities, (b) conduct that happened in a foreign country, or (c) certain intentional torts, "whether based on assault or negligence that resulted in the intentional tort." 28 U.S.C. § 1346(b) (2012).

[81] Holzer, *supra* note 45, at 55–56. Even so, the FTCA does not immunize offenders from "violations of the plaintiff's federal Constitutional rights, or to claims based on the violation of federal statutes which allow actions to be brought against individuals. In

Any claim barred by the FTCA is also is barred from monetary recovery under the Military Claims Act (MCA). The MCA allows any individual who has a claim for property damage, personal injury, or death that is caused by a civilian employee or service member to apply for relief from the Armed Forces. The MCA, however, "does not allow recovery for . . . claims otherwise excluded under the Federal Tort Claims Act, or . . . claims by any employee or service member whose injury arose 'incident to his service.'"[82]

Thus, any credible attempt to overturn the *Feres* doctrine would also require significant amendments to the FTCA and the MCA. To overhaul multiple statutes and years of judicial understanding would (1) be virtually impossible to orchestrate politically, (2) could cause the unintended consequence of leaving the military and chain of command too exposed to frivolous lawsuits, and (3) prove too disruptive to the military justice system to justify the ensuing benefits.

Francine Banner, by contrast, suggests that even if Congress does not act to overturn the *Feres* doctrine, it is time for the judiciary to shift its interpretation of *Feres* such that adjudication by civilian courts of intra-military sexual assaults could become a reality. Banner argues that because intra-military sexual assault has extreme and destructive effects on military readiness, using *Feres* as a shield from adjudicating such claims is no longer defensible under the theory that the military needs autonomy and deference from civilian courts to maintain combat readiness.[83]

To illustrate the point, Banner compares the judiciary's current treatment of the *Feres* doctrine in military sexual assault cases to its past treatment of the "Don't Ask, Don't Tell" (DADT) policy, which barred openly gay individuals from participating in military service.[84] Banner points to the Ninth Circuit's interpretation of DADT in *Witt v. Dep't of the Air Force*[85] as a model for how judicial decision making can "prove itself a vital engine of social change" in light of the "harm that can result

---

those situations, an action brought against an individual will survive any attempt by the government to substitute itself for the named individual defendant(s)." *Id.*

[82] *Id.* at 59–60; 10 U.S.C. § 2733 (2012).

[83] Banner, *supra* note 55, at 729.

[84] *Id.*

[85] Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008).

from the glacial pace of legislative action."[86] The *Witt* court held that when the government attempts to intrude on the personal and private lives of homosexuals, a heightened scrutiny of that attempt would apply and that, therefore, DADT would have to *significantly* further an important government interest when "alternative, less intrusive [methods of achieving that interest] are unlikely to achieve substantially the same results."[87] Banner felt that this holding appropriately gave deference to the military without abdicating the court's duty to pay homage to the Due Process Clause. Just as the Ninth Circuit did not "repeal" DADT but rather influenced legislation in concert with the "three concomitant powers" of the judiciary, executive, and legislative branches, Banner suggests the judiciary should now shift its view of *Feres* to one of deference, not abstention, and balance the harm of judicial intervention against the injustice perpetrated against military sexual assault victims.[88]

Despite the merit of Banner's arguments, the Fourth and D.C. Circuits have refused to accept its rationale and have continued to broadly apply *Feres*. In *Cioca v. Rumsfeld*,[89] the Fourth Circuit held that despite the troubling allegations of sexual assault, judicial abstention was the proper course. The court justified its hesitation to act in that the particular remedy sought would be a new one at law—one that should be handled by Congress or the President as Commander in Chief.[90] The court also noted that (1) *Bivens* suits—which allow damages as remedies for constitutional violations—"are never permitted for . . . violations arising from military service, no matter how severe the injury or how egregious the rights infringement," and (2) that *Feres* "concerns are implicated" when a civilian court is second-guessing military decisions in the case of intra-military sexual assault.[91] The D.C. Circuit in *Klay v. Panetta*[92] based its decision on similar grounds, stating that "the U.S. Supreme Court has been reluctant to extend *Bivens* liability to any new context or new category of defendants."[93] Even more clearly, it stated, "[T]he consequent need and justification for a *special and exclusive system of military justice, is too obvious to require extensive*

---

[86] Banner, *supra* note 55, at 731.
[87] Witt, 572 F.3d at 818-19.
[88] *Id.* at 777.
[89] Cioca v. Rumsfeld, 720 F.3d 505 (4th Cir. 2013).
[90] *Id.* at 509.
[91] *Id.* at 512.
[92] Klay v. Panetta, 924 F. Supp. 2d 8 (D.D.C. 2013).
[93] *Id.* at 11.

discussion."[94] The court then noted that the role of civilian courts is not to tamper with this exclusive system of military discipline, structure, and justice.[95]

b. Joint Jurisdiction with the EEOC—Not Worth the Costs

A second suggestion argues that uniformed service personnel ought to be considered federal employees under Title VII of the Civil Rights Act.[96] Title VII prohibits employment discrimination based on "race, color, religion, sex, and national origin."[97] As the Equal Employment Opportunity Commission (EEOC) is authorized to enforce Title VII, the military would then necessarily be subjected to concurrent EEOC jurisdiction. This suggestion would provide a guarantee of impartial review of complaints in federal and civilian courts, and it would also provide remedies that include compensatory and punitive damages.[98]

These benefits, unfortunately, come at too high a cost. First, the ingratiated civilian presence in military affairs would undermine the essential faith of servicemembers in their superior officers and in the military justice system generally. Furthermore, civilian courts might be incapable of fairly evaluating military decision-making, and the presence of civilian investigators might disrupt military discipline. Though proponents of concurrent EEOC jurisdiction call these concerns "superficial," there are two other problematic components of the suggestion: costs and caseloads.[99] The EEOC's high monetary caps on awards, while helpful to the victim, do not achieve optimal deterrence because the costs are paid by the employer, in this case the armed services, instead of the perpetrator.[100] Such costs, which are purportedly

---

[94] *Id.* at 14 (emphasis added).
[95] *Id.* at 15.
[96] Spak & Tomes, *supra* note 32, at 363-34; s*ee* Gonzalez v. Dep't of Army, 718 F.2d 926 (9th Cir. 1983) (holding Title VII does not apply to uniformed members of the Armed Forces). *But see* Hill v. Berkman, 635 F. Supp. 1228, 1241 (E.D.N.Y. 1986) (finding Title VII could apply in limited circumstances involving facially discriminatory policies and that investigating anything less than an "outrageous incident of discrimination" would be "too intrusive" into military decision-making).
[97] 42 U.S.C. § 2000e-2 (2012).
[98] *Employees & Applicants*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, http://www.eeoc.gov/employees/remedies.cfm [hereinafter *Employees & Applicants*] (last visited July 10, 2014).
[99] Spak & Tomes, *supra* note 32, at 364.
[100] *Employees & Applicants*, *supra* note 98.

escalating, could make concurrent jurisdiction an unaffordable option.[101] Lastly, the increased caseload the EEOC would have to shoulder as a result of concurrent jurisdiction would inevitably increase wait times for victims. As these waiting periods are already subject to public criticism,[102] aggravating the situation would be inefficient and stress the EEOC's ability to resolve claims in a timely manner.

C. Costs, Conclusion, and Recommendation

The consequences of sexual assault and harassment on both victims and the military as a whole are drastic. "More than 85,000 veterans were treated last year for injuries or illness stemming from sexual abuse in the military, and 4,000 sought disability benefits" for crippling depression and PTSD.[103] Compensation amounts for these claims vary, but some cases cost over $500,000 per victim over the course of a lifetime.[104] In addition to medical costs, "one researcher has put the costs of sexual harassment to the U.S. Army at $250,000,000 a year in lost productivity, personnel replacement costs, transfers, and absenteeism."[105] These financial costs do not include the costs on combat readiness and effectiveness.[106] Sexual assault and harassment in the military is thus a high cost, high stakes problem that demands the careful attention of policy makers and military members alike.

---

[101] *EEOC Complaints: Damages Awards for Pain and Suffering Escalating*, SOLOMON LAW FIRM PLLC, http://www.fedemploylaw.com/DC-Federal-Employee-Law-Blog/2011/October/EEOC-Complaints-Damages-Awards-for-Pain-and-Suff.aspx.

[102] *EEOC, the Ugly Truth*, WHITEOUT PRESS, http://www.whiteoutpress.com/articles/q12013/eeoc-the-ugly-truth/; *EEOC Taking Longer to Complete Appeals, Hearings, Investigations*, FED. TIMES, http://www.federaltimes.com/article/20120820/AGENCY02/308200002/EEOC-taking-longer-complete-appeals-hearings-investigations.

[103] *VA Help*, *supra* note 54.

[104] Tracking the overall cost of treating those with military sexual trauma (MST) before the new June 2011 system was difficult because MST cases were categorized under trauma generally. *Id.*

[105] Hollywood, *supra* note 11, at 152–53.

[106] *Id.*

III. Civilian Crime Compensation Boards: A Useful Model

A. Background

Every state, the District of Columbia, the U.S. Virgin Islands, Puerto Rico, and Guam have passed legislation to create crime victims' compensation programs.[107] These compensation boards pay for a variety of physical or emotional injuries suffered by victims and their families under state, federal, military, and tribal jurisdiction in the aftermath of violent crimes, such as homicide, spousal and child abuse, rape, assault, and drunk driving.[108] As payers of last resort, the state boards only pay for certain expenses not covered by insurance, pension benefits, Veterans' benefits, Medicare, Social Security Disability, or other federally financed programs.[109] Most states require victims to report crimes to law enforcement within seventy-two hours of the offense, file claims within one year, cooperate in the investigation and prosecution of the crime, and be innocent of criminal activity or misconduct leading to the victim's injury or death.[110] The offender's conviction is not required for victims to receive compensation for their economic losses resulting from the crime, but it is needed for court-ordered restitution—a punitive award statutorily determined not by the victim's need but by the offender's crime.[111] Each state has diverse funding sources for their compensation boards, as well as different benefits, compensation caps, restitution-collection processes, and strength of enforcement.[112]

B. Federal Funding for State Compensation Boards

In 1984, the Victims of Crime Act (VOCA)[113] established the Crime Victims Fund (CVF)[114] within the U.S. Treasury. The Victims of Crime

---

[107] NAT'L ASS'N OF CRIME VICTIM COMPENSATION BDS., COMPENSATION FOR VICTIMS, *available at* http://www.nacvcb.org/NACVCB/files/ccLibraryFiles/Filename/000000000120/BrochureCVC1.pdf [hereinafter BROCHURE].

[108] The state must provide compensation to victims of federal crimes occurring within the state on the same basis that the program provides compensation to victims of state crimes. Victims of Crime Act Victim Compensation Grant Program, No. 95, 66 Fed Reg. 27,158 (May 16, 2001).

