

# Striking a Balance Between Victim and Commanding Officer: Why Current Military Sexual Assault Reform Goes Too Far

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*Under the military justice system, as it currently stands, commanding officers (COs) almost complete discretion to decide whether to prosecute the accused in sexual assault cases, and whether to commute the sentences of soldiers found guilty of such crimes. In the wake of the Department of Defense's estimate that 26,000 sexual assaults occurred in fiscal year 2012 alone, Congress passed the National Defense Authorization Act for Fiscal Year 2014 (NDAA for FY14). In addition to giving victims of sexual assault greater legal rights, the legislation denies commanders the right to overturn jury convictions and subjects COs' decisions not to prosecute to civilian review. Critics such as Senator Kirsten Gillibrand (D-NY), however, have suggested that the problem lies in placing the legal power in the hands of COs, and recommend removing sexual assault cases from the chain of command entirely by instituting a third party into such proceedings. This Note assesses the strengths of the reforms contained in the NDAA for FY14 and those of Senator Gillibrand's alternative proposal. It then suggests that the best solution is one charting a hybrid approach — requiring formalized training of the COs by state or federal prosecutors specializing in sexual assault crimes, mandating review of a CO's decision not to prosecute in limited circumstances, subjecting COs' power to commute sentences to judicial approval, and ensuring that each prosecution be headed by a neutral CO. Such a solution would diminish COs' almost unlimited authority in sexual assault proceedings, while still allowing them a role consistent with the overarching purpose of the military justice system — to ensure good order and discipline.*

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## I. INTRODUCTION

Sexual assault in the military has become a widespread concern following media reports on its prevalence and the lack of victim protection and assistance. At the Lackland Air Force basic training base in San Antonio, Texas, more than thirty instructors were convicted of sexually assaulting recruits.<sup>1</sup> In one high-profile case, a three-star Air Force general tossed out a jury's sexual assault conviction of a pilot.<sup>2</sup> The Department of Defense's (DoD) 2013 annual report on sexual assault in the military paints an alarming picture. It estimated that there were 26,000 cases of unwanted sexual contact during the 2012 fiscal year.<sup>3</sup> Only 3374 incidents were formally reported,<sup>4</sup> and less than 10% were actually tried by courts-martial.<sup>5</sup> Congress has taken the problem seriously and implemented reforms, but advocates of stronger protections against sexual violence in the military, such as Senator Kirsten Gillibrand (D-NY), contend they do not go far enough.<sup>6</sup> However, both Congress' reforms and Gillibrand's alternative proposal are insensitive to the context in which they will be implemented and go too far in restructuring the military's handling of sexual assault cases.

While sexual assault is deeply troubling in civilian society, it has added dangers and repercussions in military life.<sup>7</sup> Prevent-

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1. Tom Vanden Brook, *Senate Begins Debate on Military Sexual Assault Plans*, USA TODAY (Nov. 20, 2013), <http://www.usatoday.com/story/news/nation/2013/11/20/military-sexual-assault-proposals-senate/3651633/>.

2. *Id.*

3. U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2012, at 13 (2013), available at [http://www.sapr.mil/public/docs/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-volume\\_one.pdf](http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-volume_one.pdf) [hereinafter SAPRO FY12 REPORT].

4. *Id.* at 57.

5. *Id.* at 71.

6. See Editorial, *New Sexual Assault Policies for the Military May Not Go Far Enough*, WASH. POST (Dec. 28, 2013), [http://www.washingtonpost.com/opinions/new-sexual-assault-policies-for-the-military-may-not-go-far-enough/2013/12/28/5e5f21f4-6f0f-11e3-aecc-85cb037b7236\\_story.html](http://www.washingtonpost.com/opinions/new-sexual-assault-policies-for-the-military-may-not-go-far-enough/2013/12/28/5e5f21f4-6f0f-11e3-aecc-85cb037b7236_story.html). Just days after President Obama signed the new reforms into law, Senator Gillibrand began "pressing for a stand-alone vote" on her proposed amendment. *Id.* She expressed concern that "the one reform survivors have asked for" was not included in the final Congressional bill. *Id.* (internal quotation marks omitted).

7. U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE FISCAL YEAR 2009 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 5 (2010), available at [http://www.sapr.mil/public/docs/reports/fy09\\_annual\\_report.pdf](http://www.sapr.mil/public/docs/reports/fy09_annual_report.pdf) [hereinafter SAPRO FY09 REPORT] ("In the Armed

ing and responding to incidents of sexual assault is therefore a high priority for the military justice system.<sup>8</sup> The DoD's Sexual Assault Prevention and Response Office has established five priorities to address sexual assault in the military.<sup>9</sup> The first is to institutionalize prevention strategies in the military with the ultimate goal of eliminating instances of sexual assault altogether.<sup>10</sup> Secondly, the DoD seeks to increase the climate of victim confidence associated with reporting in order to increase the number of victims who actually make a report of sexual assault.<sup>11</sup> Thirdly, the office hopes to improve sexual assault response to enhance the quality of victim care and the victim's experience with the military justice system.<sup>12</sup> The fourth priority the DoD has established is to improve system accountability to ensure the Sexual Assault Prevention and Response (SAPR) program functions as intended.<sup>13</sup> Finally, the DoD is focused on improving stakeholder knowledge and understanding of sexual assault prevention and response in an effort to certify that stakeholders are informed of the DoD's efforts to combat sexual assault in the military.<sup>14</sup>

Following the release of the DoD report on sexual assault in the military for fiscal year 2012, Defense Secretary Chuck Hagel ordered that rape allegations be reviewed directly by generals and admirals.<sup>15</sup> In addition, the Pentagon issued a proposal to

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Forces, sexual assault not only degrades individual resilience but also erodes unit integrity. Service members risk their lives for each other and seek to keep fellow Service members out of harm's way. Sexual assault breaks this important bond and tears apart military units. An effective fighting force cannot tolerate sexual assault within its ranks. Sexual assault is incompatible with military culture, and the costs and consequences for mission accomplishments are unbearable.”).

8. See U.S. DEPT OF DEF., DEPARTMENT OF DEFENSE FY07 REPORT ON SEXUAL ASSAULT IN THE MILITARY 4 (2008), available at <http://www.sapr.mil/public/docs/reports/2007-annual-report.pdf> [hereinafter SAPRO FY07 REPORT] (“The Department of Defense remains committed to eliminating sexual assault from military service by sustaining a robust sexual assault prevention and response policy. . .”).

9. SAPRO FY12 REPORT, *supra* note 3, at 2.

10. *Id.* at 6 (“[P]revention refers to population-based or system-level strategies, policies, and actions that aim to decrease the number of individuals who perpetrate sexual assault and the number of individuals who are sexual assault victims.”).

11. *Id.* at 17.

12. *Id.* at 27.

13. *Id.* at 38 (“System accountability is achieved through standardized data collection, analysis, and reporting of case outcomes, as well as review of ongoing SAPR efforts to ensure that the desired programmatic and problem solutions are being attained.”).

14. *Id.* at 46.

15. Dan Friedman, *Defense Secretary Hagel Orders Changes in Handling Military Sex Assaults — But Not Enough for Sen. Gillibrand*, N.Y. DAILY NEWS (Aug. 15, 2013),

create legal advocacy programs in each branch of the military to provide sexual assault victims with legal representation, ensure that pre-trial investigative hearings are conducted by judge advocate general officers (JAGs), and give commanding officers (COs) the option of reassigning or transferring a unit member accused of a sex crime.<sup>16</sup>

Critics, led by Senator Gillibrand, responded quickly and disapprovingly to the Pentagon's proposal.<sup>17</sup> "As we have heard over and over again from the victims, and the top military leadership themselves, there is a lack of trust in the system that has a chilling effect on reporting,"<sup>18</sup> she lamented. For Senator Gillibrand then, the answer begins with a restructuring of the military justice system from the top. Echoing Senator Gillibrand's sentiment, Taryn Meeks, a former Navy JAG officer, suggested, "Prosecutors — and not commanders — must be given the authority to decide whether to proceed to trial."<sup>19</sup>

Senator Gillibrand ultimately proposed an amendment to the defense authorization bill — appropriately named the Military Justice Improvement Act (MJIA) — which Congress considered in November 2013.<sup>20</sup> It would have moved prosecution of sexual assaults and other crimes away from commanding officers to military prosecutors,<sup>21</sup> allowing victims to go outside of the command structure to see their attackers prosecuted.<sup>22</sup> Senator Claire McCaskill (D-MO) countered Senator Gillibrand's amendment, arguing that altering the pre-trial procedure is not the answer. Senator McCaskill also forwarded an alternative proposal that would have allowed commanding officers "to determine the cases

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<http://www.nydailynews.com/news/politics/hagel-orders-handling-military-sex-assaults-article-1.1428439>.

16. Craig Whitlock, *Pentagon Issues New Regulations Aimed at Combating Sexual Assault in Military*, WASH. POST, (Aug. 15, 2013), [http://articles.washingtonpost.com/2013-08-15/world/41412364\\_1\\_pentagon-issues-sexual-assault-defense-secretary-chuck-hagel](http://articles.washingtonpost.com/2013-08-15/world/41412364_1_pentagon-issues-sexual-assault-defense-secretary-chuck-hagel).

17. Bill Briggs, *Critics Underwhelmed with Pentagon Plan to Stem Military Sex Assaults*, U.S. NEWS (Aug. 15, 2013), [http://cached.newslookup.com/cached.php?ref\\_id=46&siteid=2039&id=2832020&t=1376594256](http://cached.newslookup.com/cached.php?ref_id=46&siteid=2039&id=2832020&t=1376594256).

18. *Id.*

19. *Id.*

20. Dan Friedman, *Gillibrand's Legislation to Curb Sex Assaults in Military Faces Opposition*, N.Y. DAILY NEWS (Nov. 24, 2013), <http://www.nydailynews.com/news/national/gillibrand-bid-curb-sex-assaults-military-fire-article-1.1527185>.

21. *Id.*

22. Lolita C. Baldor, *Military Sexual Assault Reports Jump By 50 Percent*, HUFFINGTON POST (Dec. 27, 2013), [http://www.huffingtonpost.com/2013/12/27/military-sexual-assault-reports\\_n\\_4508698.html](http://www.huffingtonpost.com/2013/12/27/military-sexual-assault-reports_n_4508698.html).

that get prosecuted but prevent them from overturning convictions,” and that added “more layers of review for their actions.”<sup>23</sup>

After much debate and negotiation, Congress approved legislation reforming the Uniform Code of Military Justice and the handling of sexual assault offenses in the military,<sup>24</sup> the National Defense Authorization Act for Fiscal Year 2014 (NDAA for FY14).<sup>25</sup> President Barack Obama signed the bill into law on December 26, 2013.<sup>26</sup> The new legislation gives victims of sexual assault greater legal rights and denies commanders the right to overturn jury convictions during post-trial review.<sup>27</sup> Additionally, the legislation subjects commanding officers’ decisions not to prosecute to civilian review and provides for automatic dismissal or dishonorable discharge for anyone convicted of a sexual assault.<sup>28</sup>

This Note explores the newly enacted NDAA for FY14, as well as Senator Gillibrand’s rejected amendment to the Act, and explains why neither resolution is productive in a military setting. Part II provides a historical perspective on the problem of sexual assault in the military. Part III explains the prosecutorial timeline for sexual assault charges in the military, from formal report of the criminal act to the convening of a court-martial against the accused, and the procedures involved during both pre- and post-trial review. Part III also explores the incidence of sexual assault prosecutions and convictions in fiscal year 2012, which gave rise to the push for reform. Part IV presents and critiques the specifics of the recently approved legislation and Senator Gillibrand’s proposed MJIA. Part IV concludes that neither the victim-centric and post-trial procedural reforms included in the NDAA for FY 2014, nor Senator Gillibrand’s more extensive internal restructuring of pre-trial procedure, are effective resolutions to combat the sexual assault crisis in the military. As Part IV argues, this is due primarily to victims’ inherent distrust of the military jus-

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23. Vanden Brook, *supra* note 1. This proposal was ultimately accepted and codified in the National Defense Authorization Act for Fiscal Year 2014. National Defense Authorization Act for Fiscal Year 2014, §§ 1702(b), 1744(a), 127 Stat. 672, 955, 980 (2013).