[109] BROCHURE, *supra* note 107.

[110] *Id.* Most states can extend these time limits for good cause. *Id.*

[111] *Id.* (BROCHURE).

[112] *See* Appendix B (Summary of Basic State Program Information).

[113] 42 U.S.C. §§ 10601–10608 (2006).

[114] Pub. L. No. 98-473, 98 Stat. 2170 (1984).

Act was amended in 1988 to establish the Office for Victims of Crime (OVC).[115] The OVC, as a part of the Department of Justice's (DOJ) Office of Justice Programs, administers CVF funds, awarding grants to states, local units of government, individuals, and other entities.[116] The CVF receives funding from "criminal fines, forfeited bail bonds, penalties and special assessments collected by the U.S. Attorneys' Offices, federal U.S. courts, and the Federal Bureau of Prisons."[117] As of 2001, gifts, bequests, or donations from private entities could be deposited into CVF, but the amount that can be deposited into the CVF is capped.[118] These caps, however, have been raised, which seems to indicate an increased need for, and congressional support of, assisting victims of crime.[119] Additionally, the Crime Victims Fund[120] requires that all sums deposited in any fiscal year that are not obligated by Congress must remain in the Fund for obligation in future fiscal years, without fiscal year limitation.[121] Appendix C details the amounts collected in, and distributed from, the fund from 1985 through 2012.

The CVF provides funds in varying amounts to the Children's Justice Act Program, the U.S. Attorney's Victims Witness Coordinators, the Federal Bureau of Investigation Victim Witness Specialists, and Federal Victim Notification Center. The remaining funds are divided between OVC discretionary funds, state victim compensation grants, and state victim assistance grants.

---

[115] Pub. L. No. 100-690, 102 Stat. 481 (1988).

[116] M. ANN WOLFE, CONG. RESEARCH, SERV., RL32579, VICTIMS OF CRIME COMPENSATION AND ASSISTANCE: BACKGROUND AND FUNDING 1 (2004).

[117] *Id.*

[118] *Id.* at 2.

[119] In 2001, the cap was $532.4 million; in 2002, it was $550; in 2003, it was $621; and in 2004, it was $621.3. *Id.* app. C (Crime Victims funs, FY1985–2012).

[120] 42 U.S.C. § 10601 (2006).

[121] *Id.*

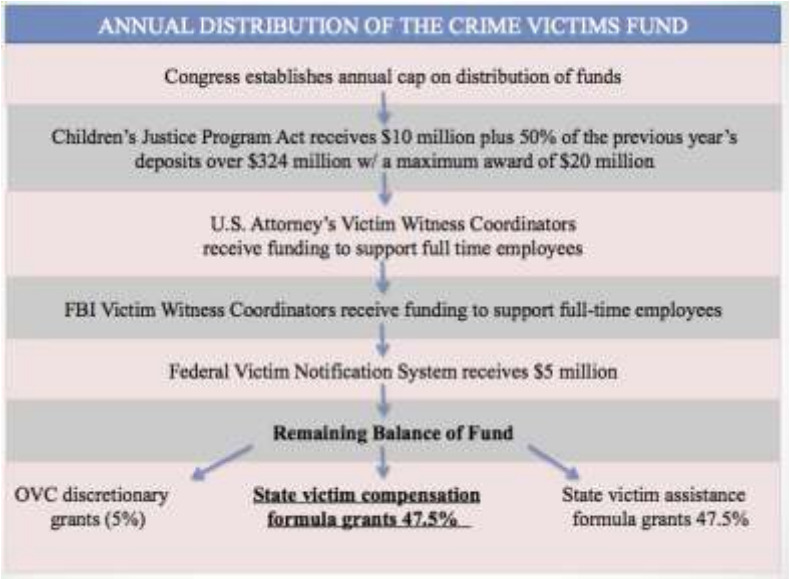


Figure 1. Annual Distribution of the Crime Victims Fund[122]

As shown above in Figure 1, state compensation boards receive 47.5% of remaining CVF funds.[123] The purpose of the federal grants is to "supplement state efforts to provide financial assistance and reimbursement to crime victims throughout the Nation for costs associated with crime, and to encourage victim cooperation and participation in the criminal justice system."[124] The Victims of Crime Act requires each state's compensation programs to cover "the following crime-related costs: (1) medical expenses, (2) lost wages for victims unable to work because of crime-related injury, and (3) funeral expenses."[125] Many state compensation programs cover additional costs, such as sexual assault forensic exams, temporary lodging, transportation

---

[122] U.S. Dep't of Justice, Office of Justice Programs, Office for Victims of Crime, *Crime Victims Fund* fig. 2, http://ojp.gov/ovc/pubs/crimevictimsfundfs/intro.html (last visited Feb. 18, 2015); U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, FY2013 CONGRESSIONAL BUDGET SUBMISSION V (Annual Distribution of the Crime Victims Fund).

[123] *Id.*

[124] Victims of Crime Act Victim Compensation Grant Program, 66 Fed Reg. 27158, 27,161 (May 16, 2001).

[125] *Compensation for the Rape Survivor*, RAINN, http://www.rainn.org/public-policy/legal-resources/compensation-for-rape-survivors (last visited July 16, 2014).

to medical providers, crime-scene cleanup, and rehabilitation.[126] A smaller number of states pay for attorney's fees, dependent care, financial counseling services, and annuities for the loss of support for children of homicide victims.[127] Just two states, Tennessee and Hawaii, provide compensation for pain and suffering.[128] Tennessee only offers this benefit for victims of sexually-oriented crimes and caps their pain and suffering claims at $3,000, while Hawaii's benefits do not "quantify physical and/or emotional losses" but rather acknowledge a victim's suffering.[129] The Department of Justice's final implementing guidelines for the state compensation boards, however, allow compensation for all of the aforementioned categories.[130]

C. Beyond Federal Funding—State Compensation Board Funding

While states receive a large portion of their funding from VOCA, they also rely on additional sources to supplement their compensation board funds—ultimately placing the burden on offenders, including imposing costs on offenders through system-wide offender surcharge fees,[131] fining offenders for "particular types of crime (e.g., child pornography, other offenses against children, domestic violence, sex

---

[126] A comprehensive review of state compensation programs and resources can be found at *Providers/Community Leaders: U.S. Resources Map of Crime Victim Services & Information*, OFFICE FOR VICTIMS OF CRIME, http://www.ovc.gov/map.html; *Compensation for the Rape Survivor*, RAINN, http://www.rainn.org/public-policy/legal-resources/compensation-for-rape-survivors.

[127] *Id.*

[128] *CIC-Benefits*, TENN. DEP'T OF TREASURY, http://www.treasury.state.tn.us/injury/CIC-Benefits.html#bene4 (last visited Feb. 18, 2015); *State of Hawaii Crime Victim Compensation: Benefits*, HAWAII, http://dps.hawaii.gov/cvcc/benefits/ (last visited Feb. 18, 2015).

[129] *CIC-Benefits*, TENN. DEP'T OF TREASURY, http://www.treasury.state.tn.us/injury/CIC-Benefits.html#bene4 (last visited Feb. 18, 2015); *State of Hawaii Crime Victim Compensation: Benefits*, HAWAII, http://dps.hawaii.gov/cvcc/benefits/ (last visited Feb. 18, 2015).

[130] Victims of Crime Act Victim Compensation Grant Program, No. 95, 66 Fed Reg. 27158, 27,162 (May 16, 2001).

[131] By imposing a $3 fee on all traffic and misdemeanor offenders, Virginia brings in $3.8 million annually, which it deposits into Virginia's victim-witness fund. WOLFE, *supra* note 116, at 9. Similarly, Texas raised nearly $69 million in 1999 for the Texas Crime Victims' Compensation Fund by imposing a $45 penalty for a felony, $35 for class A and B misdemeanors, and a $15 fee for Class C misdemeanors. *Id.*

offenses, . . . and crimes against the elderly or disabled),"[132] imposing costs on offenders who are on probation for particular crimes,[133] withholding a percentage of inmates' earnings,[134] charging restitution payments that pass directly from the offender to the victim of the violent crime,[135] and transferring to the fund "surplus restitution."[136]

Other states impose non-offender-based fees to fund crime victim programs by adding a surcharge when issuing a marriage license or filing for a divorce,[137] attaching fees for issuing birth certificates (these fees generally fund a Children's Trust Fund or child-abuse program),[138] selling specialized bonds,[139] placing a voluntary "income tax check-off box on tax forms that designate payment to crime victim programs,"[140] and granting special taxing authority.[141] Other states, after submitting a resolution to voters at a general election, grant county boards special taxing authority.[142]

D. Capping Award Amounts

Maximum awards range from $10,000 to $50,000, and states place varying compensation caps on the types of benefits victims can receive, such as mental-health counseling, funeral costs, or dental care.[143] Figure

---

[132] Indiana, for example, assesses a $100 fine on convicted offenders of various violent and sexual offenses against children that helps fund child abuse prevention programs. IND. CODE ANN. § 33-19-6-12 (Michie 2001).

[133] Arizona imposes a supervision fee for offenders on probation that gets deposited into the state's victim compensation fund. ARIZ. REV. STAT. §§ 31-411, -418, -466 (2001).

[134] "Colorado, South Carolina, and Utah withhold a percentage of an inmate's earnings through prison or community release work programs." *Offender-Based Funding*, OVC ARCHIVE, https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin9/2.html.

[135] WOLFE, *supra* note 116, at 8. These restitution payments are court-ordered and obviate the need for the compensation board to pay the victim from board funds as the money is coming directly from the victim's offender.

[136] "Surplus restitution" refers to court-ordered restitution that was "paid to a collecting agency but [that] was either declined by the victim or the crime victim could not be located." *Id.* (citing FLA. STAT. ANN. ch. 960.0025 (Harrison 2001)).

[137] *See, e.g.*, IND. CODE ANN. §§ 33-17-14-2, -19-9-2, -19-9-4 (Michie 2001).

[138] *See, e.g.*, MINN. STAT. §§ 119A.12, 144.226 (2001).

[139] *See, e.g.*, CONN. GEN. STAT. § 4-66c (2001).

[140] *See, e.g.*, COLO. REV. STAT. § 39-22-801 (2001).

[141] Florida permits counties to tax food, beverages, or alcohol to help fund the construction and operation of domestic violence shelters. WOLFE, *supra* note 116, at 9. "Washington imposes a $1-per-gallon tax on the syrup used to make soft drinks." *Id.*

[142] Illinois, for example, created the Children's Advocacy Centers. *Id.*

[143] CELINDA FRANCO, CONG. RESEARCH SERV., RL32579, VICTIMS OF CRIME

2, below, compares the state compensation boards of New York, California, and Texas by juxtaposing each state's non-VOCA funding sources, restitution-collection process, compensation caps, yearly costs, relative success at collecting restitution, and benefits not covered by the state program. These states were chosen as comparators because each has a large population, is geographically and demographically diverse, and utilizes different methods to run their respective boards.