24. Baldor, *supra* note 22.

25. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

26. Meredith Clark, *Landmark Year for Military Sex Assault Reform Ends with Spike in Reports*, MSNBC (Dec. 28, 2013), <http://www.msnbc.com/melissa-harris-perry/big-jump-reports-military-sex-assault>.

27. Baldor, *supra* note 22.

28. *Id.*

tice system and to the nature of the military as an institution that not only fosters, but demands obedience to one's commanding officer. Part V suggests an alternative set of reforms — specialized training, a more formalized review procedure, and greater neutrality — that are still consistent with the military's emphasis on obedience by retaining commanders' discretion in prosecutorial and sentencing decisions.

## II. HISTORICAL BACKGROUND

Sexual assault has long been prevalent in military culture.<sup>29</sup> In recent years, the number of reported sexual assaults has continued to increase,<sup>30</sup> but such reports are only a small sample of the estimated total occurrence of unwanted sexual contact.<sup>31</sup> In addition to a low victim reporting percentage, few soldiers are brought to justice through the military's court-martial proceedings.<sup>32</sup> The Uniform Code of Military Justice affords commanding officers broad discretion in both pre- and post-trial decisions, including the determination of whether to convene a court-martial against an accused<sup>33</sup> and the power to commute a convicted soldier's sentence.<sup>34</sup> As such, this section explores the historic prevalence of sexual assault in the military and discusses, in depth, the current state of affairs with regards to sexual assault prosecutions within the military justice system.

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29. See Jessica L. Cornett, *The U.S. Military Responds to Rape: Will Recent Changes Be Enough?*, 29 WOMEN'S RTS. L. REP. 99, 105 (2008) (explaining that a 1995 Department of Defense survey found that 78% of female service members experienced unwanted sexual behavior in the military).

30. SAPRO FY12 REPORT, *supra* note 3, at 24.

31. See *id.* at 13 (“Estimates derived from the rates of USC [unwanted sexual conduct] in the 2012 WGRA [*Workplace and Gender Relations Survey of Active Duty Members*] suggest that there may have been approximately 26,000 Service members who experienced some form of USC in the year prior to being surveyed. This estimate suggests that there may have been approximately 7000 more Service members who experienced some kind of USC in 2012 than in 2011.”).

32. See *id.* at 71 (indicating that in fiscal year 2012, of the 3374 reported instances of sexual assault involving service members as victims or subjects, only 302 cases proceeded to trial by courts-martial).

33. 10 U.S.C.A. § 815(b) (West 2013); see *Cappella v. United States*, 624 F.2d 976, 978 (Ct. Cl. 1980) (“[T]he commanding officer has broad discretion to determine whether a particular alleged offense is sufficiently serious to warrant court-martial rather than nonjudicial punishment under Article 15.”).

34. 10 U.S.C.A. § 860(c) (West 2013).

## A. A BRIEF HISTORY OF SEXUAL ASSAULT IN THE MILITARY

Prior to 2004, no military branch routinely compiled statistics on sexual assault.<sup>35</sup> Nonetheless, it cannot be seriously disputed that sexual assault in the military has been widespread and increasing for many years. A study by the Navy Criminal Investigative Service found that the number of rapes occurring on naval bases steadily increased 55% from 1987 to 1990.<sup>36</sup> A separate 1995 survey found that 78% of Servicewomen had experienced unwanted sexual behavior in the military.<sup>37</sup> The accuracy of these surveys, however, may be diminished by the military's lack of a uniform definition of "unwanted sexual behavior" at the time.<sup>38</sup> It is possible that the broad term "unwanted sexual behavior" captured conduct outside the current definition of sexual assault in the military,<sup>39</sup> thereby inflating the number of Servicewomen the survey found to have experienced sexual assault.

Realizing the lack of consistent data surrounding sexual assaults within the Armed Forces, Congress included a provision in the Ronald W. Reagan National Defense Authorization Act of 2004 requiring the Secretary of Defense to submit annual reports of sexual assault involving Service members and to make them available to the public.<sup>40</sup> The reports must include the number of sexual assaults committed by and against members of the Armed Forces reported to military officials during the fiscal year, descriptions of those cases found to be substantiated, including the disciplinary actions taken, and a plan for preventing and responding to sexual assault in the following year.<sup>41</sup> In addition to

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35. Jack Nevin & Joshua R. Lorenz, *Neither a Model of Clarity nor a Model Statute: An Analysis of the History, Challenges, and Suggested Changes to The "New" Article 120*, 67 A.F. L. REV. 269, 273 (2011).

36. Cornett, *supra* note 29.

37. *Id.*

38. Nevin & Lorenz, *supra* note 35.

39. Currently, sexual assault is defined as "intentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent." U.S. DEP'T OF DEF., DIRECTIVE NO. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM 21 (2012), available at <http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf> (reissued on January 20, 2015). The term "sexual assault" refers only to the crimes of rape, sexual assault, aggravated sexual contact, abusive sexual contact, nonconsensual sodomy, and attempts to commit these acts. SAPRO FY12 REPORT, *supra* note 3, at 57.

40. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, § 577(f), 118 Stat. 1811, 1927 (2004).

41. *Id.* at § 577(f)(2).

submitting annual reports, the legislation directed the Secretary of Defense to develop a uniform definition of sexual assault. Today, “sexual assault” is defined as: “intentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent.”<sup>42</sup> On June 28, 2012 the term “sexual assault”<sup>43</sup> was narrowed from previous definition to refer “only to the crimes of rape, sexual assault, aggravated sexual contact, abusive sexual contact, nonconsensual sodomy, and attempts to commit these acts.”<sup>44</sup>

In accordance with the 2004 Act, the DoD has published reports annually since 2005. For calendar year 2004, military criminal investigation organizations (MCIOs) received 1700 reports of sexual assault involving members of the Armed Forces.<sup>45</sup> Following the institution of training programs for both military personnel and first responders, as well as the adoption of confidential, or “restricted,” reporting,<sup>46</sup> 2005 saw the number of reported sexual assaults increase significantly to 2374 (a nearly 40% increase).<sup>47</sup> In 2006, MCIOs received 2947 reports of sexual assault, a 24% increase from 2005, perhaps due to increased victim confidence in the confidential reporting structure.<sup>48</sup> The report for 2007 identified 2688 total reports of sexual assault involving military Service members.<sup>49</sup> In fiscal years 2008, 2009, 2010, and 2011, MCIO received 2908, 3230, 3158, and 3192 reports of sexu-

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42. U.S. DEP'T OF DEF., DIRECTIVE NO. 6495.01, *supra* note 39.

43. As used in the mandatory annual DoD reports on sexual assault in the military.

44. SAPRO FY12 REPORT, *supra* note 3, at 57.

45. U.S. DEP'T OF DEF., CALENDAR YEAR 2004 REPORT — SEXUAL OFFENSES INVOLVING MEMBERS OF THE ARMED FORCES 1 (2005), *available at* <http://www.sapr.mil/public/docs/reports/2004-annual-report.pdf>.

46. U.S. DEP'T OF DEF., CALENDAR YEAR 2005 REPORT — SEXUAL OFFENSES INVOLVING MEMBERS OF THE ARMED FORCES 1 (2006), *available at* <http://www.defense.gov/news/Mar2006/d20060316SexualAssaultReport.pdf>. Restricted reporting allows current members of the Armed Forces who become adult victims of sexual assault to report their assault confidentially to specific individuals. *Restricted Reporting*, U.S. DEP'T OF DEF., <http://sapr.mil/index.php/dod-policy/reporting-options/restricted-reporting> (last visited Jan. 7, 2015). Victims may be drawn to file a restricted report when they do not desire to trigger an official investigation or notify their, or other, COs. *See id.*

47. U.S. DEP'T OF DEF., CALENDAR YEAR 2005 REPORT, *supra* note 46, at 1.

48. U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON MILITARY SERVICES SEXUAL ASSAULT FOR CY 2006, at iii (2007), *available at* <http://www.sapr.mil/public/docs/reports/2006-annual-report.pdf>.

49. SAPRO FY07 REPORT, *supra* note 8. Beginning in 2007, the reporting period shifted from calendar year to fiscal year, thus causing a three-month overlap with Calendar Year 2006. *Id.* at 3. As a result, side-by-side analysis of the data from fiscal year 2007 and that of the previous year is not possible. *See id.*



al assault, respectively.<sup>50</sup> While the number of reports may seem low in the context of over 1 million active-duty military personnel,<sup>51</sup> sexual assault in the military, as in the civilian context, is vastly underreported.<sup>52</sup> The DoD has indicated that 20% or fewer of instances involving unwanted sexual contact are actually reported to a military authority.<sup>53</sup>

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50. U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE FY08 REPORT ON SEXUAL ASSAULT IN THE MILITARY 6 (2009), *available at* [http://www.sapr.mil/public/docs/reports/dod\\_fy08\\_annual\\_report\\_combined.pdf](http://www.sapr.mil/public/docs/reports/dod_fy08_annual_report_combined.pdf) [hereinafter SAPRO FY08 REPORT]; SAPRO FY09 REPORT, *supra* note 7, at 58; U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2010, at 64 (2011), *available at* [http://www.sapr.mil/public/docs/reports/DoD\\_Fiscal\\_Year\\_2010\\_Annual\\_Report\\_on\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](http://www.sapr.mil/public/docs/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf) [hereinafter SAPRO FY10 REPORT]; U.S. DEP'T. OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2011, at 33 (2012), *available at* [http://www.sapr.mil/public/docs/reports/Department\\_of\\_Defense\\_Fiscal\\_Year\\_2011\\_Annual\\_Report\\_on\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](http://www.sapr.mil/public/docs/reports/Department_of_Defense_Fiscal_Year_2011_Annual_Report_on_Sexual_Assault_in_the_Military.pdf) [hereinafter SAPRO FY11 REPORT].

51. In fiscal year 2008 there were 1,401,757 active duty military personnel, an increase of only 1.6% from Fiscal Year 2007, which boasted 1,379,551 members. DEF. MANPOWER DATA CTR., OFFICE OF THE SEC'Y OF DEF., ACTIVE DUTY MILITARY STRENGTH BY SERVICE, HISTORICAL—FY 1994–2012, at 0709–0809, [https://www.dmdc.osd.mil/appj/dwp/dwp\\_reports.jsp#](https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp#). The DoD nevertheless recorded an increase of over 8% in reports. SAPRO FY08 REPORT, *supra* note 50, at 6. Fiscal year 2009 saw a similarly small increase of 1.2% in active members, DEF. MANPOWER DATA CTR., *supra*, at 0809–0909, and an even larger increase in reports of more than 11%. SAPRO FY09 REPORT, *supra* note 7, at 58. In fiscal year 2010, active duty military personnel increased again to 1,430,985, amounting to only a 0.9% increase from fiscal year 2009. DEF. MANPOWER DATA CTR., *supra*, at 0909–1009. Fiscal year 2010, however, broke the trend of increased reporting and report numbers fell by 2.2%. SAPRO FY10 REPORT, *supra* note 50, at 64. In fiscal year 2011, the number of active duty members actually decreased by 0.4% to 1,425,113. DEF. MANPOWER DATA CTR., *supra*, at 1009–1109, while reports increased by over 1%. SAPRO FY11 REPORT, *supra* note 50, at 33. This data indicates that while reporting trends seem to correlate with active duty personnel trends, such increases and decreases have not been proportional. Where the Armed Forces saw minimal increases in active duty personnel numbers, it is also true that they saw much higher increases in reporting in general. Further, as shown in Part II, *infra*, the number of active duty personnel decreased in fiscal years 2011 and 2012, while the number of reports increased.