State	Non-VOCA Funding	Payment Process	Caps	Yearly Costs	Items Not Covered
NY	• Offenders pay restitution, surcharges, and fees[144]	• Restitution paid to probation office[145]	• Maximums for benefit types[146]	FY2010-11: • $31,751,660 paid to victims • $132,114 collected in restitution[147]	• Those paid by insurance or other reimbursement source • Pain and suffering • Future losses[148]
CA	• Offenders pay restitution, fines, and fees[149]	• Restitution paid to victim • Fines and fees paid to Board[150]	• Floors and ceilings for convictions • Maximums for benefit types[151]	FY2011-12: • $70,422,451 paid to victims • $66,000,000 collected in restitution[152]	• Those paid by insurance or other reimbursement source • Pain and suffering • Property damages[153]
TX	• Offenders pay restitution	• Restitution is paid to the Board	• Cap per claim: $50,000	FY2011-12: • $71,018,268 paid to	• Those paid by insurance or other reimbursement

COMPENSATION AND ASSISTANCE: BACKGROUND AND FUNDING 9 (2008).

[144] TINA M. STANFORD, ANNUAL REPORT, N.Y. STATE OFFICE OF VICTIM SERVICES 37 (2011), http://www.ovs.ny.gov/Files/Annual%20ReportFiscalYear2010_2011.pdf.

[145] N.Y. STATE OFFICE OF VICTIM SERVS., A VICTIM'S GUIDE TO RESTITUTION IN NEW YORK STATE 2 (2011), http://www.ovs.ny.gov/Files/2011%20ENGLISH%20RESTITUTION%20BROCHURE.pdf [hereinafter N.Y. VICTIM GUIDE].

[146] N.Y. STATE OFFICE OF VICTIM SERVS., FINAL GUIDE TO COMPENSATION (2011), http://www.ovs.ny.gov/Files/2011%20Guide%20to%20Compensation%20(1).pdf (listing loss or damage of essential personal property up to $500, burial expenses up to $6,000, lost wages up to $30,000 and so on).

[147] STANFORD, *supra* note 144, at 13, 56.

[148] N.Y. VICTIM GUIDE, *supra* note 145, at 2.

[149] CALIFORNIA VICTIM COMPENSATION PROGRAM PROVIDING FINANCIAL ASSISTANCE TO CRIME VICTIMS SINCE 1965, CALIFORNIA VICTIM COMPENSATION PROGRAM [hereinafter CAL. VICTIM COMPENSATION PROGRAM BROCHURE].

[150] CAL. VICTIM COMPENSATION AND GOV'T CLAIMS BD., 2011–2012 ANNUAL REPORT [hereinafter CAL. VCGCN].

[151] ADMIN. OFFICE OF THE COURTS, RESTITUTION, CALIFORNIA JUDGES BENCHGUIDES (2013), http://www.vcgcb.ca.gov/docs/forms/victims/restitution/Benchguide.pdf.

[152] CAL. VCGCN, *supra* note 150, at 7, 13.

[153] *Id.* at 4.

	and fees • Subrogation • Juror Donations[154]	directly[155]	• Maximums for benefit type[156]	victims • $1,199,345 collected in restitution[157]	source • Pain and suffering • Property damages • Expenses not direct result of crime[158]

Figure 2. Compensation Board Comparison of NY, CA, and TX[159]

California's Victims Compensation & Government Claims Board (CalVCGCB) stands out for its extraordinary ability to collect restitution.[160] While restitution is court-ordered and paid directly to the victim on top of whatever funds that the victim may receive from the compensation board,[161] the amount of restitution collected could have funded over 90% of its victim-compensation program if deposited directly in the CalVCGCB funds. California attributes its success to its twenty-five Criminal Restitution Compacts (CRCs)—partnerships between counties and the CalVCGCB—that "facilitate the imposition of restitution orders against criminal offenders through coordination with prosecutors, probation offenders, and the courts."[162] California has strict laws governing restitution that state: (1) victims are entitled to seek restitution from the criminal perpetrator to recover the full amount for any reasonable losses or expenses (not including pain and suffering),[163]

---

[154] Attorney Gen. of Tex., *Crime Victim's Compensation* (2012), https://www.oag.state.tx.us/victims/about_comp.shtml; CRIME VICTIM'S COMPENSATION BROCHURE (2014), https://www.oag.state.tx.us/AG_Publications/pdfs/cvc_brochure.pdf.

[155] CRIME VICTIM SERVS., 2012 ANNUAL REPORT 3 (2012), https://www.oag.state.tx.us/AG_Publications/pdfs/cvs_annual2012.pdf [hereinafter TEX. ANNUAL REPORT].

[156] For example, the cap per claim for a victim suffering from a disability rises to $75,000. *Id.* at 10. The maximum amount a victim could recover for the benefit type of "evidence replacement" is $750. *Id.* at 13.

[157] Texas made $6,000 of the restitution amount by charging installment fees. *Id.* at 4.

[158] Attorney Gen. of Tex., *Texas Crime Victim's Compensation Program Application*, https://www.oag.state.tx.us/ag_publications/pdfs/cvcapplication.pdf.

[159] Figure 2 was prepared by the author using recent New York, California, and Texas compensation board reports.

[160] CAL. VCGCN, *supra* note 150, at 13.

[161] Interview with Cal. Dep't of Corrections and Rehabilitation (CDCR) employee (Apr. 11, 2014) [hereinafter Interview with CDCR employee].

[162] CAL. VICTIM COMPENSATION AND GOV'T CLAIMS BD., 2007–2008 ANNUAL REPORT 5, http://www.vcgcb.ca.gov/docs/reports/AnnualReport-FY-07-08.pdf.

[163]

> Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss. All monetary payments, monies, and

(2) prosecutors may not reduce this amount during plea bargains,[164] and (3) even if a charge is dismissed as a result of a plea bargain, the court may still order the defendant to pay restitution to the victim.[165] To receive restitution, a victim need not prove the defendant's conduct was the sole contributing factor; rather, the victim must only prove that the defendant's criminal conduct substantially caused the victim's losses.[166] Once a judge awards restitution, California law offers several resources to help victims collect payments, such as the ability to access the defendant's financial records, garnish wages or bank accounts, and place liens on property.[167]

If offenders are sentenced to prison, the California Department of Corrections and Rehabilitation (CDCR) automatically collects 50% of the offender's prison wages or other money that he or she has deposited into trust accounts.[168] Through this process, the CDCR collects $1.4 to $1.5 million dollars in restitution each month.[169] After an offender is released from prison, the CDCR refers his or her case to the Franchise Tax Board (FTB), which continues to collect restitution until it is paid in full.[170] Lastly, offenders may not move out of California until their restitution obligations are fulfilled.[171]

> property collected . . . shall be first applied to pay the amounts ordered as restitution to the victim.

CAL. CONST. art. I, § 28.

[164] People v. Brown, 147 Cal. App. 4th 1213, 1226, (2007) ("Victim restitution may not be bargained away by the People.")

[165] CAL. PENAL CODE § 1192.3 (West).

[166] Judicial Council of California Criminal Jury Instruction 240 (2014).

[167] *Victim Restitution in California Criminal Cases*, SHOUSE LAW GROUP, http://www.shouselaw.com/victim-restitution.html [hereinafter Shouse] (last visited July 16, 2014).

[168] CAL. DEP'T OF CORRECTIONS & REHABILITATION, OFFENDER RESTITUTION INFORMATION—FAQ, STATE OF CALIFORNIA, http://www.cdcr.ca.gov/victim_services/restitution_offender.html.

[169] Interview with CDCR employee, *supra* note 161.

[170] CALVCP & CDCR, YOUR RESTITUTION RESPONSIBILITIES: A GUIDE FOR ADULT & JUVENILE OFFENDERS 5, http://www.vcgcb.ca.gov/docs/brochures/RestOffenders.pdf.

[171] *Id.* at 6.

E. Benefits and Detriments of State Crime Compensation Boards

For victims, there are several advantages to filing a compensation claim with a state compensation board as opposed to filing a civil suit. In civil suits, a victim may have to participate in a deposition, which could last for hours or days.[172] For traumatized victims, it is likely less emotionally stressful to file a compensation board claim than to sit through a deposition. Furthermore, in a civil suit, a victim's lawyer will often collect 30 to 40% of the victim's total recovery.[173] By contrast, the victim receives all of the money in court-ordered criminal restitution, as well as any money received from a state compensation board.[174] State compensation boards, however, almost never allow pain and suffering damages.[175]

The way civil suits determine pain and suffering, however, is also problematic. Unlike medical bills or lost wages that can be calculated, pain and suffering is a subjective amount determined by juries. Juries often have no other instruction but to reasonably compensate a victim according to their "enlightened conscience," which may lead to unpredictable distributions of damages that are highly influenced by how sympathetic the victim appears or how skilled the attorneys of the respective parties are.[176] Finally, even if victims are awarded pain and suffering damages, they may never see the money if their defendants are judgment proof or if the state fails to enforce payment.[177]

---

[172] Shouse, *supra* note 167.

[173] *Id.*

[174] *Crime Victim Compensation: An Overview*, NACVCB, http://www.nacvcb.org/index.asp?bid=14.

[175] Pain and suffering is defined as "physical discomfort or emotional distress compensable as an element of non-economic damages in torts." BLACK'S LAW DICTIONARY (9th ed. 2009).

[176] RONALD W. EADES, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS 321 (3d ed. 1993) ("There are no objective guidelines by which you can measure the money equivalent of this element of injury; the only real measuring stick, if it can be so described, is your collective enlightened conscience."); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 766-67 n.10 (Summer 1995) (summarizing similar state and federal instructions); *see also* Randall R. Bovbjerg, *Frank A. Sloan & James F. Blumstein, Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908 (1989).

[177] Ronen Avraham, *Putting a Price on Pain and suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 90 (2006).

IV. A Military Compensation Board

A. Reasons for a Separate Military System

Though military victims of sexual assault and harassment may file for compensation with the state crime victims compensation board in their official state of residence, a separate military crime compensation board would provide military victims with a more efficient, equitable, and expansive system of support than the patchwork state system. Not only are active military members moving every few years to a new state and duty station but also a substantial number of victims are injured outside the United States where no state crime compensation board would have jurisdiction.