52. In 2012, approximately 84,376 military and civilian forcible rapes were reported to law enforcement. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2012, at 1 (2013), *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/violent-crime/rape/rapemain.pdf>. However, the Bureau of Justice Statistics found that only 28% of rapes and sexual assaults were reported that same year. JENNIFER TRUMAN, LYNN LANGTON & MICHAEL PLANTY, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2012, at 4 (2013), *available at* <http://www.bjs.gov/content/pub/pdf/cv12.pdf>. Such high rates of underreporting are not new; from 2006 to 2010, rape and sexual assault crimes were among the most underreported crimes, with just 35% being reported to law enforcement. LYNN LANGTON ET AL., U.S. DEP'T OF JUSTICE, VICTIMIZATION NOT REPORTED TO THE POLICE, 2006–2010, at 1 (2012), *available at* <http://www.bjs.gov/content/pub/pdf/vnvp0610.pdf>.

53. SAPRO FY09 REPORT, *supra* note 7; SAPRO FY12 REPORT, *supra* note 3, at 53 (“Over the past 6 years, the Department estimates that fewer than 15 percent of military sexual assault victims report the matter to a military authority.”).

## B. SEXUAL ASSAULT IN THE MILITARY TODAY

In fiscal year 2012,<sup>54</sup> there were a total of 3374 reported instances of sexual assault involving Service members as victims, an almost 6% increase from the number reported in fiscal year 2011.<sup>55</sup> This increase is more striking in light of the fact that fiscal year 2012 saw a 1.8% decrease in active military personnel.<sup>56</sup> This indicates that reporting rates are increasing service-wide, rather than simply mirroring active duty personnel trends. There were a total of 3604 victims, 2949 of which were Service members in fiscal year 2012, demonstrating that some of the reported instances of sexual assault involved multiple victims.<sup>57</sup> Of the 3374 reports received, 816 were restricted reports and, per the victims' requests, were never investigated.<sup>58</sup> Of the remaining 2558 unrestricted reports, 1590 (62%) involved allegations of intra-military sexual assault.<sup>59</sup> The most common sexual assault crimes alleged in unrestricted reports were abusive/wrongful sexual contact (35%), aggravated sexual assault/sexual assault (28%), and rape (27%).<sup>60</sup>

In fiscal year 2013, 5061 reports of sexual assault were filed,<sup>61</sup> an increase of more than 48% from the prior fiscal year. While such an increase may suggest that victims are becoming more willing to come forward, it might also suggest that, due to the increased coverage of sexual assault in the media, more Service members understand the type of behavior that constitutes sexual

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54. While the most recent report on sexual assault in the military covers fiscal year 2013, this Note focuses on the data contained in the report for fiscal year 2012 because it underlies the various proposals discussed in Part IV, *infra*. The Sexual Assault Prevention and Response Office's report for fiscal year 2013 can be found at [http://www.sapr.mil/public/docs/reports/FY13\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault.pdf](http://www.sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf).

55. SAPRO FY12 REPORT, *supra* note 3, at 57; News Release No. 307-13, U.S. Dep't of Def., DOD Releases Sexual Assault Prevention & Response Strategy (May 7, 2013), *available at* <http://www.defense.gov/Releases/Release.aspx?ReleaseID=15984>.

56. DEF. MANPOWER DATA CTR., *supra* note 51, at 1109–1209 (falling from 1,425,113 service members in FY 2011 to just 1,399,622 in FY 2012).

57. SAPRO FY12 REPORT, *supra* note 3, at 59.

58. *Id.* at 57.

59. *Id.* at 60.

60. *Id.* at 62.

61. U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE YEAR 2013 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 2 (2014), *available at* [http://www.sapr.mil/public/docs/reports/FY13\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault.pdf](http://www.sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf) [hereinafter SAPRO FY13 REPORT].

assault.<sup>62</sup> The greatest increase in reports, percentage-wise, came from the United States Marine Corps, where reports went up by 86%.<sup>63</sup>

The military has been, and continues to be, male dominated. Although the number of women in the military has risen over the past forty years, in 2010, only 14% of the 1.4-million active-duty personnel in the military were women.<sup>64</sup> The vast majority of victims of sexual assault in the military are women,<sup>65</sup> and, unsurprisingly, subjects of sexual assault investigations tend to be male.<sup>66</sup> The Department of Defense reported that 88% of the victims in completed investigations of unrestricted reports in fiscal year 2012 were female, and 90% of the accused were male.<sup>67</sup> Furthermore, victims tend to be under the age of twenty-five,<sup>68</sup> and of junior enlisted grades (the lowest non-officer ranks).<sup>69</sup> The accused, on the other hand, tend to be older than their victims,<sup>70</sup> and while some are of junior enlisted grades, a larger percentage have achieved a higher ranking of E5–E9 than among reported victims.<sup>71</sup>

While victim reporting has been on a steady rise since 2007, it still represents only a fraction of the total occurrences of unwanted sexual contact. The DoD estimated that in fiscal year 2012 alone, there were approximately 26,000 cases of unwanted sexual contact.<sup>72</sup> This means that less than 13% of sexual assault cases

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62. *Id.* Despite the increase in reports filed, this number does not seem to correspond to an increased number of sexual assaults. Baldor, *supra* note 22. No official estimate of Service Members experiencing unwanted sexual conduct was available for fiscal year 2013. SAPRO FY13 REPORT, *supra*, at 3. Such estimates are based on a survey completed every other year and fiscal year 2013 was not a survey year. *Id.* at 2.

63. Baldor, *supra* note 22. Reporting increased by 45% for the Air Force, 46% for the Navy, and 50% for the Army. *Id.*

64. Nevin & Lorenz, *supra* note 35, at 272.

65. *Id.* at 271.

66. SAPRO FY12 REPORT, *supra* note 3, at 81.

67. *Id.* at 83.

68. *Id.* at 81 (indicating 69% of victims in fiscal year 2012 were under the age of twenty-five).

69. *Id.* at 82 (indicating 73% of victims in fiscal year 2012 had achieved the rank of E1–E4, and only 12% had achieved E5–E9). “Enlisted” (E) is one of three pay grades in the United States military used to determine wages and benefits and it refers to non-officer soldiers. Junior enlisted grades are those Service members who hold the lowest enlisted ranks, E1–E4.

70. *Id.* at 83 (indicating that 77% of investigatory subjects in fiscal year 2012 were under the age of thirty-five).

71. *Id.* at 84 (indicating that 51% of investigatory subjects in fiscal year 2012 had achieved the rank of E1–E4, while 28% had achieved E5–E9).

72. *Id.* at 13.

were actually reported and that, therefore, more than 87% of cases went uninvestigated simply because military authorities remained unaware of their existence.<sup>73</sup>

### III. SEXUAL ASSAULT PROSECUTIONS AND POST-TRIAL COMMANDER ACTION

The life of a criminal charge in the military justice system from report to conviction is, in many ways, similar to that of a criminal complaint in the civilian criminal justice system. However, there are important distinctions that make the military justice system both more complex and undoubtedly more confusing. The answer to the question “Who prosecutes?” in the military justice system is not a simple one, but is central to understanding the manner in which the National Defense Authorization Act (NDAA) for FY14 and Senator Gillibrand’s Military Justice Improvement Act (MJIA) seek to alter the current procedure.<sup>74</sup> Post-conviction review is another unique aspect of the military justice system and yet the NDAA for FY14 eliminates it entirely for sexual assault cases.<sup>75</sup> This section provides a more in-depth discussion of pre-trial and post-conviction procedures, as well as a glimpse at sexual assault prosecutions in fiscal year 2012.

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73. It remains to be seen if any sexual assaults from fiscal year 2012 will be reported in future fiscal years, thus reducing this number.

74. The NDAA for Fiscal Year 2014 institutes automatic review of all COs’ decisions not to prosecute, regardless of the staff judge advocate’s advice. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1744(a), 127 Stat. 672, 980–82 (2013). Sen. Gillibrand’s MJIA proposes to remove the prosecutorial decision from COs entirely and place it in the hands of “independent, trained, professional military prosecutors” outside of the chain of command. *Comprehensive Resource Center for the Military Justice Improvement Act*, OFFICE OF KIRSTEN GILLIBRAND, <http://www.gillibrand.senate.gov/mjia> (last visited Jan. 9, 2014).

75. National Defense Authorization Act for Fiscal Year 2014, § 1702(b), 127 Stat. 672, 955; 10 U.S.C.A. § 860 (West 2014). While a CO may still exercise clemency over “qualifying offenses,” offenses authorizing a maximum term of two years’ confinement and including dismissal, a dishonorable discharge, or confinement for more than six months are not “qualifying offenses.” 10 U.S.C.A. § 860(c)(3)(B) (West 2014). Since the NDAA for FY 14 imposes a minimum sentence of dismissal or dishonorable discharge for offenders convicted of rape (as defined by 10 U.S.C.A. § 920(a) (West 2014)), sexual assault (as defined by 10 U.S.C.A. § 920(b) (West 2014)) and forcible sodomy (as defined by 10 U.S.C.A. § 925 (West 2014)), such offenses are not “qualifying offenses.” National Defense Authorization Act for Fiscal Year 2014, § 1705(a)(1)(b); 10 U.S.C. 856(b) (West 2014).

## A. PRE-TRIAL PROCEDURES: FROM REPORT TO COURT-MARTIAL

When a CO receives a report of sexual assault involving a member of the Armed Forces, those reports marked as “unrestricted” are referred to a MCIO and investigated.<sup>76</sup> “Restricted” reports are confidential, and, therefore, not investigated unless the victim later converts the report to “unrestricted.”<sup>77</sup> The length of an investigation varies “according to the offense(s) alleged and the complexity of the case.”<sup>78</sup> Additional factors that may affect MCIO’s investigation are: “[t]he location and availability of the victim, subject, and witness,” “[t]he amount and kind of physical evidence gathered during the investigation,” and “[t]he length of time required for crime laboratory analysis of evidence.”<sup>79</sup>

Once the investigation is complete the accused’s immediate commander has broad, but not absolute,<sup>80</sup> discretion in dealing with the charges. Avenues available to the CO may include: (1) taking no action, (2) taking or initiating administrative action, (3) imposing nonjudicial punishment<sup>81</sup> pursuant to Article 15 of the UCMJ, or (4) disposing of the charges himself or delegating disposition to a superior or subordinate authority.<sup>82</sup> Disposition of charges may take the form of dismissal, forwarding charges to another commander for disposition, or referral to a summary, special, or general court-martial.<sup>83</sup> Preferral of charges is “the

76. SAPRO FY12 REPORT, *supra* note 3, at 52.

77. *Id.* at 58, 64.

78. ESTEL I. VELEZ POLLACK, CONG. RESEARCH SERV., RS21850, MILITARY COURTS-MARTIAL: AN OVERVIEW 3 (2004), available at <http://www.fas.org/man/crs/RS21850.pdf>.

79. SAPRO FY12 REPORT, *supra* note 3, at 64.

80. The commander is still subject to the restrictions in the UCMJ and the Rules for Courts-Martial (“R.C.M.”). Exec. Order No. 12,473, Manual for Courts-Martial, 49 Fed. Reg. 17152, 17165 (1984) (hereinafter *Manual for Courts-Martial*).