As previously discussed, the military is a specialized society with different administrative rules, systems, and institutions designed to fulfill the military's unique mission of fighting wars and strengthening the national security of the United States. Providing a uniform compensation system for victims within this society can better address the specific needs of the military. By coordinating with military institutions, systems, and documents, like TRICARE insurance, VA benefits, court-martial and disciplinary records, and DoD financial and accounting services, the MCB could streamline the processes of accepting, reviewing, and processing military victims' claims. Moreover, a separate military system would allow for the close monitoring of an offender's payment schedule and the garnishing of wages if he or she has not been discharged from the service.[178]

As one cohesive system, the MCB would permit the military to play an active role in providing specific advice to military victims about application procedures in a way that it cannot possibly do for victims subject to fifty different state compensation boards. Furthermore, a single system would facilitate the military's ability to record the number and type of compensation applications. Having this separate military data may prove useful in future surveys and studies attempting to track or evaluate the effects of sexual assault and harassment in the military. Lastly, having the opportunity to apply for compensation within the

---

[178] The Defense Finance and Accounting Service processes all court ordered garnishments for military members. *About Garnishment Operations*, DFAS, http://www.dfas.mil/garnishment/about.html (last visited July 21, 2014).

military will incentivize more victims to report either formally or informally to the authorities.

B. A Separate Military Crime Victims Compensation Board

1. Organization of the MCB

Organizationally, the MCB should be established under the DoD Office of the Under Secretary of Defense for Personnel and Readiness (Sec Def P&R).[179] The DoD Office of Personnel and Readiness determines and oversees active-duty and reserve military pay and allowances, retired pay, and survivor benefits.[180] Additionally, the office is responsible for oversight and coordination with the Department of VA, Disability, Service member's Group Life Insurance (SGLI), Dependency and Indemnity Compensation (DIC), Department of Labor, Unemployment Compensation for Ex-servicemembers, Monitor Health Care, and other non-compensation benefits for active-duty, reserve and retired members.[181] The office is thus well suited to processing and determining monetary claims.

After the MCB reviews a victim's application and determines the compensation owed, the payment order would be sent to the Defense Finance and Accounting Service (DFAS), the victim, and the perpetrator. The DFAS would wait thirty days, and if no notice of appeal is filed, pay the victim and take action to garnish the perpetrator's pay. To administer appeals, the Sec Def P&R could utilize the services of judges assigned to the Defense Legal Services Agency, which already has an appeal process in place for DFAS claims and security clearances. If the offender is discharged from the service, DFAS should refer the offender's debts to the Treasury Department for collection through the Internal Revenue Service (IRS).[182]

---

[179] As the U.S. Coast Guard is organized under the Department of Homeland Security (DHS) and not DoD, either the DoD compensation board would process Coast Guard Claims or the Coast Guard would have it's own compensation board within DHS. Efficiency suggests DoD should process the claims, but whether DoD has the authority to do so must first be established.

[180] *Mission*, UNDER SEC'Y OF DEF., PERS. & READINESS, http://militarypay.defense.gov/ABOUT/MISSION/ (last visited Feb. 18, 2015).

[181] *Id.*

[182] There is precedent for this type of debt collection transference. Pursuant to its Commerce Clause powers, Congress established a similar system to deal with debtors to the Federal Communications Commission (FCC) when it enacted the Debt Collection

2. Submitting a Claim to the MCB

On August 14, 2013, the Secretary of Defense established a victims' advocacy program to represent victims throughout the justice process.[183] Because a victim's compensation is not part of the military justice process, victim representation should include the claims process and continue until that process is completed.[184]

The Military Crime Victims Compensation Board would hear and determine all claims for awards filed pursuant to its authorizing statute outlined in Appendix A. Like the state compensation boards, the MCB would impose reporting and filing deadlines. As in a majority of states, victims would be required to informally or formally report the incident within seventy-two hours of its occurrence though the MCB could extend this deadline for good cause, especially if the victim's military duties or deployment circumstances hampered the reporting process.[185]

Applying to and receiving funds from the military compensation board, however, would be a post-adjudication process. Unlike the state processes, which generally require filing within one year of the incident, the MCB would require applications to be filed within 90 calendar days of the sentence being announced or other disciplinary action disposing of the allegations. Should the commander decide the complainant's allegations do not merit disciplinary action, the complainant must file an application within 90 calendar days of that decision. Again, the MCB may extend this application timeline for good cause, but it should do so

---

Improvement Act of 1996. Pub. L. No. 104-124, 110 Stat. 1321, 1358 (1996). Under the Act, the Department of Treasury may collect FCC referred debts.

[183] Provisions of the National Defense Authorization Act of 2014 (NDAA) also mandate that a report detailing the actions taken "to provide the necessary care and support to the victim of assault, to refer the allegation of sexual assault to the proper investigatory agency, and to provide initial notification of the serious incident when that notification has not already taken place" be submitted within eight days of the unrestricted report of a sexual assault. Memorandum from Deputy Sec'y of Def. for Sec'ys of the Military Departments et al., *Sexual Assault Prevention and Response* (Aug. 14, 2013), *available at* http://www.defense.gov/home/features/2013/docs/FINAL-Directive-Memo-14-August-2013.pdf.

[184] 10 U.S.C. §1044 provides that military legal assistance may be provided to victims of sexual assault. The victim need only report they have been victim of a sexual assault and then choose to have a Special Victims' Counsel (SVC) assigned to them. The SVC will represent them in related legal proceedings and counsel them on available benefits.

[185] A majority of states require victims to report within seventy-two hours or less. *See infra* Appendix B.

sparingly to incentivize the timely resolution of complaints, the quick distribution of funds to victims, and the notification of compensation obligations to offenders within a reasonable amount of time. For other aspects of claim submissions, such as where to submit the claim or the particular nature of a claim's formatting, victims or those acting on their behalf should adhere to all rules outlined in Enclosure 5 of DoD Instruction 1340.2[186] that are not inconsistent with the process previously described.

At this point, it is important to note that the MCB claims system would not replace the VA disability claims system but rather work in tandem with it. First, the MCB has two functions unique unto itself: (1) punishing the perpetrator through a financial obligation based partially on the victim's age and offender's rank (as discussed in section B(3)(a) of Part IV), and (2) providing the victim compensation for his or her pain and suffering. These two functions do not directly overlap with VA objectives. The VA has no responsibility for the first function. And although the second MCB function, to compensate the victim for physical and emotional injuries, does have some overlap with the VA system, this overlap is similar to that between civilian victims' insurance and their compensation payments from a state compensation board. That is, the MCB creates a second place for active-duty soldiers and veterans to receive payments for some of their medical and disability needs. Like the relationship between a state compensation board and a victim's insurance, the MCB would only pay for portions of claims not covered by the VA and vice versa.

In some state compensation board systems, victims of sexual assault may apply for and receive *compensation* for economic losses (paid for from the state board via offender-based and non-offender-based fines, fees, surcharges, etc.) without a conviction,[187] but an offender would only pay *restitution* (paid to the victim directly by the offender) if convicted of a crime. The proposed MCB system combines these separate tracks, ordering the offender to pay *compensation* to either DFAS, who in turn will pay the victim from the U.S. Treasury, or if the offender is discharged, to the Internal Revenue Service. These collections from

---

[186] U.S. DEP'T OF DEF., INSTR., 1340.21, PROCEDURES FOR SETTLING PERSONNEL AND GENERAL CLAIMS AND PPROCESSING ADVANCE DECISION REPORTS 10 (12 May 2004) [hereinafter DOD INSTR. 1340.21].

[187] *See supra* notes 131 and 137 and accompanying text.

offenders, based on various factors discussed later in this paper, will constitute the MCB funds used to compensate victims.

This article focuses on military victims who pursue their claims through the adjudicative process. However, as allowed by state compensation boards, a conviction should not be strictly necessary for a military victim to file a need-based compensation application with the MCB. This military victim would not be eligible for pain and suffering damages, and the victim's offender would not be liable for payments. The victim could only receive payment for any related medical costs not covered by other sources. The money for these victims would come from the surplus funds necessarily received when convicted offenders "over pay" into the MCB funds.[188] As will be explained in subsequent sections, even if a *victim* will not be compensated for costs already paid for by military benefits or insurance, a convicted offender will still have to pay those costs to DFAS subject to a certain cap. This system mirrors traditional tort law, which requires tortfeasors to pay the costs of their victims' damages despite any insurance owned by the victim. This prevents a tortfeasor from realizing a windfall due to the victim's foresight. In this context, it also means that extra funds from convicted offenders can be redirected to other victims.

The potential award for pain and suffering will hopefully incentivize victims to take their claims through the adjudicative process instead of simply applying to the MCB for need-based compensation. Victims may also find the extra courage needed to adjudicate their claims knowing their subsequent efforts through the MCB might help other victims. Admittedly, it is not ideal that some offenders escape payment and justice for their wrongs while others are held accountable. However, even offenders who have been through the adjudicative process may be acquitted if the case is not clear-cut. That does not negate the needs of their victims for financial assistance. Of course, appropriate standards of review should be developed for these need-based applications.

---

[188] This is not dissimilar from the process set out in 10 U.S.C. § 2772, which commands the Secretary of the military department concerned to deposit in the Armed Forces Retirement Home Trust Fund a percentage of forfeitures and fines adjudged against enlisted members, warrant officers, or limited duty officers. The Armed Forces Retirement Home offers retirees and certain veterans the benefits of a well-run retirement community.

3. The MCB Compensation System

a. Introduction to MCB Compensation and Its Determination of Pain and Suffering Damages

The MCB would, for the most part, follow the same DOJ regulations governing what benefits state compensation boards can and cannot offer. That is, like the states, the MCB would not compensate victims for items already paid for by any reimbursement source, including insurance, for damage done to property, or for items unrelated to the crime. Even though victims are not compensated for these expenses, the MCB must still consider those costs when computing the amount of compensation owed by the offender. That is, even if the MCB orders an offender to pay $20,000 dollars, the victim may only receive $10,000 for uncompensated needs. The excess funds will be saved for eligible victims who do not go through the adjudicative process or for whom the adjudicative process does not render a conviction.

The MCB should compensate victims' expenses for unreimbursed medical expenses, lost wages due to a crime-related injury, and funeral expenses, if any.[189] Unlike the state compensation boards, however, the MCB would also compensate eligible victims for pain and suffering.[190] While the MCB could, and perhaps should, provide compensation for all victims of crime and not just for victims of sexual assault or harassment, this article focuses specifically on the MCB's treatment of and compensation for sexually-based offenses.

---

[189] Victims of Crime Act Victim Compensation Grant Program, No. 95, 66 Fed Reg. 27,158 (May 16, 2001).

[190] It may appear unfair that military victims would have access to pain and suffering damages while many civilian victims do not have access to the same from the state compensation boards. The solution to this apparent inequality remains a topic of concern. Even so, should the military successfully implement a compensation board providing scheduled pain and suffering, the states would hopefully adopt the military's model and begin offering comparable compensation opportunities. This seems increasingly possible as more states reshape their restitution collection policies into effective sources of crime compensation board funding. *See, e.g.*, STATE OF HAWAI'I DEP'T OF PUB. SAFETY, CRIME VICTIM COMPENSATION COMM'N, FORTY-FIFTH ANNUAL REPORT JULY 1, 2012–JUNE 30, 2013, at 10 (2013) (noting how the Commission collected just $46,000 in restitution in 2003, and after years of refining its restitution policies, collected $600,000 in 2013). Again, it is important to remember that, under certain circumstances, civilians may have the opportunity to sue their perpetrator's employer for pain and suffering – an opportunity military victims do not have.

Without a jury to determine the pain and suffering damages, the MCB would need to determine pain and suffering. Deviating from a traditionally jury-based system may seem like a significant or radical legal shift, but the DoD and VA already incorporate a type of pain and suffering scheduling into their disability determinations. Both use a point-based Disability Evaluation System to determine whether a member is fit for duty or eligible for disability pay.[191] Furthermore, on a larger scale, several states have called for scheduled pain and suffering in tort reform,[192] and in England, juries no longer decide tort awards.[193]

Under a scheduled system of pain and suffering, the compensation a victim receives may not make them "whole." Due to necessary compensatory caps on pain and suffering that the MCB may have to impose, MCB damages may be incapable of giving victims the full amount that they deserve or of completely replacing what a victim has lost. Even so, any pain and suffering damages the victim received would provide the individual with more money than he or she could have likely collected. Additionally, while money may not heal physical and emotional injuries, offering victims the opportunity to apply for pain and suffering damages, which is paid by offenders, would demonstrate the DoD recognizes the suffering of victims and imposes financial consequences on offenders.

When scheduling pain and suffering, the MCB should follow the basic recommendations set forth by Ronen Avraham in his 2006 article entitled *Putting a Price on Pain and suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*.[194] Avraham calculates pain and suffering by assigning a system of non-biding age-adjusted multipliers to a plaintiff's medical costs.[195]

---

[191] QRMC, *supra* note 51, at 95; s*ee also Integrated Disability Evaluation System (IDES)*, OFFICE OF WOUNDED WARRIOR CARE AND TRANSITION POL'Y, http://www.med.navy.mil/sites/pcola/SpecialLinks/Documents/IDES%20Overview%20Handout.pdf. Servicemembers who are no longer on active-duty must rate 30% or more on the scale to be eligible for disability retired pay although the pay is based on the member's ranking or years of service, whichever is greater. *Id.* Members rated at below 30% receive severance pay. *Id.*

[192] Avraham, *supra* note 177, at 91 (noting four states have debated using "professional courts" composed of doctors and lawyers to determine damages as opposed to juries).

[193] *Id.*; *The Criminal Injuries Compensation Scheme*, Ministry of Justice (U.K.) (2012) (noting compensation amounts are set by Parliament).

[194] Avraham, *supra* note 177.

[195] *Id.* at 90. The multipliers would be nonbinding so that the Board could deviate when justice required. *Id.*

Avraham's system generates greater predictability in compensation awards and could approximate optimal deterrence on a case-by-case basis. Avraham's system, if adjusted for factors particular to the military, could reliably and fairly compensate victims of sexual assault and harassment for their pain and suffering.

1	2	3
Medical Costs	**Multiplier**	**Pain-and-Suffering Damages**
$0–$100,000	0.5	$0–$50,000
$100,001–$500,000	0.75	$75,000–$375,000
$500,001–$1,000,000	1	$500,001–$1,000,000
Above $1,000,000	1.25	Above $1,250,000

Figure 3. Calculating Pain and suffering Damages[196]

Avraham uses medical costs as his base number, reasoning larger economic losses correlate with a higher severity of injury, "which is in turn what pain and suffering is all about."[197] As previously noted, however, some injuries caused by sexual assault and harassment may be hard to detect and may not generate the sizeable medical bills that would more accurately represent the victim's suffering.[198] Other latent injuries from sexual assault and harassment will cause medical expenditures only much later in time.[199] The MCB should therefore not rely solely on medical costs to determine the base number.[200] Instead, the MCB should assign a base dollar value to each military sexual offense, such as sexual abuse, rape, aggravated abuse, and so on.[201] A suggested process for determining this base number is explored in subsection (c) of this section.

Moreover, Avraham's multipliers only take into account age "to capture the fact that a younger person living with a disability" must do so

---

[196] *Id.*
[197] *Id.* at 111.
[198] *See Effects of Sexual Assault*, *supra* note 58.
[199] *Id.*
[200] A base figure would also be helpful for wrongful death claims, in which there are generally no medical costs involved.
[201] This article does not attempt to provide suggested base numbers. However, state compensation boards like Oregon's that charge floors and ceilings for certain classes of felonies and misdemeanors would likely be informative to the MCB in setting their base numbers.

for a longer period of time.[202] In addition to age, the MCB multipliers should also account for aggravating factors, such as physical injuries, disfigurement, and disability; the intensity and longevity of the victim's emotional distress; lack of offender remorse; and the offender's rank. The offender's rank should be considered as it directly correlates with how much he or she is capable of paying to the victim. For instance, in 2012, a sergeant first class (E-7) with 20 years of service makes $4,256 a month while a colonel (O-6) makes $11,735.[203] Of course, those dismissed or discharged from the service for their offenses will no longer receive pay. Even so, the offender's previous earning capabilities, to a certain extent, reflect not only the offender's current ability to reimburse the victim (perhaps from savings) but also the offender's future earning potential.

While this system of base numbers and multipliers naturally creates a range of floors and ceilings for the pain and suffering element of compensation awards, the authorizing document for the MCB could also address monetary caps for other areas of relief, such as child care, lost wages, therapy, etc., either as individual categories or as a whole. Admittedly, restricting compensation awards has inherent problems: it may be unable to accommodate eggshell victims, it could prevent those with legitimately large claims from collecting, and it could throw a wrench in the idea of tailoring deterrence. The unfortunate financial reality, however, is that offender's salaries are naturally limited and thus so too must be the ultimate compensation awards to victims. Even so, as military victims may receive VA and other benefits that cover service-related medical costs after they are discharged from the service, limiting the total amount of collectable compensation reduces the risk of this unfairness.

b. Determining Compensation Floors and Ceilings

To determine what caps seem reasonable, it is helpful to look to state precedent. Ten states allow victims to recover $50,000 or more in compensation awards.[204] Of these ten, only five allow victims to collect $50,000 or more if their injuries are catastrophic or total and

---

[202] Avraham, *supra* note 177, at 110.
[203] *2012 Enlisted Pay Chart*, MILITARY.COM, http://www.military.com/military/benefits/0,15465,2012-1pt6-Pct-Military-Pay,00.html#epay (last visited July 16, 2014).
[204] *See* Appendix B.

permanent.[205] Returning to the three selected compensation comparator states, New York places no maximum caps on medical care expenses but limits other categories of benefits, California limits recovery to $63,000, and Texas limits recovery to $50,000 unless the injuries are permanent and total in which case the victim can recover up to $125,000.[206] The MCB should therefore consider using $50,000 as a benchmark in determining compensation award ceilings for most sexual assault and harassment crimes.

Unlike state compensation boards, the MCB should also establish an appropriate compensation floor that is applied before adding reimbursable costs and pain and suffering. One method of determining and assigning an appropriate compensation floor to crimes of sexual misconduct is to look at the costs society imposes on first-time drunk-driving convictions. The similarity between the costs of drunk driving and sexual misconduct lies not in the nature of the crimes but in the nature of the offenders. As drunk drivers presumably make enough money to pay for their car, their car's registration and maintenance, and their alcohol, society demands they pay dues for their misconduct. Likewise, military offenders have a guaranteed salary; and even if they are subsequently discharged for their sexual misconduct, it is at least guaranteed they had a salary during their time in the service. As shown in Figure 4 below, New York state charges offenders anywhere between $7,392.50 and $11,127.50 for a first-time drunk-driving conviction. If society is willing to charge drunk drivers, whose actions may or may not hurt anyone else, the military should be willing to charge sexual offenders more since their actions necessitate victims. This article proposes that the compensation floor for a rape conviction should be $20,000, and the compensation ceiling for the same offense would be $100,000, of which no more than $62,500 could be allotted to pain and suffering.

By approximately doubling the drunk driver fine, the MCB could appropriately account for the varying nature of the two crimes. "As courts and legislators in this country have long recognized, rape is 'highly reprehensible, both in a moral sense and in its almost total

---

[205] *Id.*
[206] *Id.*

contempt for the personal integrity and autonomy of the . . . victim.'"[207] The Supreme Court has similarly emphasized that, "[s]hort of homicide, it is the 'ultimate violation of self.'"[208] While drunk driving is dangerous and potentially deadly, rape's particular moral reprehensibility and its devastating ability to violate the victim's personal autonomy demand a higher compensation floor than drunk driving.

Additionally, a $20,000 compensation floor for rape ensures military compensation amounts are comparably fair to tort awards for the same crimes in civilian courts. Civilian courts, for example, have awarded compensatory awards ranging from $100,000 to $500,000 for multi-incident sexual assault and rape of inmates or detainees by prison guards.[209] For single incidents "of rape or sexual assault by an on-duty, uniformed enforcement officer who preyed upon his victim by either effectuating a traffic stop, offering a ride to a lone woman, or taking advantage of a woman who sought the officer's assistance," civilian courts have typically awarded damages ranging from $50,000 to $350,000.[210]

The infamous 1991 Tailhook Convention served as a basis for even higher compensatory damage awards.[211] In *Caughlin v. Tailhook Association*, Coughlin—a female Navy lieutenant—managed to escape a throng of men who "attacked, groped, [and] grabbed" her in a hotel hallway.[212] As a result of the incident, she experienced PTSD and other psychological problems that eventually caused her to leave the Navy.[213] An eight-person jury in Nevada awarded Caughlin compensatory damages of $1,695,000 and set total punitive damages for the Tailhook Association and the hotel at over four-million dollars.[214] In light of the compensatory damages awarded to sexual assault victims in civil suits, a compensation floor of at least $20,000 is necessary to ensure military victims receive comparable compensation to their civilian counterparts.