81. Commanding officers have the discretion to impose punishment for “minor” offenses without resorting to the court-martial forum. *E.g.*, U.S. COAST GUARD, MILITARY JUSTICE MANUAL COMMANDANT INSTRUCTION M5810.1D, at 1.A.2.a. (2001), available at [http://www.uscg.mil/legal/mj/MJ\\_Doc/MJM%20Ch%2001%20NJP.pdf](http://www.uscg.mil/legal/mj/MJ_Doc/MJM%20Ch%2001%20NJP.pdf). What constitutes a “minor” offense is also at their discretion. *See id.* at 1.A.5.a. A commanding officer may choose to impose such punishment in lieu of a court-martial or in addition to one. 10 U.S.C.A. § 815 (West 2013). Nonjudicial punishment is limited to confinement or diminished rations, restriction, arrest in quarters, correctional custody, extra duties, forfeiture of pay, detention of pay and reduction in grade. U.S. COAST GUARD, *supra*, at 1.E.2. The severity of the punishment depends on the accused’s rank and the rank of the officer imposing such punishment. *Id.* at 1.A.6.b.

82. *Manual for Courts-Martial*, 49 Fed. Reg. at 17166.

83. DEP’T. OF DEF., MANUAL FOR COURTS-MARTIAL UNITED STATES, at II-26 (2012), available at <http://www.apd.army.mil/pdffiles/mcm.pdf>.

first formal step in a court-martial,”<sup>84</sup> and is akin to charging a civilian for committing a crime. Once charges have been preferred against an accused, they may be referred in a formal order stating that charges are to be tried in front of a summary, special, or general courts-martial.<sup>85</sup>

For a trial by courts-martial to be proper, the court-martial must have jurisdiction over the accused. Courts-martial have jurisdiction over all Service members subject to the UCMJ, including active duty, regular, and reserve personnel.<sup>86</sup> The court-martial itself must be convened by the “convening authority,” usually a commissioned officer, or his successor, in command of the accused’s entire unit.<sup>87</sup> In making the decision to bring the accused to trial, the convening authority must seek the advice and consideration of his staff judge advocate (SJA), his legal counsel.<sup>88</sup> The judge advocate’s advice must be in writing and the convening authority may not refer a charge for trial unless the judge advocate certifies that the evidence garnered by the investigation warrants it.<sup>89</sup> So while the accused’s immediate commander has the authority to make the initial decision of whether to begin the process leading to a court-martial, it is the CO in command of the accused’s unit who ultimately has discretion to convene a court-martial, and only after obtaining the advice of a trained legal professional.

## B. POST-CONVICTION PROCEDURES: WHO HAS THE LAST WORD?

If the accused is convicted at a general or special court-martial, the convening authority initiates a post-trial review process.<sup>90</sup> Before the convening authority may take any action, he must again seek the written advice and counsel of his SJA.<sup>91</sup> The

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84. POLLACK, *supra* note 78, at 3.

85. *Id.*; *Manual for Courts-Martial*, 49 Fed. Reg. at 17178. A summary courts-martial is a military criminal trial court adjudicating minor offenses allegedly committed by those under the UCMJ’s jurisdiction. POLLACK, *supra* note 78, at 3–4. A special courts-martial can adjudicate any offense except a capital offense, unless under a presidential regulation, and most often tries misdemeanors. *Id.* at 4. A general courts-martial is the highest military trial court and, thus, is reserved for the most serious offenses. *Id.* at 5.

86. POLLACK, *supra* note 78, at 2; SAPRO FY12 REPORT, *supra* note 3, at 66.

87. 10 U.S.C.A. § 822 (West 2013); *Manual for Courts-Martial*, 49 Fed. Reg. 17152 at 17155; POLLACK, *supra* note 78, at 3.

88. 10 U.S.C.A. § 834(a) (West 2013).

89. *Id.* at § 834(a)(2).

90. *Id.* at § 860; POLLACK, *supra* note 78, at 5–6.

91. 10 U.S.C.A. § 860(e) (West 2013).

SJA must make his recommendation based on the record of the trial.<sup>92</sup> After review of the trial record and the SJA's recommendation, the convening authority, in his sole discretion, may modify the findings and sentence of the court-martial as "a matter of command prerogative."<sup>93</sup> Such action could take the form of approving, disapproving, commuting, or suspending all or part of the convicted soldier's sentence.<sup>94</sup> The convening authority has the prerogative to set aside a finding of guilty, thereby dismissing the charge or specification, or alter the finding (e.g., to a finding of guilty to a lesser included offense).<sup>95</sup> While the convening authority has broad discretion to reduce or do away with the sentence completely, he may not increase the sentence meted out by the court-martial.<sup>96</sup> In this way, the convening authority has "virtually limitless"<sup>97</sup> power in sentencing and may, in his discretion, suspend an entire sentence for any or no cause at all. The NDAA for FY14, however, suspends the convening authority's power to overturn jury convictions in sexual assault cases.<sup>98</sup>

Once the convening authority takes action, the post-trial review process is complete and the convicted may have an opportunity to appeal his conviction.<sup>99</sup> Convictions by a general or special court-martial that include confinement for at least one year, dishonorable discharge, dismissal, or death, are subject to an automatic appeal to a Service Court of Criminal Appeals.<sup>100</sup> Where a summary court-martial or court-martial outside the Service

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92. *Id.*

93. *Id.* at § 860(c)(1).

94. *Id.* at § 860(c)(2)(B).

95. *Id.* at § 860(c)(2)–(3).

96. *Manual for Courts-Martial*, 49 Fed. Reg. 17152 at 17233 ("The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased."); 10 U.S.C.A. § 860(c)(2) (West 2013); *United States v. Lee*, 43 M.J. 794, 799 (N-M. Ct. Crim. App. 1995).

97. *United States v. Cabbie*, 38 M.J. 654, 655 (A.C.M.R. 1993). See *United States v. Cowan*, 34 M.J. 258, 259 (C.M.A. 1992) (approving the convening authority's suspension of forfeitures contingent upon accused's initiating and maintaining allotment to her sister for benefit of accused's minor child, despite there being no express regulatory basis); *United States v. Montesinos*, 24 M.J. 682, 684 (A.C.M.R. 1987), *aff'd*, 28 M.J. 38 (C.M.A. 1989) ("The initial action taken on a court-martial by a convening authority is a matter of command prerogative. At that stage, a convening authority may disapprove findings of guilty and dismiss the charges for any reason or for no reason at all.").

98. National Defense Authorization Act for Fiscal Year 2014, § 1702(b), Pub. L. No. 113-66, 127 Stat. 672, 954 (2013).

99. POLLACK, *supra* note 78, at 6.

100. *Manual for Courts-Martial*, 49 Fed. Reg. at 17238; 10 U.S.C.A. § 866(b) (West 2013).

Appellate Courts' jurisdiction prescribes the sentence, a judge advocate will review the approved findings and sentence for correctness in law and fact.<sup>101</sup> Where this requirement is met, the conviction is final.<sup>102</sup>

### C. SEXUAL ASSAULT PROSECUTIONS IN FISCAL YEAR 2012

MCIOs completed 2610 sexual assault investigations involving 2900 different subjects alleged to have perpetrated the assaults in fiscal year 2012.<sup>103</sup> At the close of fiscal year 2012, there were 3288 subjects receiving or awaiting disposition, including 2900 subjects from the 2558 unrestricted reports made in fiscal year 2012, and 388 subjects still awaiting disposition from fiscal year 2011.<sup>104</sup> The MCIO for each military branch reported dispositions on 2661 of these subjects,<sup>105</sup> but because COs are limited to taking legal or disciplinary action against only those Service members subject to the UCMJ,<sup>106</sup> only 1714 subjects of investigation could be considered for possible action by DoD commanders.<sup>107</sup> Before the matter is referred to a commander, the MCIO may determine that the collected evidence indicates that the accused did not commit the crime, or that the offense was improperly reported as a sexual assault.<sup>108</sup> Under such circumstances, the allegations are said to be unfounded, and commanders may not take action against the accused.<sup>109</sup>

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101. *Manual for Courts-Martial*, 49 Fed. Reg. at 17240, 17253; 10 U.S.C.A. § 864(a) (West 2013).

102. 10 U.S.C.A. § 876 (West 2013).

103. SAPRO FY12 REPORT, *supra* note 3, at 65.

104. *Id.*

105. *Id.*

106. *Id.* at 66.

107. *Id.* at 68. Where an alleged offender is a civilian or foreign national, the proper local authorities in the United States (District Attorneys' Offices) and host nations abroad are responsible for his prosecution. *Id.* at 53. Further, a civilian authority may prosecute service members suspected of committing a sexual assault against a civilian. *Id.* It is then at the discretion of the local authority to turn over the case for prosecution to the military. *Id.* at 53–54. In fiscal year 2012, 584 subjects were outside the military's jurisdiction: 250 offenders were unknown, 131 subjects were civilians or foreign nationals, 192 Service members were subject to civilian or foreign prosecutions, and 11 subjects died or deserted before charges could be brought. *Id.* at 66.

108. *Id.* at 66–67.

109. *Id.* at 67.



After investigatory completion, commanders took action against 880 Service members for a sexual assault offense.<sup>110</sup> Of those subjects who received such disciplinary action, 68% had courts-martial proceedings initiated against them, compared to just 30% in 2007.<sup>111</sup> However, this amounted to less than 35% of subjects under DoD control for whom possible commander action could be considered.<sup>112</sup> Reasons for not taking judicial action included: (1) insufficient evidence of an offense to prosecute (307 subjects in fiscal year 2012); (2) victim refusal to participate in the military justice process (196 subjects in fiscal year 2012); (3) expiration of the statute of limitations (six subjects in fiscal year 2012); (4) determination that allegations are unfounded after review by a military attorney (81 subjects in fiscal year 2012); or (5) conclusion that the assault was not sexual in nature (244 subjects in fiscal year 2012, although 37 subjects had courts-martials initiated against them).<sup>113</sup>

While charges were dropped against 88 subjects and 70 were granted a resignation or discharged as an alternative to court-martial, 302 cases eventually proceeded to trial with 238 subjects (79%) being convicted.<sup>114</sup> Following conviction for sexual assault, most Service members received some combination of confinement (74%), reduction in rank (76%), fines or forfeitures (66%), a discharge (enlisted) or dismissal (officers) from service (56%).<sup>115</sup> Other, but less common, punishments included restriction (9%)<sup>116</sup> and extra duty or hard labor (8%).<sup>117</sup>

Data is not available regarding the convening authority's use of its post-trial review discretion to overturn jury convictions or

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110. *Id.* at 69–70 (indicating that 594 subjects had a courts-martial initiated for sexual assault charges, 158 (18%) received nonjudicial punishment pursuant to Article 15 of the UCMJ, 63 (7%) receive administrative discharge, and 65 (7%) had other adverse administrative action taken against them).

111. *Id.* at 70.

112. *See id.* at 69 (of the 1714 subjects under DoD control, 594 had a courts-martial initiated for sexual assault charges).

113. *Id.* at 69–70.

114. *Id.* at 71.

115. *Id.* at 71, 73 exhibit 12.