---

[207] Charleston Area Med. Ctr, Inc. v. Nat'l Union Fire Ins., No. 2:09-cv-00573, 2011 U.S. Dist. LEXIS 58520 at *23–24 (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)).
[208] *Id.*
[209] Trinidad v. City of Boston, No. 07-11679-DPW, 2011 U.S. Dist. LEXIS 26416, at *18–19 (D. Mass. Mar. 15, 2011).
[210] *Id.* at 19.
[211] Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1054 (9th Cir.1997).
[212] *Id.*
[213] *Id.*
[214] *Id.*

DWI Expenses	Amount	Time Period	Total (Low)	Total (High)	Total (Average)
Towing	$75+	--	--	--	$75.00
Car Storage	$45+/day	--	--	--	$45.00
Defense Attorney	$1500+	--	--	--	$1,500.00
Bail Fee	$0-500	--	--	$500+	$250.00
DWI Fine	$350-1,000	--	$350.00	$1,000.00	$675.00
State Surcharges	$245-395	--	$245.00	$395.00	$320.00
Ignition Interlock	$75-150 installation, $65-90 monthly maintenance	6 month minimum	$465.00	$690.00	$577.50
Alcohol Evaluation	$100+	--	$100.00	--	$100.00
Victim Impact Panel	$10-50	--	$10.00	$50.00	$30.00
Probation Supervision	$0-250+	--	$0	$250.00	$175.00
Conditional License	$75.00	--	--	--	$75.00
Drinking Driver Program	$175-300+	--	$175.00	$300.00	$237.50
DMV Civil Penalty	$125-750	--	$125.00	$750.00	$437.50
DWI license reinstate	$100.00	--	--	--	$100.00
DMV susp. Termination	$50.00	--	--	--	$50.00
Assessment	$250.00	Every three years	--	--	$250.00
Auto Insurance	$2,000-$3000	Per Year	$2,000.00	$3,000.00	$2,500.00
				Total 1:	**$7,397.50**
Additional Costs:					
SCRAM Ankle Bracelet	$11/day	6 weeks+, average of 6 months	$66.00	--	$1,980.00
Fines if BAC is over > 0.18	+1000-2500	--	$1,000.00	$2,500.00	$1,750.00
				Total:	$3,730.00
				Total 2:	**$11,127.50**

Figure 4. Cost of a First Time Drunk Driving Conviction[215]

[215] STOP DWI NEW YORK, PENALTIES FOR DRIVING WHILE INTOXICATED IN NEW YORK STATE, http://www.stopdwi.org/sites/default/files/brochures/

After assigning rape a compensation floor of $20,000 and a ceiling of $100,000, it becomes necessary to categorize other crimes of sexual misconduct to determine their relative compensation floors and ceilings. Figure 5, below, contains a list of common sexual offenses under the UCMJ, lists their maximum punishments, and assigns them a number category based on their corresponding maximum prison time. Figure 6, also below, shows what category numbers are matched to what maximum prison times, assigning a category of 1 to offenses that carry maximum punishments of confinement less than a year, a category of 2 to offenses that carry maximum punishments of one year confinement to less than five years, a category of 3 to offenses that carry maximum punishments of five years confinement to less than ten years, and so on in five-year increments until reaching category 7.

Crimes	**UCMJ**	**Maximum/Minimum Punishment**	**Category**
Cruelty and maltreatment	Article 93	Dishonorable discharge, forfeiture of all pay and allowances (P&A), confinement for 1 year	2
Murder	Article 118(1), (4)	Death, mandatory minimum is confinement for life	7
Murder	Article 118(2), (3)	Punishment other than death	7
Manslaughter (Voluntary)	Article 119	Dishonorable discharge, forfeiture of all P&A, confinement for 15 years	5
Manslaughter (Involuntary)	Article 119	Dishonorable discharge, forfeiture of all P&A, confinement for 10 years	4
Indecent Exposure	Article 120c	Dishonorable discharge, forfeiture of all P&A, confinement for 1 year	2
Rape	Article 120	Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life	7[216]
Sexual Assault	Article 120	Dishonorable discharge, forfeiture of all P&A, and confinement for 30 years	7

STOP_DWI_PENALTIES_INTERNAL_TRI_052713.pdf (last visited Feb. 19, 2015).

[216] National Defense Authorization Act for Fiscal Year 2014, Pub L. No. 113-66, § 1705, 127 Stat. 672, 959 (2013) (adding a mandatory minimum for subsections (a) and (b) of section 920 (article 120(a) or (b)) and forcible sodomy under section 925 (article 125)).

Aggravated Sexual contact	Article 120	Dishonorable discharge, forfeiture of all P&A, confinement for 20 years	6
Abusive Sexual contact	Article 120	Dishonorable discharge, forfeiture of all P&A, confinement for 7 years	2
Stalking	Article 120a	Dishonorable discharge, forfeiture of all P&A, confinement for 3 years	3
Indecent Viewing, Visual Recording, or Broadcasting	Article 120c	Dishonorable discharge, forfeiture of all P&A, confinement for 1 year	2
Forcible Pandering	Article 120c	Dishonorable discharge, forfeiture of all P&A, confinement for 12 years	4
Sexual Harassment: Threatening job, career salary	Article 127 (Extortion)	Dishonorable discharge, forfeiture of all P&A, confinement for 3 years	2
Sexual Harassment: Threatening job, career salary	Article 128 (Assault)	Confinement for 3 months, forfeiture of 2/3 pay for 3 months	1
Assault consummate by a battery	Article 128	Bad conduct discharge, forfeiture of all P&A, confinement for 6 months	1
Conduct unbecoming an officer and gentleman	Article 133	Dismissal, forfeiture of all P&A, confinement not in excess of that authorized for the most analogous offense, or if none prescribed, for 1 year	2
Sexual Harassment: Threatening job, career salary	Article 134 (Communicating a threat)	Dishonorable discharge, forfeiture of all P&A, confinement for 3 years	2
Assault with intent to commit rape	Article 134	Dishonorable discharge, forfeiture of all P&A, confinement for life without eligibility for parole or confinement for 20 years.	6

Assault with intent to commit sodomy	Article 134	Dishonorable discharge, forfeiture of all P&A, confinement for 10 years.	4

Figure 5. UCMJ Crimes, Punishments, and Corresponding Categories[217]

With each offense assigned a number category, the relative compensation floors and ceilings can be established. The compensation floors decrease from a maximum of $20,000 for category 7 offenses to $1,000 for category 1 offenses. Meanwhile, the compensation ceilings decrease with each drop in category such that the average of the ceilings, assuming an even distribution of all crimes committed (excluding murder), is $56,250. This average is close to the $50,000 maximum award amounts maintained by numerous states' compensation boards. Realistically, more crimes will fall in the lower categories, suggesting that the maximum amounts charged offenders are more than reasonable by state standards. The only exception to the maximum $100,000 charge is in the case of murder convictions in which case the compensation ceiling can reach $250,000.

No:	Confinement	Min:	Max:	Base P&S:	P&S Multiplier Range:	P&S Max:
1	Confinement less than a year	$1000.00	$6,250.00	$500.00	0.02-6.25	$3,125.00
2	Confinement 1 year to less than 5 years	$2,000.00	$12,500.00	$1,000.00	0.02-6.25	$6,250.00
3	Confinement 5 years to less than 10 years	$4,000.00	$25,000.00	$2,000.00	0.02-6.25	$12,500.00
4	Confinement 10 years to less than 15 years	$6,000.00	$50,000.00	$4,000.00	0.02-6.25	$25,000.00
5	Confinement 15 years to less than 20 years	$8,000.00	$75,000.00	$6,000.00	0.02-6.25	$37,500.00
6	Confinement 20 years to less than 30 years	$10,000.00	$100,000.00	$8,000.00	0.02-6.25	$50,000.00

[217] This table was created by the author using the *Manual for Courts-Martial*.

7	Confinement 30 years to life	$20,000.00	$125,000, unless murder then $250,000	$10,000.00	0.02-6.25	$62,500

Figure 6. Conviction Categories ("No."), Minimums ("Min"), Maximums ("Max"), and Pain and Suffering ("P&S")

c. Determining Pain and Suffering

As show in Figure 6, above, no more than half the amount of any compensation ceiling may be awarded in pain and suffering damages. To determine pain and suffering damages, the MCB will multiply the base number assigned to the applicable conviction by a pain and suffering multiplier. These pain and suffering base numbers are always half of the relevant compensation floor. The highest pain and suffering multiplier has a value of 6.25 points and the lowest multiplier has a value of 0.02 points.

Variable Components:	Multiplier Ranges:
Age of Victim	0.01-0.25
Rank of Offender:	0.01-0.25
Lack of Offender Remorse:	0 – 0.25
Physical Injuries:	0-2.75
Mental/Emotional Injuries:	0-2.75
Total:	0.02-6.25

Figure 7. Breaking down the Pain and Suffering Variable[218]

The appropriate multiplier number is determined by finding the sum of all point values assigned to the variables of victim age at the time of offense, offender rank at time of the offense,[219] offender remorse,

[218] The concept of using multipliers to determine pain and suffering is based on Avraham, *supra* note 177, at 90.

[219] The military is a hierarchal system, and soldiers place a significant amount of trust in their superiors. A violation of that trust arguably deserves an imposition of higher

victim's physical injuries, and victim's emotional injuries. As may be obvious, the worse the physical and emotional injuries, the more points the MCB will assign within those ranges. Similarly, the less remorse an offender demonstrates, the higher the offender's rank is, and the younger the victim is, the more points the MCB will assign those variables.

Moreover, Figure 7, above, shows that each variable has its own range of minimum and maximum values corresponding to the importance of the aggravating factors considered in previous sections. The first three variables are given lesser weight than physical and emotional injury categories because (1) while the amount of time a victim must live with his or her trauma and while the rank of the offender matters for payment purposes, these two factors are completely circumstantial and cannot reveal the true gravity of the offense as well as the other factors can, and (2) offender remorse may be extremely difficult to measure.

To follow this proposed scheme properly, additional schemes are needed to sensibly plot a demonstration of remorse, offender rank, and victim ages across a scale of 0.01 to 0.25 and to plot physical and emotional injuries on a scale of 0 to 2.75.

d. Summary of Offender Payment

To summarize, when an offender is convicted of sexual misconduct and the victim applies to the MCB, the MCB will first look to the category number assigned the offense. Next, it will see what floors and ceilings correspond with the conviction category number. To the floor amount will be added any expenses directly related to the crime incurred by the victim that have not been reimbursed by insurance or some other source, such as VA benefits. In addition to the floor plus victim expenses, the MCB will determine the amount of pain and suffering damages (capped at half of the conviction's compensation ceiling) owed the victim using the system of base numbers, multipliers, and point systems established in this article. Should the MCB hit the conviction's ceiling amount before pain and suffering can be considered, pain and suffering will not be considered unless justice requires an expansion of

---

compensation burdens.

the pain and suffering maximum.[220] This determines the final amount awarded to the victim.

If the ceiling has not been reached, the MCB should also consider any costs to the victim that have been reimbursed by insurance or some source. Such costs should be added to the compensation owed by the offender to the MCB (but which will not be passed on to the victim). Likewise, the VA should assess MCB awards given when determining how much assistance to afford a benefits applicant.

4. MCB Award Disbursement and Funding

After determining a final compensation award and after the appeals process is complete, the MCB would promptly pay the victim the determined amount in either one lump sum or in several installments from the U.S. Treasury. Offenders would then make their payments to DFAS when on active-duty or through a garnishment order, which would, in turn, pay the U.S. Treasury. Like student loans and other priority debts, Congress should ensure such amounts are not dischargable through bankruptcy.[221] This system would immediately provide funds for suffering victims and place the burden of compensation collection on DFAS and ultimately on the IRS. To collect money from offenders sentenced to a military confinement facility, the military should consider implementing a system similar to that of the CDCR by which DFAS could collect up to 50% of any money deposited into their accounts.

As with other debts owed to the federal government, the IRS should charge installment and late fees for compensation payments that do not comply with the original offender compensation plan. If necessary, the IRS would also be able to attach the offender's real and personal property in the same manner as for a federal tax lien, seize and sell an individual's assets pursuant to its levy authority, seize pending income tax refunds, garnish the wages of federal employees, and request civilian

---

[220] Hitting the conviction's compensation ceiling before the consideration of pain and suffering is anticipated to be an extremely rare occurrence. If this turns out to be incorrect, the system of assigned floors and ceilings ought to be adjusted according to the principles laid out in this article.

[221] *See* 11 U.S.C. § 523(a)(8) (2012) (providing that educational loans owed to a governmental unit or a nonprofit institution of higher education are not dischargeable).

employers to participate in wage garnishment.[222] The IRS should apply its normal rules for liens and levies on retired pay. The 20-year statute of limitations and other provisions for civil fines in 18 U.S.C. § 3613(b)[223] should be applied.

While offenders pay their restitution obligations, and in case offenders are unable to pay off the entire order, the military will need to access funds within the U.S. Treasury to pay victims. Congress may choose to use VOCA as a "vehicle to address . . . [the] risks and needs" of military victims."[224] Since its inception, Congress has amended VOCA several times "to support additional victim-related activities and accommodate the needs of specific groups of victims, such as child abuse victims and victims of terrorist acts."[225] As the current situation of military victims render them a population with unique risks and needs, Congress should, under VOCA, allocate additional funds to the Crime Victims Fund (CVF) within the U.S. Treasury from which DFAS would pay victims.

While a U.S. Treasury-supported system may superficially appear to circumvent the *Feres* doctrine, a closer examination shows the compensation system does not violate any of the purposes for which *Feres* was enacted.[226] That is, by allocating funds to CVF for DFAS to use, Congress would simply be voluntarily appropriating funds to compensate victims of sexual assault and harassment—a process that would improve the existing comprehensive compensation schemes already in place for injured military personnel. Additionally, the proposed MCB system would not allow soldiers to sue the government,

---

[222] Bobby L. Dexter, *Transfiguration of the Deadbeat Dad and the Greedy Octogenarian: An Intratextualist Critique of Tax Refund Seizures*, 54 KAN. L. REV. 643, 644 (2006).

[223] Title 18 U.S.C. § 3613(b) provides, "Termination of Liability—The liability to pay a fine shall terminate the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person fined, or upon the death of the individual fined."

[224] LISA N. SACCO, CONG. RESEARCH SERV., R42672, THE CRIME VICTIMS FUND: FEDERAL SUPPORT FOR VICTIMS OF CRIME 14 (2012).

[225] *Id.*

[226] The *Feres* court's rationale for barring military victims' claims is: (1) the military offers "a separate, uniform, comprehensive, no-fault compensation scheme for injured military personnel," (2) permitting soldiers to sue the Government or each other might have a negative effect on "military order, discipline, and effectiveness," and (3) a "corresponding unfairness" would arise when non-uniform local tort law would decide service-connected claims. *The Feres Doctrine: An Examination of this Military Exception to the Federal Torts Claims Act*: *Hearing before the S. Comm.on the Judiciary*, 107th Cong. 2 (2002) (statement of Paul Harris, Deputy Assoc. Attorney Gen.); *see also* Feres v. United States, 340 U.S. 135, at 140–43 (1950).

nor would it have a negative effect on military order and discipline. In fact, as the goal of the MCB is to curb sexual assault, it would improve military order, discipline, and effectiveness. Lastly, no "corresponding unfairness" would arise from a non-uniform tort law because the MCB creates a uniform system within the military.

5. Challenging MCB Findings

A complainant, perpetrator, or government counsel could appeal MCB findings within 30 calendar days of receiving the decision.[227] After the appellant sends a written notice of appeal to the MCB, the appellant would have 30 additional days to file an appeal, and the appellees (government, perpetrator, or victim) would have 60 days to file a response. Three MCB members would review the appeal and have the authority to affirm, modify, or remand the decision. The review panel's decision would stand as final. As with individuals appealing revoked security clearances,[228] the party paying the compensation can obtain legal counsel or other assistance at his or her own expense. Other aspects of the appeal process, such as content of an appeal and submission of an appeal, should conform with all rules outlined in Enclosure 7 of DoD Instruction 1340.21 [229] that are not inconsistent with the process previously described.

6. Cross-Examination Concerns

Though the MCB provides compensation as a post-appellate process, some defense attorneys may try to use the process during the cross-examination of a victim at criminal trials, which may occur in courts-martial, state courts, or U.S. district courts, depending on the location of the offense, arguing, essentially, that the possibility of compensation creates perverse incentives for the victim to file a false report. Even so, the defense's argument would not necessarily be persuasive or decisive.

---

[227] Thirty days is the length of time New York allows victims to submit a written appeal to their state compensation board. *Frequently Asked Questions What Do I Do If I Am Unhappy with the OVS Decision on My Claim Application?*, N.Y. OFFICE OF VICTIM SERVS., http://www.ovs.ny.gov/HelpforCrimeVictims/HelpFAQ.aspx (last visited July 16, 2014).

[228] U.S. DEP'T OF DEF., 5200.2-R, PERSONNEL SECURITY PROGRAM para. C8.2.2.1.1 (Jan. 1987).

[229] DOD INSTR.1340.21, *supra* note 186, at 17.

Victims have been able to sue perpetrators in tort after criminal trials for decades and prosecutors have nevertheless been able to obtain convictions.

V. Benefits of Creating the MCB Instead of Implementing Other Potential Solutions

The MCB uniformly provides justice for military victims of sexual assault and harassment while punishing their perpetrators, fostering proper deterrence levels, and contributing to the essential military goals of discipline and preparedness. By creating a military-based solution for a military problem, the MCB preserves the authority of the commander. While some critics may be uncomfortable preserving the strong role the commander plays within the military justice system, especially in regards to claims of sexual assault and harassment,[230] changing the role of the commander may come with undesirable and unintended consequences. As Diane H. Mazur notes in her article *The Beginning of the End for Women in the Military*,[231] "[u]sing the chain of command is ingrained in all service members," and once the chain of command is discarded as an avenue for redress, she says sexual assault and harassment will "no longer [be] a priority for the command."[232] That is, "[i]f we tell individual supervisors and commanders that they are incompetent to respond to women's concerns, they will remain incompetent."[233]

Moreover, victims will be less fearful of reporting sexual assault and harassment, and of engaging with the military's administrative and judicial processes, knowing they will have a chance to approach the MCB (regardless of their offender's conviction status) and recover monetary compensation that appropriately recognizes their struggles.

---

[230] Some advocates do not like that commanders and not lawyers are deciding what disciplinary action to take, choosing whether or not to try a case, and in selecting the court members. *See, e.g.*, *Will Military Sexual Assault Survivors Find Justice*, NOW (March 19, 2014), http://now.org/resource/will-military-sexual-assault-survivors-find-justice-issue-advisory/ (last visited July 21, 2014). Others doubt the commanders' abilities to ignore the pressure from the media or their superiors to "look good" and keep problematic issues in their unit quiet by ignoring them, or worse, actively discouraging victims from making allegations against other servicemembers. *See, e.g.*, Jackie Speier, *Military Justice Bungles Sex Cases*, CNN, Mar. 20, 2014, http://www.cnn.com/2014/03/20/opinion/speier-military-prosecution/.

[231] Diane H. Mazur, *The Beginning of the End for Women in the Military*, 48 U. FLA. L. REV. 461, 464 (1996).

[232] *Id.* at 470.

[233] *Id.*

Additionally, the creation of the MCB accomplishes reform in a simpler and more efficient manner than other suggested solutions. By implementing the MCB, Congress would not have to transform the ingrained role of the commander or overturn federal case law to eliminate or seriously amend the *Feres* doctrine, the FTCA, the MCA, Title VII, or EEOC jurisdiction. Lastly, the MCB is a solution that gives the military the proper deference that courts and Congress have long afforded it. It is also large enough in its scope and vision to respond to the serious problem of sexual assault and harassment in the military.

VI. Conclusion

In summary, the military is a community apart, a society with unique tasks and responsibilities that operates under a separate legal system. It is a community whose sexual assault and harassment victims often do not report incidents for fear of reprisal or retaliation.[234] None of these victims can sue the government for tort damages, and the compensation options available to them are decidedly lacking.

Creation of a separate Military Crime Victims Compensation Board creates an efficient military solution to a unique military problem, allowing military victims of sexual assault and harassment to apply for and receive just compensation awards. The award amount would include scheduled pain and suffering damages to ensure fair, predictable awards tailored for deterrence. Perpetrators would be responsible for paying the compensation, and if discharged from the military, the IRS could then use the full panoply of remedies to collect the debt. While the need for further improvement and refinement of the processes developed in this article remains, by creating the MCB, the military would make significant progress toward providing justice for victims and forcing offenders to face tougher consequences.

---

[234] Banner, *supra* note 55, at 768-71.

Appendix A

Sample Draft Bill

.

(Original Signature of Member)

114TH CONGRESS

H. R. _____

To expand the roles and responsibilities of the Under Secretary of Personnel and Readiness to provide a uniform compensation system to military victims of violent crimes committed by military offenders to ensure victims receive adequate support and recognition of their suffering, impose appropriate consequences on offenders, and offer opportunities to military victims by which they can recover awards available to similarly situated civilians.

_____

IN THE HOUSE OF REPRESENTATIVES

_____ introduced the following bill; which was referred to the Committee on _____

_____

A BILL

To expand the roles and responsibilities of the Under Secretary of Personnel and Readiness to provide a uniform compensation system to military victims of violent crimes committed by military offenders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Military Crime Victims Compensation Board Act of 2015."

SEC. 2. EXPANDING THE ROLE AND RESPONSIBILITY OF THE UNDER SECRETARY OF PERSONNEL AND READINESS.

(a) SECTION 136(D) OF TITLE 10 U.S. CODE IS ADDED TO AS FOLLOWS:

(1) At the end of Section 136(d), the following sentence is added: "The Department of Defense shall establish a fund, to be known as the Military Crime Compensation Fund."