116. *Id.* at 73 exhibit 12. Restriction is a lesser form of non-judicial punishment than confinement. Judge Advocate General's Corps, *Defense/Personal Representative Services Addendum*, U.S. NAVY, [http://www.jag.navy.mil/legal\\_services/defense\\_services\\_addendum.htm#njp](http://www.jag.navy.mil/legal_services/defense_services_addendum.htm#njp) (last visited Jan. 7, 2015). While sentences of confinement are generally served in a military brig, restriction limits the travel of the accused to specified areas, such as the accused's base. *Id.*

117. SAPRO FY12 REPORT, *supra* note 3, at 73.

lessen sentences for those found guilty of committing sexual assault,<sup>118</sup> but media reports characterize the exercise of such authority as a scourge on the face of sexual assault in the military.<sup>119</sup> Without a review of the action, the UCMJ makes the convening authority's decision final. Victims are well aware that their attackers, if brought to court-martial, may receive no more than a slap on the wrist. It is therefore unsurprising that many victims distrust the military justice system's ability to exact justice.<sup>120</sup> The recent reform efforts, including the NDAA for FY14 and Senator Gillibrand's Military Justice Improvement Act, aim to improve reporting by increasing victims' faith in the system.<sup>121</sup>

#### IV. CRITIQUE OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014 AND SENATOR GILLIBRAND'S MILITARY JUSTICE IMPROVEMENT ACT

The NDAA for FY14 is a combination of two bills, H.R. 1960, which passed the House on June 14, 2013, and S. 1197, which

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118. Commander action during post-trial review is not public information; however, in a recent article, *The Washington Post* reported that “[o]ver the past five years, Air Force prosecutors have recorded 327 convictions for rape, sexual assault and similar crimes. Of those, five verdicts were overturned by commanders based on clemency . . . .” Craig Whitlock, *Air Force General's Reversal of Pilot's Conviction for Sexual Assault Angers Lawmakers*, WASH. POST (Mar. 8, 2013), [http://www.washingtonpost.com/world/national-security/air-force-generals-reversal-of-pilots-sexual-assault-conviction-angers-lawmakers/2013/03/08/f84b49c2-8816-11e2-8646-d574216d3c8c\\_story.html](http://www.washingtonpost.com/world/national-security/air-force-generals-reversal-of-pilots-sexual-assault-conviction-angers-lawmakers/2013/03/08/f84b49c2-8816-11e2-8646-d574216d3c8c_story.html).

119. See *Air Force Officer's Sex Assault Sentence Thrown out by Commander despite Jury's Decision*, RT (Mar. 13, 2013), <http://rt.com/usa/air-force-rape-law-218/> (“The Uniform Code of Military Justice (UCMJ) allows commanders to overturn military convictions — a law that has been a source of outrage, especially among victims of sexual assault.”).

120. Jennifer Steinhauer, *Reports of Military Sexual Assault Rise Sharply*, N.Y. TIMES, Nov. 7, 2013, at A24 (“[T]he trust that any justice will be served has been irreparably broken under the current system, where commanders hold all the cards. . . .”); see SAPRO FY12 REPORT, *supra* note 3, at 18 (“According to the 2012 WGRA, of the Active Duty women who indicated experiencing USC and did not report it to a military authority, the top three reasons for not reporting were as follows: 70 percent did not want anyone to know; 66 percent felt uncomfortable making a report; and 51 percent did not think the report would be kept confidential.”).

121. Baldor, *supra* note 22; Jeremy Hobson & Robin Young, *Gillibrand Renews Push for Military Sexual Assault Reforms*, HERE & NOW (Dec. 12, 2013), <http://hereandnow.wbur.org/2013/12/12/gillibrand-defense-bill>; OFFICE OF KIRSTEN GILLIBRAND, *supra* note 74 (“[A] bipartisan coalition of 55 Senators — 43 Democrats, 11 Republicans and 1 Independent — came together to reverse the systemic fear that victims of military sexual assault have described in deciding whether or not to report the crimes committed against them due to the clear bias and inherent conflicts of interest posed by the military chain of command's current sole decision-making power over whether cases move forward to a trial.”).

passed the Senate Armed Services Committee on the same day.<sup>122</sup> Following the widely covered reports of rampant sexual assault in the military in early 2013, Senator Gillibrand proposed an amendment to the NDAA for FY14 that would essentially remove the decision to prosecute sexual assault from the chain of command and place it in the hands of military prosecutors.<sup>123</sup> In November 2013, the bill, as well as Senator Gillibrand's amendment, was before Congress, but it stalled in the Senate before the Thanksgiving holiday.<sup>124</sup> In an effort to pass the defense bill before the end of the year, a compromise was hammered out that allowed the original bill to pass but prohibited any amendments.<sup>125</sup> As a result, Senator Gillibrand's amendment was not included in the final version of the NDAA for FY14, which passed both houses of Congress on December 9, 2013,<sup>126</sup> and was signed by President Obama on December 26, 2013.<sup>127</sup> However, Senator Gillibrand's amendment is by no means dead in the water: it was before the Senate as a stand-alone bill following a vote in March 2014 returning it to the Senate's calendar for further decision.<sup>128</sup> Senator Gillibrand has pushed the Senate to reconsider her proposal heading into 2015 after the most recent DoD report showed no improvement in the number of sexual assaults committed and the high incidence (62%) of retaliation following reports of sexual assaults.<sup>129</sup>

While the sexual assault provisions included in the NDAA for FY14 and Senator Gillibrand's "Military Justice Improvement Act" seek to curb the rising tide of sexual assault cases in the mil-

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122. *FY 2014 NDAA, ARMED SERVS. COMM.*, <http://armedservices.house.gov/index.cfm/fy-2014-ndaa> (last visited Mar. 17, 2015).

123. Friedman, *supra* note 20.

124. Paul Rieckhoff, *Broken Senate Delays Military Sexual Assault Reform*, HUFFINGTON POST (Nov. 22, 2013), [http://www.huffingtonpost.com/paul-rieckhoff/broken-senate-delays-mili\\_b\\_4324969.html](http://www.huffingtonpost.com/paul-rieckhoff/broken-senate-delays-mili_b_4324969.html).

125. Laura Basset, *Key Military Sexual Assault Reforms Dropped From Defense Bill*, HUFFINGTON POST (Dec. 10, 2013), [http://www.huffingtonpost.com/2013/12/10/military-sexual-assault\\_n\\_4419029.html](http://www.huffingtonpost.com/2013/12/10/military-sexual-assault_n_4419029.html).

126. *Id.*

127. Carimah Townes, *President Obama Signs Bill to Combat Sexual Assault in the Military*, THINK PROGRESS (Dec. 27, 2013), <http://thinkprogress.org/security/2013/12/27/3104851/president-obama-sexual-assault-military/#>.

128. Erin Matson, *Procedural Vote Blocks Gillibrand's Military Sexual Assault Bill*, RH REALITY CHECK (Mar. 6, 2014), <http://rhrealitycheck.org/article/2014/03/06/procedural-vote-blocks-gillibrands-military-sexual-assault-bill/>.

129. Anna Palmer & Darren Samuelsohn, *Kirsten Gillibrand Gears Up For Another Round*, POLITICO (Jan. 7, 2015), <http://www.politico.com/story/2015/01/kirsten-gillibrand-military-sexual-assault-114018.html>.

itary, they are both ultimately ineffective as a matter of policy. Neither proposal sufficiently addresses the distrust of sexual assault victims in the military justice system, and both are incompatible with the nature and mission of the military as a combat organization.

A. THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FY14'S  
REFORM OF ARTICLE 60 OF THE UCMJ

The NDAA for FY14 has a stated purpose to “authorize appropriations for fiscal year 2014 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.”<sup>130</sup> Among the provisions intended to achieve “other purposes” are those included under Title XVII, “Sexual Assault Prevention and Response and Related Reforms.”<sup>131</sup> Title XVII’s most significant reform provisions grant extra legal rights and protection to victims of sexual assault;<sup>132</sup> rewrite provisions of Article 32 of the UCMJ, regarding preliminary hearings, and Article 60 of the UCMJ, defining the scope of post-trial review;<sup>133</sup> require a discharge or dismissal of any Service member convicted of certain sex-related offenses;<sup>134</sup> and institute an automatic review process

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130. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

131. *Id.* at §§ 1701–53, 127 Stat. 672, 952–85.

132. *Id.* at § 1701. It should be noted that Secretary of Defense Chuck Hagel required each Service to implement a victim advocacy programs with fully functioning legal advocacy services by January 1, 2014, to help aid victims in each step of reporting and prosecuting sexual assault. *Staff Judge Advocate to the Commandant*, U.S. MARINE CORPS, [http://www.hqmc.marines.mil/sja/Branches/VictimLegalCounselOrganization\(VLCO\).aspx](http://www.hqmc.marines.mil/sja/Branches/VictimLegalCounselOrganization(VLCO).aspx) (last visited Jan. 9, 2015). Each service now has Special Victims’ Counsel (Army, Air Force, and Coast Guard) or Victims’ Legal Counsel (Marines and Navy) programs. *HARP: Special Victim Counsel Program*, U.S. ARMY, [http://www.army.mil/standto/archive\\_2013-12-02/](http://www.army.mil/standto/archive_2013-12-02/) (last visited Jan. 9, 2015); *Air Force Special Victims’ Counsel Program*, U.S. AIR FORCE, <http://www.afjag.af.mil/shared/media/document/AFD-130129-005.pdf>, (last visited Jan. 9, 2015); *U.S. Coast Guard Special Victims’ Counsel Program*, U.S. COAST GUARD, <http://www.uscg.mil/legal/094M-A.asp> (last visited Jan. 9, 2015); *Navy Victims’ Legal Counsel (VLC)*, U.S. NAVY, [http://www.jag.navy.mil/legal\\_services/vlc.htm](http://www.jag.navy.mil/legal_services/vlc.htm) (last visited Jan. 9, 2015). This Note does not focus on this reform because it is not contained in the NDAA for Fiscal Year 2014 or in Senator Gillibrand’s MJIA.

133. National Defense Authorization Act for Fiscal Year 2014, §§ 1702(a)–(b), 1705, 127 Stat. at 954, 959.

134. *Id.* at § 1705, 127 Stat. at 959–960.

of COs' decisions not to refer charges of sexual assault for trial by court-martial.<sup>135</sup>

Specifically, Section 1701 amends Article 6b of the UCMJ to grant victims the right to “be reasonably protected from the accused”<sup>136</sup> and the right to “be treated with fairness and with respect for [their] dignity and privacy. . . .”<sup>137</sup> Section 1709 further protects those who report sexual assaults by requiring the Secretary of Defense to prescribe, or require the Secretaries of the military departments to prescribe “regulations[ ] that prohibit retaliation against an alleged victim,” or the person reporting the offense, if a member of the Armed Forces.<sup>138</sup> Section 1705 mandates that every sentence for a conviction of a sexual assault crime must include dismissal or dishonorable discharge,<sup>139</sup> establishing a mandatory minimum level of punishment for sexual assault offenders in the military.<sup>140</sup> While many provisions focus on the victim and the convicted offender, Sections 1702 and 1744, which limit command discretion, are hailed as the most important to effectively curb sexual assault in the military.

Prior to convening a general court-martial, an Article 32 preliminary hearing must be held.<sup>141</sup> Section 1702(a) requires a preliminary hearing for the purpose of: “(A) [d]etermining whether there is probable cause to believe an offense has been committed and the accused committed the offense, (B) [d]etermining whether the convening authority has court-martial jurisdiction over the offense and the accused, (C) [c]onsidering the form of charges, [and] (D) [r]ecommending the disposition that should be made in the case.”<sup>142</sup> The hearing is to be conducted by an impartial judge advocate of equal or superior rank to the accused.<sup>143</sup> Furthermore, Section 1702 removes the power of the convening authority to overturn jury convictions for sexual assault offenses. The NDAA for FY14 amends Article 60 of the UCMJ, which previously gave commanders sole discretion to review and alter courts-martial findings and sentences, by removing the COs' authority

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135. *Id.* at § 1744, 127 Stat. at 980–82.

136. *Id.* at, § 1701(a)(1), 127 Stat. at 952.

137. *Id.* at § 1701(a)(8), 127 Stat. at 952.

138. *Id.* at § 1709(a)(1), 127 Stat. at 962.

139. *Id.* at § 1705(a)(1)(B), 127 Stat. at 959.

140. Section 1705 renames Article 56 of the UCMJ “Maximum and minimum limits.” *Id.* at § 1701(b)(2)(A), 127 Stat. at 959.

141. *Id.* at § 1702(a)(1), 127 Stat. at 952.

142. *Id.*

143. *Id.*

to set aside a finding of guilty and to commute a soldier's sentence to a lesser charge.<sup>144</sup> Further, if a commander decides to take such action, he or she must provide a written rationale for doing so.<sup>145</sup> Article 60, as amended, also prohibits commanders from "disapprov[ing], commut[ing], or suspend[ing] in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge."<sup>146</sup> The Amendment also strikes the phrase "in his sole discretion" from subsection (e)(1) of Article 60.<sup>147</sup> It is apparent from this modification that COs no longer have sole discretion to alter the findings or sentence of a court-martial, rather the new legislation seeks to make him accountable for his post-trial decisions.

While the NDAA for FY14 does not altogether remove the decision to prosecute from the chain of command, Section 1744 adds a layer of review to a process that previously placed no check on the commander's authority. Under the previous system, when a commander declined to refer sexual assault charges for court-martial, that decision was final and no reason needed to be given.<sup>148</sup> However, Section 1744 makes a review of such decisions mandatory<sup>149</sup> and requires the reviewer to consider the victim's statement regarding the sexual assault charges and to determine whether the convening authority considered this statement in deciding whether to bring the accused before a court-martial.<sup>150</sup> The process of review depends on the SJA's initial recommenda-

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

145. *Id.*

146. *Id.* There are two situations in which the convening authority will still have the authority to "disapprove, commute or suspend the adjudge sentence in whole or in part": (1) upon the recommendation of the trial counsel in order to recognize that the accused has provided substantial assistance in the investigation or prosecution of another person accused of committing a crime, or (2) if the accused and the convening authority entered into a pre-trial agreement. *Id.* In the case of the latter, where the mandatory minimum sentence is a dishonorable discharge, the convening authority may commute it to a bad-conduct discharge and may not take action to disapprove, commute, or suspend any other mandatory minimum sentence. *Id.*

147. *Id.* at § 1702(c)(1)(C), 127 Stat. at 957.

148. See 10 U.S.C.A. § 834 (West 2013) (indicating that the only limitation on the convening authority's decision to convene a court-martial is the requirement that he receive advice from his SJA); Manual for Courts-Martial, Exec. Order No. 12473, R.C.M. 306(c), 49 Fed. Reg. 17152, 17165-66 (1984); *id.* at R.C.M. 401(c), 49 Fed. Reg. 17152, 17167 (1984).

149. National Defense Authorization Act for Fiscal Year 2014, § 1744(a)(1), 127 Stat. at 980.

150. *Id.* at § 1744(a)(2), 127 Stat. at 980-81.

tion to the convening authority.<sup>151</sup> Where the SJA has recommended non-referral of charges for trial and the convening authority follows that recommendation, the decision need only be reviewed by a superior commander authorized to convene a general court-martial.<sup>152</sup> However, where the SJA has recommended that charges be referred for trial, Section 1744 requires an additional layer of protection and subjects the convening authority's divergent decision to automatic review by the Secretary of the proper military branch.<sup>153</sup> It is important to note that this formal review process applies only to the convening authority's decision to refer charges for courts-martial, not the immediate commander's initial action as described by the Rules for Courts-Martial (R.C.M.) 306(c). While the NDAA for FY14 neither amends this provision of the R.C.M. nor Article 15 of the UCMJ regarding non-judicial punishment, Congress has made it clear that any sexual assault charge, if not dismissed, "should be disposed of by court-martial, rather than by non-judicial punishment or administrative action."<sup>154</sup> However, Congress did not explicitly prohibit the disposition of such offenses by means other than a court-martial. An immediate commander may still, against the "sense of Congress,"<sup>155</sup> dispose of a sexual assault charge by non-judicial punishment pursuant to Article 15 of the UCMJ or administrative action, provided that he supplies a justification for preferring to dispose of the charges in a way other than by court-martial.<sup>156</sup>

The NDAA for FY14 is a major step towards meaningful sexual assault reform in the military. However, while many of the newly added protections will be effective in a military setting, they ultimately fail to address the problem of victim distrust in the military justice system. Provisions such as Sections 1701 and 1709, which gave victims greater legal rights during both the investigative and trial phases and added protection from retaliatory actions, aim to address the problem of low reporting rates among victims of sexual assault in the military. While both of these reforms are an important step towards easing victims' fears that reporting sexual assault comes with consequences such as retali-

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151. *Id.* at § 1744(c)–(d), 127 Stat. at 981.

152. *Id.* at § 1744(d), 127 Stat. at 981.

153. *Id.* at § 1744(c), 127 Stat. at 981.

154. *Id.* at § 1752(a)(1), 127 Stat. at 984.

155. *Id.* at § 1752(a), 127 Stat. at 984.

156. *Id.* at § 1752(a)(2), 127 Stat. at 984.

ation,<sup>157</sup> they only remove one obstacle, which may not occur. The reforms do little to address the virtually absolute control commanders wield in making both prosecutorial and post-trial judgments.<sup>158</sup> If reporting rates are to rise,<sup>159</sup> so too must victims' trust in the military justice system to act on such reports.

Sections 1744 and 1702 attempted to address the distrust of the internal structure of the military justice system by removing the unbridled discretion of commanding officers from the prosecutorial and post-trial review decisions.<sup>160</sup> Section 1744 allows commanders to retain their authority in making the initial decision of whether to refer charges for court-martial, to dismiss charges, or to initiate non-judicial punishment or administrative action, but subjects this decision to a special review process, whereby the commander must provide a rationale for his decision not to prefer charges.<sup>161</sup> Such a reform injects a layer of protection for victims in a decision otherwise characterized by unchecked commander discretion. However, the protection is only implemented after a decision has been rendered, and may be an

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157. The DoD found that 16% of active duty males who indicated they had been victims of sexual assault but did not report the incident cited fear that "their performance evaluation or chance for promotion would suffer." SAPRO FY12 REPORT, *supra* note 3, at 18. The Department further found that 47% of active duty females did not report experiencing unwanted sexual contact due to fear of retaliation or reprisal. *Id.* at 27. Section 1709 of the NDAA for Fiscal Year 2014 addresses this concern by prohibiting retaliatory action by a commanding officer. National Defense Authorization Act for Fiscal Year 2014, § 1709(a)(1), 127 Stat. 672, 962. Further, Section 1701(a)(1) addresses the fear of retaliation by the accused by explicitly guaranteeing the victim the right to be reasonably protected from the alleged attacker. *Id.* at § 1701(a)(1), 127 Stat. at 952.

158. Steinhauer, *supra* note 120; Hobson & Young, *supra* note 121.

159. In order for an alleged attacker to be tried by court-martial, or otherwise punished for his or her offense, someone in an authority position must receive a report of sexual assault. See Manual for Courts-Martial, Exec. Order No. 12473, R.C.M. 306(c), 49 Fed. Reg. 17152, 17165 (1984) (stating that an immediate commander is authorized to take action after receiving the investigative report following a complaint). It is only after the report is received that the immediate commander of the accused may take action. *Id.* It is a common theory in criminal law, especially in the interplay between the law and economics fields, that crimes can only be prevented where there is a consequence for that action which outweighs the benefit. See ROBERT COOTER & THOMAS ULEN, INTRODUCTION TO LAW AND ECONOMICS 496 (Denise Clinton et al. eds., 5th ed. 2007), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1056&context=robert\\_cooter](http://works.bepress.com/cgi/viewcontent.cgi?article=1056&context=robert_cooter). The probability of detection (in this case, dependent on reporting) is highly determinative of the severity of the consequences. See *id.* at 498 (the rational criminal can be said to choose whether to commit a crime by comparing his maximum net payoff (max  $y(x)$ ) to his expected punishment ( $p(x)/f(x)$ ), where  $y(x)$  is the payoff from committing the crime,  $p(x)$  is the probability of punishment, and  $f(x)$  is the punishment).

160. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1702(b), 1744(a)(1), 127 Stat. at 954, 980 (2013).

161. *Id.* at 1744(a)(1).



inherently time-consuming process in a system demanding efficiency.<sup>162</sup> Review of a commander's decision to decline prosecution against the SJA general's recommendation may help ensure that justice is done where there is sufficient evidence to warrant a trial against the accused. However, little is to be gained from a review of those cases where the commander and the SJA agree prosecution is unjustified. It is in the latter category of cases where a review is most likely to be a waste of the military justice system's time and resources, and adds little to no protection for victims in ensuring that their reports of sexual assault will be taken seriously and handled properly. While a post-prosecutorial decision review may serve to instill greater trust in the military's criminal justice system, such review should be limited to those cases where the commander's decision conflicts with the SJA's recommendation.

However, unlike Section 1744's focus on pre-trial procedures, Section 1702 removes commanders from post-trial decisions of sexual assault offenses altogether.<sup>163</sup> While this section addresses the inherent distrust in the military's justice system more directly than any other reform codified in the NDAA for FY14, the complete removal of commander authority runs contrary to the military's reliance upon discipline as an institution.<sup>164</sup> The military justice system is similar to its civilian counterpart in many ways, but while the civilian justice system's purpose is to enforce the laws of the nation and punish offenders, the military justice system exists to ensure "good order and discipline" across the Armed Forces.<sup>165</sup> Commander discretion in both the pre- and post-trial phases of a court-martial is a reminder to the accused

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162. *Manual for Courts-Martial*, 49 Fed. Reg. 17152, 17154 (1984) ("The purpose of military law is . . . to promote efficiency and effectiveness in the military establishment. . ."). *See id.* at 17155 ("These rules shall be construed to secure . . . the elimination of unjustifiable expense and delay.").

163. National Defense Authorization Act, § 1702(b), 127 Stat. at 955.

164. *See Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the S. Comm. on Armed Services*, 97th Cong. 14 (1982), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/act\\_1982.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/act_1982.pdf) (opening statement of Roger Jespen, Chairman, Subcomm. on Manpower and Personnel) ("[D]iscipline is the cornerstone of an effective fighting force and the fabric that binds the military community together.").

165. CHARLES D. STIMSON, THE HERITAGE FOUNDATION, SPECIAL REPORT NO. 149, SEXUAL ASSAULT IN THE MILITARY: UNDERSTANDING THE PROBLEM AND HOW TO FIX IT 2 (2013), available at [http://thf\\_media.s3.amazonaws.com/2013/pdf/SR149.pdf](http://thf_media.s3.amazonaws.com/2013/pdf/SR149.pdf).

that he is ultimately accountable to his CO.<sup>166</sup> It is imperative that COs be allowed to hold their subordinates accountable for all their actions, in order to instill obedience and discipline among the ranks.<sup>167</sup> It has long been recognized that “the protection of the Nation depends on the capacity of the Armed Services to maintain and enforce discipline.”<sup>168</sup> If Congress is to implement a reform that effectively addresses the problem of sexual assault in the military by increasing reporting rates and deterring would-be attackers,<sup>169</sup> it should seek to do so by “enhanc[ing] and preserv[ing] a commander’s ability to enforce good order and discipline,”<sup>170</sup> not stripping it away. All crimes, especially those involving sexual assault, committed by and against military per-

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166. The military justice system is unlike its civilian counterpart in many respects, especially with respect to its emphasis on obedience. To illustrate, the UCMJ makes behaving with “disrespect toward [one’s] superior commissioned officer” an offense punishable by court-martial. 10 U.S.C.A. § 889 (West 2013). Disobeying a superior commissioned officer’s “lawful command” is an offense punishable by death if such disobedience occurs in time of war, and a court-martial offense if committed otherwise. *Id.* at § 890(2). It is a soldier’s duty to obey a lawful order or regulation and failure to do so is a court-martialable offense. *Id.* at § 892. Clearly, a soldier’s ability to obey his commanding officer is of utmost importance in any branch of the military and the UCMJ gives commanders the authority to hold soldiers accountable for their disrespect or disobedience.