(b) SECTION 136(D)(1) OF TITLE 10 U.S. CODE IS ADDED AS A SUBSECTION OF 136(D) AS FOLLOWS:

(1) Property loss, personal injury, or death due to sexual assault, abuse, or harassment: incident to combat or noncombat activities of the armed forces:

(A) Definitions:

(1) personal injury as used in this section refers to a victim's physical as well as emotional pain and suffering caused by sexual assault, abuse, or harassment.

(2) servicemember as used in this section refers to any member or the Army, Marines, Navy, Air Force, or Coast Guard.

(3) service as used in this section refers to the Army, Marines, Navy, Air Force, and Coast Guard.

(B) The purpose of this Act is to promote and maintain a collaborative safe working environment within the armed services; to compensate the victims of sexual assault, abuse, and harassment, and to punish sexual offenders through the prompt settlement of meritorious claims, the Secretary concerned, or an officer or employee designated by the Secretary, may

appoint, under such regulations as the Secretary may prescribe the Military Compensation Board (MCB), composed of at least five officers or employees or combination of officers or employees of the services, to settle and pay in an amount not more than $100,000, or not more than $250,000 in the case of murder, a claim against the United States for—

(1) damage to, or loss of, real property of any servicemember;

(2) personal injury to, or death of, any servicemember if the damage, loss, personal injury, or death—no matter the place of its occurrence, whether inside or outside the United States or its commonwealths or possessions—and is caused by, or is otherwise incident to, combat or noncombat[235] activities of the armed forces under his jurisdiction, or is caused by a member thereof or by the Coast Guard, as the case may be. An officer or employee may serve on a claims commission under the jurisdiction of another armed force only with the consent of the Secretary of his department, or his designee, but shall perform his duties under regulations of the department appointing the commission.

(C) A claim may be allowed under subsection (B) only if—

(1) the underlying incidence was reported within 72 hours of its occurrence, or a reasonable amount of time depending on deployment circumstances or military duties of the

[235] While the Foreign Claims Act (FCA) bans claims arising from combat activities, there have been instances in which the DoD has still found a way to compensate combat related damages. These exclusions from the FCA ban are "strong evidence of the high value that the U.S. military places upon winning the hearts and minds of civilians and compensation as a means to that end." Jordan Walerstein, Note, *Coping with Combat Claims: An Analysis of the Foreign Claims Act's Combat Exclusion*, 11 CARDOZO J. CONFLICT RESOL. 319, 331 (Fall 2009). If the military prioritizes the hearts and minds of civilians in other countries, it seems logical that it would also prioritize the hearts and minds of its own soldiers. The combat provision should apply to military victims of sexual assault, abuse, and harassment.

victim, and was presented within two years after the filing of the report or within 90 days after the sentence of the court-martial is announced, or the matter is otherwise resolved through imposition of a reprimand or non-judicial punishment, whichever is later; and (2) it arose from criminal conduct by a servicemember who was on active duty when such conduct occurred.

An appeal of a final claim determination as prescribed in this chapter is allowed only if –

(1) a complainant, an accused, or the United States believes the amount tendered is unjust or in violation of the rules prescribing compensation payments.

(2) the appellant files notice of the written appeal within 30 calendar days of receiving the MCB's final payment decision.

(3) the appellant files the appeal within 60 days of filing the notice of appeal.

(D) After the MCB reviews a victim's application and determines the compensation owed, an order for payment will be sent to the Defense Finance and Accounting Office (DFAS), the victim, and the perpetrator.

(E) If after 30 days no notice of appeal is filed, DFAS will pay the victim and either garnish the perpetrator's pay or forward the debt to the IRS for collection should the perpetrator be discharged.

(F) If the Secretary concerned considers that a claim in excess of $100,000 is meritorious, and the claim otherwise is payable under this section, the Secretary may pay the claimant $100,000 and report any meritorious amount in excess

of $100,000 to the Secretary of the Treasury for payment.

(G) Except as provided in subsection (d), no claim may be paid under this section unless the amount tendered is accepted by the claimant in full satisfaction.

(H) The Board will operate pursuant to the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness. The Secretary of Defense shall issue appropriate directives, appoint hearing officers, support staff, and appeal board members as necessary, to implement this statute within 180 days of the date of this authorization.

(I) The Military Crime Compensation Board designated under this paragraph shall have the following functions, powers, and duties

(1) To establish and maintain a principal office within the Department of Defense.

(2) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions and purposes of this article, including rules for the determination of claims and military judge advocates or lawyers appointed as victim representatives shall be responsible for assisting victims in filing claims to the MCB.

(3) To require any military criminal investigative agency, military police agency, or Department of Defense command to provide investigative reports and records necessary to enable the Board to

carry out its functions and duties.

(4) To hear, determine, and review all claims for awards filed with the office by military victims including for pain and suffering damages.

(5) To establish an advisory council to assist in formulation of policies on the problems of crime victims and providing recommendations to the Under Secretary to improve the delivery of services to victims by the office.

(6) To establish a review board to review claims and affirm, modify, or remand the claims to ensure compliance with Department of Defense procedural regulations and to establish uniformity in awards throughout the Department of Defense.

(7) Render each year a written report to the Under Secretary on the office's activities including, but not limited to, the manner in which the rights, needs, and interests of crime victims are being addressed by the MCB and changes that are recommended in the authority or procedures of the MCB.

Appendix B

Summary of Basic State Program Information

Note: Significant exceptions exist for many states' reporting and filing requirements. In general, most states can waive reporting and filing requirements for "good cause" and many have specific exceptions for child victims. With regard to the maximums listed below, nearly every state has limits below the maximum on some specific expenses, such as funerals, mental health counseling, and lost wages. Go to www.nacvcb.org and the Program Directory there to find more state information.

	Reporting Requirement (in hours unless noted)	Filing Limit	Maximum Payment
Alabama	72	1 year	15,000
Alaska	5 days	2 years	40,000; 80,000 in homicides with multiple victims
Arizona	72	2 years	25,000
Arkansas	72	1 year	10,000; 25,000 for catastrophic injuries
California	reasonable time	3 years	63,000
Colorado	72	1 year	20,000 (each district may set lower maximum)
Connecticut	5 days	2 years	15,000; 25,000 in homicides
Delaware	72	1 year	25,000; 50,000 when injuries are total and permanent
D.C.	7 days	1 year	25,000
Florida	72	1 year	15,000; 30,000 for catastrophic injuries
Georgia	72	1 year	25,000
Hawaii	72	18 months	10,000; 20,000 if only medical expenses are claimed
Idaho	72	1 year	25,000
Illinois	72/7 days sexual assault	2 years	27,000
Indiana	48	180 days	15,000
Iowa	72	2 years	No overall limit; maximums for each expense
Kansas	72	2 years	25,000
Kentucky	48	5 years	25,000
Louisiana	72	1 year	10,000; 25,000 when injuries are total and permanent
Maine	5 days	3 years	15,000
Maryland	48	3 years	45,000
Massachusetts	5 days	3 years	25,000
Michigan	48	1 year	25,000
Minnesota	30 days	3 years	50,000
Mississippi	72	3 years	20,000
Missouri	48	2 years	25,000
Montana	72	1 year	25,000
Nebraska	72	2 years	10,000
Nevada	5 days	1 year	35,000
New Hampshire	5 days	1 year	25,000
New Jersey	9 months	3 years	25,000; 60,000 for catastrophic injuries
New Mexico	30 days; 180 days d.v./sexual assault	2 years	20,000; 50,000 for catastrophic injuries
New York	7 days	1 year	No medical maximum; limits on other expenses
North Carolina	72	2 years	30,000; additional 5,000 for funeral expenses
North Dakota	72	1 year	25,000
Ohio	no limit	no limit	50,000
Oklahoma	72	1 year	20,000; 40,000 in catastrophic cases and homicides
Oregon	72	6 months	47,000
Pennsylvania	72	2 years	46,500 (35,000 plus 10,000 counseling; 1,500 other)
Puerto Rico	72	6 months	6,000 per person, 15,000 per family; 40,000 in catastrophic
Rhode Island	10 days	3 years	25,000
South Carolina	48	180 days	15,000; 25,000 in catastrophic cases
South Dakota	5 days	1 year	15,000
Tennessee	48	1 year	30,000
Texas	reasonable time	3 years	50,000; 125,000 when injuries are permanent and total
Utah	no limit	no limit	25,000; additional 25,000 medical if base amount exceeded
Vermont	no limit	no limit	10,000
Virgin Islands	24	2 years	25,000
Virginia	5 days	1 year	25,000
Washington	1 year	2 years	50,000
West Virginia	72	2 years	35,000; 50,000 in homicides; 100,000 in catastrophic cases
Wisconsin	5 days	1 year	40,000; additional 2,000 for funerals
Wyoming	reasonable time	1 year	15,000; 25,000 for catastrophic injuries

NAT'L ASS'N OF CRIME VICTIM COMPENSATION BDS., BASIC PROGRAM INFORMATION, *available at* http://www.nacvcb.org/NACVCB/files/ccLibraryFiles/Filename/000000000196/Basic%20Information%202014.doc.

Appendix C

Crime Victims Funds FY1985–2012 (dollars in millions)[236]

Fiscal Year	Amount Collected to CVF	Enacted Cap on CVF Deposits	Enacted Cap on CVF Distribution	Funds Made Available for Distribution[a]	Carryover CVF Balance
1985	$68.3	$100	—	$68.3	—
1986	62.5	$110	—	62.5	—
1987	77.5	$110	—	77.5	—
1988	93.6	$110	—	93.6	—
1989	133.5	$125	—	124.2	—
1990	146.2	$125	—	127.2	—
1991	128.0	$150	—	128.0	—
1992	221.6	$150	—	152.2	—
1993	144.7	—	—	144.7	—
1994	185.1	—	—	185.1	—
1995	233.9	—	—	233.9	—
1996	528.9	—	—	528.9	—
1997	362.9	—	—	362.9	—
1998	324.0	—	—	324.0	—
1999	985.2	—	—	500.0	—
2000	777.0	—	500.0	537.5	485.2
2001	544.4	—	537.5	550.0	785.2
2002	519.5	—	550.0	600.0	792.0
2003	361.3	—	600.0	617.6[b]	718.9
2004	833.7	—	621.3[c]	671.3[d]	422.1
2005	668.3	—	620.0	620.0	1,307.4
2006	641.8	—	625.0	625.0	1,333.5
2007	1,018.0	—	625.0	625.0	1,784.0
2008	896.3	—	590.0	590.0	2,084.0
2009	1,745.7	—	635.0	635.0	3,146.5
2010	2,362.3	—	705.0	705.0	4,801.5
2011	1,998.0	—	705.0	705.0	6,099.7
2012	—	—	705.0	705.0	—

[236] U.S. Dep't of Justice, Office of Justice Programs, Office of Comm.; SACCO, *supra* note 233, at 4.