167. STIMSON, *supra* note 165, at 3 (“The military exists to defend the nation: This is its mission. To accomplish that mission, leaders must ensure that those who serve under them are combat ready, and once ordered into armed conflict, combat effective. Maintaining good order and discipline in the armed forces is essential to accomplishing the mission.”); Lorelei Laird, *An Attack on Assaults: Military Lawyers Confront Changes as Sexual Assault Becomes Big News*, ABA J., Sept. 2013, at 54 (explaining that the NDAA for Fiscal Year 2014 originally included a bill that would “authorize a military prosecutor — rather than a commanding officer — to decide whether to prosecute” but this provision was ultimately removed after military leaders said taking this initial disposition authority away from officers would undermine good order and discipline) (internal quotation marks omitted). See *Manual for Courts-Martial*, 49 Fed. Reg. 17152, 17154 (1984) (“Military law consists of . . . the inherent authority of military commanders . . . [and includes] the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is . . . to assist in maintaining good order and discipline in the armed forces . . . and thereby to strengthen the national security of the United States.”).

168. *Military Justice: Joint Hearings on S. 745, S. 746, S. 747, S. 748, S. 749, S. 750, S. 751, S. 752, S. 753, S. 754, S. 755, S. 756, S. 757, S. 758, S. 759, S. 760, S. 761, S. 762, S. 2906, and S. 2907 before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary and a Special Subcomm. on Armed Services of the S. Comm. on Armed Services*, 89th Cong. 14 (1966), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/MJ\\_hearings-1966.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/MJ_hearings-1966.pdf) (statement of Sam J. Ervin, Chairman, Subcomm. on Constitutional Rights).

169. See COOTER & ULEN, *supra* note 159, at 498 (the rational criminal can be said to choose whether to commit a crime by comparing his maximum net payoff ( $\max y(x)$ ) to his expected punishment ( $p(x)f(x)$ ), where  $y(x)$  is the payoff from committing the crime,  $p(x)$  is the probability of punishment, and  $f(x)$  is the punishment).

170. STIMSON, *supra* note 165.

sonnel, strain the fabric holding our armed forces together.<sup>171</sup> Congress should be very cautious, however, not to implement a remedy that does greater damage than the crimes it seeks to address, thereby tearing that fabric apart completely. Removing commander discretion from post-trial review may do just that, as it questions the commander's ability to take action in an area in which his decision has historically been both his alone and final.

Although the reforms enumerated in the NDAA for FY14 are likely effective from a victim-centric perspective, they go too far when it comes to the reorganization of command structure. Section 1744 unwisely instituted a review process for *all* sexual assault cases where a CO declines to prosecute. However, the most alarming reform for the military is Section 1702's removal of commander discretion in the post-trial review process. Clemency, the power of the convening authority to commute, suspend, or alter a court-martial finding, is rarely exercised.<sup>172</sup> In fact, in the last five years, clemency was granted in only two percent of Air Force sexual assault convictions.<sup>173</sup> Removing commander discretion in post-conviction review is an extreme remedy to an almost non-existent problem, and one that has become sensationalized in the media due to a small handful of high-profile cases.<sup>174</sup> The reform misunderstands the military justice system as something distinct from the military as a whole, an institution demanding obedience and discipline. As a result, the new sexual assault legislation is likely to be ineffective in combating the rising number of sexual assault offenses and works a disservice to the military as an institution.

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171. SAPRO FY09 REPORT, *supra* note 7, at 5 ("Sexual assault is incompatible with military culture, and the costs and consequences for mission accomplishments are unbearable.").

172. Kristen Davis, *Court-Martial, Then Clemency: Is This Justice?*, AIR FORCE TIMES (Mar. 11, 2013), <http://www.airforcetimes.com/article/20130311/NEWS/303110001/Court-martial-then-clemency-justice.html>.

173. *Id.* (quoting Judge Advocate General Lt. Gen. Richard Harding). According to Harding, clemency was granted in only five of 327 Air Force sexual assault cases in the past five years. *Id.*

174. *Id.*; Jennifer Hlad, *Commanders' Ability to Overturn Court-Martial Results Under Scrutiny*, STARS & STRIPES (Mar. 14, 2013), <http://www.stripes.com/news/commanders-ability-to-overturn-court-martial-results-under-scrutiny-1.211807>.

## B. SENATOR GILLIBRAND'S SWEEPING AMENDMENT TO REMOVE COMMANDER DISCRETION IN PROSECUTORIAL DECISIONS

Based on her belief that the NDAA for FY14 did not go far enough to address the problem of sexual assault in the military, Senator Gillibrand introduced her proposed amendment to that bill, the MJIA, as a stand-alone bill in the Senate.<sup>175</sup> If enacted, the MJIA would move prosecution of sexual assaults and other crimes to military prosecutors and away from the chain of command.<sup>176</sup> The effect would be to replace commanders with trained military lawyers, thereby revoking the authority of COs to prosecute or dismiss cases of alleged sexual assault.<sup>177</sup> The MJIA is a radical proposal in that its practical effect would be to remove virtually all commander discretion from the military criminal justice process for not only sexual assault offenses, but other crimes as well. According to Senator Gillibrand, this is “the one reform survivors [of sexual assault] have asked for.”<sup>178</sup> In an interview, Senator Gillibrand explained that victims were not reporting their assaults because “they don’t trust the chain of command to do anything or to protect them from retaliation.”<sup>179</sup> Senator Gillibrand’s bill seeks a departure from the status quo.

Senator Gillibrand’s MJIA went to a procedural vote on March 6, 2014, in the Senate, but failed to garner the requisite support. It resulted in a vote of 55 to 45, just shy of the 60 votes that were needed for it to pass.<sup>180</sup> Coming shortly after her Amendment was omitted from the NDAA for FY14, the bill’s failure to advance is yet another disappointment for Senator Gillibrand. Unfortunately for the military, however, the bill is not necessarily dead, as it was returned to the full Senate calendar following its failed vote.<sup>181</sup> While President Obama has not publically supported Senator Gillibrand’s efforts, following the passage of the

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175. Jennifer Steinhauer & Jonathan Weisman, *Negotiators Reach Compromise on Defense Bill*, N.Y. TIMES (Dec. 9, 2013), [http://www.nytimes.com/2013/12/10/us/politics/house-and-senate-reach-compromise-on-pentagon-bill.html?\\_r=0&adxnnl=1&adxnnlx=1388551953-CXE8WnFGmFsXldSUCyIl3A](http://www.nytimes.com/2013/12/10/us/politics/house-and-senate-reach-compromise-on-pentagon-bill.html?_r=0&adxnnl=1&adxnnlx=1388551953-CXE8WnFGmFsXldSUCyIl3A).

176. Friedman, *supra* note 20.

177. Vanden Brook, *supra* note 1.

178. Editorial, *supra* note 6.

179. Hobson & Young, *supra* note 121.

180. Darren Samuelsohn, Juana Summers & Anna Palmer, *Kirsten Gillibrand’s Sexual Assault Bill Derailed*, POLITICO (Mar. 6, 2014), [http://www.politico.com/story/2014/03/senate-military-sexual-assault-vote-104372.html?hp=t1\\_3](http://www.politico.com/story/2014/03/senate-military-sexual-assault-vote-104372.html?hp=t1_3).

181. Matson, *supra* note 128.

NDAAs for FY14, he announced that he would “give the Pentagon until the end of 2014 to show progress on sexual assaults before deciding whether to push for stronger reforms like those in [Senator Gillibrand’s] bill.”<sup>182</sup> Thus, even if Senator Gillibrand’s MJIA ultimately fails before the end of 2014, President Obama has made it clear that her drastic reforms may be resurrected if the current changes to military law fail to bring about “progress” in just one short year.

Passage of Senator Gillibrand’s bill in the Senate and House would mean a reversal in the way sexual assault charges are brought to court-martial, and would require a complete severance of such cases from the chain of command. While Senator Gillibrand is convinced that sexual assault reform cannot be effective unless commanders are removed from the prosecutorial decision,<sup>183</sup> combating sexual assault in the military is not incompatible with retaining the current command structure. In order for any reform or change in policy to be successful, problems cannot be “reduced to boxes” and solutions crudely fashioned “to fit into the boxes.”<sup>184</sup> The context in which the reforms will be introduced matters.<sup>185</sup> Speaking about reforms at a national government level more generally, Matt Andrews, an Associate Professor at Harvard’s Kennedy School of Government, insists that “reforms would be improved if context were better considered in [their] design.”<sup>186</sup> Where reforms are imposed externally and uniformly without regard to the institution they are meant to repair, they are ultimately unsuccessful because they are limited in scope, causing history to repeat itself<sup>187</sup> and undermine opportunities

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182. Samuelson et al., *supra* note 180.

183. See OFFICE OF KIRSTEN GILLIBRAND, *supra* note 74. “Looking to end the epidemic of sexual assault in the military,” the MJIA’s stated purpose is to “reverse the systemic fear that victims of military sexual assault have described in deciding whether or not to report the crimes committed against them due to the clear bias and inherent conflicts of interest posed by the military chain of command’s current sole decision-making power over whether cases move forward to a trial.” *Id.* To achieve this goal, Gillibrand’s bill would “move[] the decision whether to prosecute any crime punishable by one year or more in confinement to independent, trained, professional military prosecutors. . . .” *Id.*

184. MATT ANDREWS, THE LIMITS OF INSTITUTIONAL REFORM IN DEVELOPMENT 61 (2013) (quoting a former finance secretary of Pakistan).

185. See *id.* at 35–64 (discussing the way in which external reform designers often overlook what he calls “the change context” and the consequences of doing so). Reforms that fail to take the context in which interventions are planned into account are “bound to fail” as such failure “undermines the potential of reforms to effect change.” *Id.* at 35.

186. *Id.* at 61.

187. *Id.* at 60–61.

for change within the institution.<sup>188</sup> Thus, in order for any sexual assault reform to be successful in the U.S. military, it must necessarily be sensitive to the military's unique nature.

Senator Gillibrand's MJIA seems to disregard completely the institutional context in which its reforms would be implemented. One of the central tenets of the military is obedience to one's commander.<sup>189</sup> In order to achieve the required level of obedience, "the essence of the military justice system is swift punishment to ensure discipline."<sup>190</sup> The fear is that "[a] country that fails to require its military forces to adhere to a high standard of discipline and obedience to lawful authority could soon find itself defenseless."<sup>191</sup> The Senator's amendment, by replacing the CO with a third party, breaks the chain of command that is essential to ensuring obedience and discipline within the military. Bringing in a third party to prosecute such cases, regardless of the reason, questions COs' capacity to make decisions that have historically been theirs to make.<sup>192</sup>

As James Hirschhorn of Sills Cummis & Gross, P.C., explains, "[d]iscipline and unquestioned obedience" are necessary to sustain an effective fighting force<sup>193</sup> — conditions that are determined by "the professional judgments and experiences of people familiar with military needs."<sup>194</sup> One commentator insists, "[g]iven the potential consequences of 'undesirable behavior' within a military unit, commanders need the ability to effectively ad-

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188. *Id.* at 62.

189. Obedience is of such importance in the military that the UCMJ criminalizes disobeying orders and showing disrespect to one's superior commanding officers. *See, e.g.*, 10 U.S.C.A. §§ 889, 890(2), 892 (West 2013).

190. Mitsie Smith, *Adding Force Behind Military Sexual Assault Reform: The Role of Prosecutorial Discretion in Ending Intra-Military Sexual Assault*, 19 *BUFF. J. GENDER, L. & SOC. POL'Y* 147, 153 (2011) (quoting W.G. "Scotch" Perdue, *Weighing the Scales of Discipline: A Perspective on the Naval Commanding Officer's Prosecutorial Discretion*, 46 *NAVAL L. REV.* 69, 83 (1999)).

191. *Military Justice Act of 1982, Hearings on S. 2521, supra* note 164. Sam J. Ervin, chairman of the subcommittee confirmed Col. Wiener's sentiments during hearings, noting that "the protection of the Nation depends upon the capacity of the armed services to maintain and enforce discipline." *Military Justice: Joint Hearings, supra* note 168.

192. 10 U.S.C.A. § 822 (West 2013); Manual for Courts-Martial, Exec. Order No. 12473, R.C.M. 103(6), 49 Fed. Reg. 17152, 17155 (1984); POLLACK, *supra* note 78 (explaining that accused's immediate commanding officer is tasked with the investigation of the reported offense).

193. James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 *N.C. L. REV.* 177, 203 (1984).

194. John Nelson Ohlweiler, *The Principle of Deference: Facial Constitutional Challenges to Military Regulations*, 10 *J.L. & POL.* 147, 152 (1993).

minister punishment.”<sup>195</sup> Even the Supreme Court has recognized the military’s “broad powers” in punishing Service members as civilian courts are “ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.”<sup>196</sup> And yet, Senator Gillibrand’s proposed MJIA goes beyond intruding on military authority, displacing it altogether. The MJIA ultimately questions a CO’s ability to effectively and fairly prosecute Service members accused of sexual assault within their ranks.<sup>197</sup> This may lead to the unfortunate collateral consequence of Service members questioning their COs’ fitness to make other decisions that, in the past, were similarly his or hers alone to make — such as on the battlefield.<sup>198</sup> In a system where it is the officer’s job to command and the soldier’s to obey,<sup>199</sup> such a proposal may be a death sentence — the soldier who hesitates in battle or fails to obey a superior’s command could end up dead or cause the loss of others’ lives.

This is not to say that addressing sexual assault in the military is less important than maintaining the command structure. Both are equally important given the serious consequences of sexual assault to the fabric of the military<sup>200</sup> and the failure to ensure good order and discipline within the fighting forces.<sup>201</sup> However, Senator Gillibrand’s bill strips commanders of one of their most important weapons in ensuring that good order and discipline are maintained — the power to refer a suspected offender to a court-martial<sup>202</sup> — while promising little benefit in

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195. Kenneth M. Theurer & James W. Russell, III, *Why Military Justice Matters*, REPORTER, Summer 2010, at 7, 9.

196. *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (internal quotation marks omitted) (quoting E. Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)).

197. Vanden Brook, *supra* note 1.

198. *Id.* (“Currently, a high-ranking officer who is the defendant’s superior decides whether to bring charges, who sits on the jury and whether a conviction or punishment can stand. . . . The arrangement is a key principle for maintaining order within a fighting unit.”).

199. Robert L. Goldich, *American Military Culture from Colony to Empire*, in *THE MODERN AMERICAN MILITARY* 84 (David M. Kennedy ed., 2013) (describing enlistees in the career force (generally, officers) as “those who command” and junior enlisted personnel as “those who obey”); Theurer & Russell, *supra* note 195, at 7 (citing *Parker v. Levy*, 417 U.S. 733, 743–44 (1974)).

200. SAPRO FY09 REPORT, *supra* note 7.

201. Laird, *supra* note 167, at 55. See Vanden Brook, *supra* note 1 (explaining that the decision of a superior of the accused whether to refer the case to court-martial “is a key principle for maintaining order within a fighting unit”).

202. STIMSON, *supra* note 165.

practice. Fredrick J. Kenny, Judge Advocate General of the Coast Guard, could not have stated it better when he voiced his concern that “making drastic changes that remove the commander from that position will have a detrimental effect on the discipline of the service without providing the corollary benefit of more prosecutions.”<sup>203</sup> The Supreme Court has likewise expressed its concern that a civilian court cannot adequately predict the impact a decision might have on discipline, and has adopted a standard of deference to military professional judgment in constitutional challenges.<sup>204</sup>

Senator Gillibrand’s reasoning is that by removing the CO from the initial prosecutorial decision, victims will be more likely to trust the military criminal justice process. This argument is based on the fact that her reform places the initial prosecutorial decision in the hands of a trained, neutral lawyer, as opposed to, in her view, an unqualified and potentially biased commander.<sup>205</sup> However, the current system already requires COs to seek the advice of their SJA,<sup>206</sup> a trained lawyer. While critics focus on the fact that COs are free to depart from their recommendations, one scholar notes that most critics acknowledge that COs largely follow the advice of their SJA.<sup>207</sup> Thus, removing COs from the prosecutorial decision is unlikely to have an effect on the level of victim distrust and the number of prosecutions, as their decisions are consistent with the recommendation of a trained lawyer. Further, as Kenny points out, the anticipated influx of cases that actually make it to court-martial is unlikely to offset the greater consequence of diminished confidence in COs’ abilities to make important tactical decisions outside the military justice system. Others have argued that rather than increase the number of offenders brought to justice through court-martials, Senator Gil-

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203. Hangqing Chen, *Politicians Push Back at Military Sexual Assault Panel Held This Week*, THE DAILY BEAST (Sept. 27, 2013), <http://www.thedailybeast.com/the-hero-project/articles/2013/09/27/stalled-reform-for-military-sexual-assault.html>.

204. *Chappell v. Wallace*, 462 U.S. 296, 305 (1983); Ohlweiler, *supra* note 194, at 148–49, 154.

205. OFFICE OF KIRSTEN GILLIBRAND, *supra* note 74; see Hobson & Young, *supra* note 121 (“So I would like to remove the decision making from the colonels because too many of the victims have said they don’t trust the chain of command will bring them justice, and they don’t trust the chain of command will protect them from retaliation and that’s actually the facts of what’s happening today.”).

206. 10 U.S.C.A. § 834(a) (West 2013).

207. Suzanne Simms, *Revision of Article 60 and the Military Convening Authority’s Clemency Power: An Alternative to the Enacted Legislation*, 2 NAT’L SEC. L. J. 301, 316 (2014).



librand's bill will actually decrease the number of trials for sexual assault crimes.<sup>208</sup> A commander's duty, first and foremost, is to instill discipline in those he or she commands, and there is reason to believe that independent military prosecutors will lack such passion,<sup>209</sup> as they will not be the ones uniquely tasked with ensuring units are "combat-ready."<sup>210</sup> Whereas commanders may decide to bring a suspect to court-martial to promote discipline and justice among the ranks, a military prosecutor may choose to forgo prosecution for reasons of judicial economy.<sup>211</sup> Removing the COs' authority to bring court-martial charges guarantees little, if any, benefit to victims of sexual assault (in the form of increased prosecutions), while weakening the military as a whole.

Senator Gillibrand's bill is not the only solution to the problem of victim distrust in the chain of command's ability to handle sexual assault prosecutions; it is just the most obvious. Given the potentially severe consequences of removing the authority to determine whether to prosecute a case from commanders entirely, and the relatively low anticipated rate of increased prosecutions,<sup>212</sup> a more subtle approach limiting — rather than eliminating — commander discretion would have the beneficial effects without the potential significant costs. Senator Gillibrand's bill attempts to rewrite the internal command structure in a way that is incompatible with the military's functional purpose: to raise an effective fighting force for the protection of the nation.<sup>213</sup>

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208. STIMSON, *supra* note 165, at 4 (“[T]aking the authority to refer charges away from the commanders could actually *decrease* the number of sexual assaults prosecuted.”).

209. *Id.* (referring to a statement by Col. Donna W. Martin, a U.S. Army Commander of the 202nd Military Police Group).

210. See 10 U.S.C.A. § 838(a) (West 2013) (indicating that the trial counsel's sole job is to “prosecute offenses in the name of the United States”).

211. STIMSON, *supra* note 165, at 4 (referring to a statement by Col. Jeannie Leavitt, a U.S. Air Force Commander of the 4th Fighter Wing).

212. *Id.* (“[T]aking the authority to refer charges away from the commanders could actually decrease the number of sexual assaults prosecuted.”); Chen, *supra* note 203.

213. See Vanden Brook, *supra* note 1 (“Currently, a high-ranking officer who is the defendant's superior decides whether to bring charges, who sits on the jury and whether a conviction or punishment can stand. . . . The arrangement is a key principle for maintaining order within a fighting unit.”).

## V. RECOMMENDATION: A HYBRID APPROACH IN REFORMING THE COMMANDING OFFICER'S ROLE IN SEXUAL ASSAULT PROSECUTIONS

Senator Gillibrand is correct in one respect — the low reporting rates need to be addressed in order for any sexual assault reform in the military to be effective.<sup>214</sup> Viable reform, however, must avoid a top-down restructuring in the form of removing command discretion from both the prosecutorial and post-trial decision-making process. This Note proposes four reforms, both additions and modifications to those already contained in the NDAA for FY14, which are necessary to combat the current sexual assault crisis in the military.

In addition to the NDAA for FY14, and in lieu of Senator Gillibrand's MJIA, the military should: (1) provide specific training for commanding officers from civilian sexual assault prosecutors, focusing on making the initial recommendation for court-martial or dismissal; (2) institute a formal review by a judge advocate of (i) a commander's decision to forgo prosecution when it is contrary to an SJA recommendation, and (ii) a convening authority's decision to alter the findings or sentence of a court-martial; and (3) ensure that every case is handled by a neutral officer. While these proposed reforms alone would not put an end to sexual assault in the military, they are nevertheless a first step toward restoring victims' faith in the military justice system while maintaining the proper balance between legal transparency and commander authority.

### A. PROSECUTORIAL TRAINING FOR COMMANDING OFFICERS

The NDAA for FY14 begins its reforms by subjecting a commanding officer's decision not to prosecute a sexual assault offense to review by either a superior officer or the proper Secretary of the military branch. While such a reform is preferable to the complete eradication of commander discretion pre-trial, what is even more important is the creation of a training program for commanders. Many commanders already receive Sexual Assault

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214. See OFFICE OF KIRSTEN GILLIBRAND, *supra* note 74 (explaining that the MJIA removes the decision to prosecute from COs in order to address the low victim reporting).

Prevention and Response (SAPR) training,<sup>215</sup> but it is mainly directed at “how best to engage with and care for sexual assault victims” as first responders.<sup>216</sup> Commanders, however, are not solely responsible for responding to a victim’s initial report of sexual assault. It is when commanders are left to determine what should be done following an investigation commenced by a report of sexual assault that there is the greatest risk of abuse of CO discretion.

To address this concern, the military justice system should adopt formalized training for commanding officers by state or federal prosecutors specializing in sexual assault cases.<sup>217</sup> Such training should include factors weighing on the decision of whether to prosecute and how to approach such decisions from the context of a sexual assault given the emotional and volatile nature of the crime. The implementation of mandatory training for every CO whose responsibilities include making prosecutorial decisions may better equip COs to determine, after an investigation, whether prosecution is appropriate in certain cases, rather than relying on their own instincts or the suggestions of the corresponding MICO following investigation.

Comprehensive reform must start before the prosecutorial decision is even made, and such specialized training would help to educate COs who do not have formal legal training, but who are expected to make legal decisions with lasting consequences. However, while better-informed COs would necessarily be better equipped to avoid making mistakes in exercising discretion, the training program advocated for targets only accidental abuses.

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215. SAPRO FY12 REPORT, *supra* note 3, at 34 (“The Army provided Sexual Harassment/Assault Response and Prevention (SHARP) training to 203 brigade commanders, 593 battalion commanders, and 409 Command Sergeants Major. Navy Sexual Assault Response Coordinators (SARCs) trained a total of 2058 commanders on their roles and responsibilities within the Navy’s SAPR program. Additionally, 296 prospective commanding and executive officers, 180 Command Master Chiefs/Chiefs of the Boat, and 205 Flag and General Officers received SAPR training prior to assuming command or a senior leadership position. In the Marine Corps, over 70 commanders and 50 Sergeants Major received SAPR training in the form of Command Team SAPR Training. Additionally, 81 General Officers were trained at a SAPR General Officer Symposium and 59 senior enlisted leaders were trained on SAPR at the Sergeants Major Symposium in fiscal year 2012. The Air Force trained 4592 Wing, Vice Wing, and Group commanders in SAPR. The Air National Guard trained 794 commanders in bystander intervention.”).

216. *Id.* at 35.

217. Others have likewise taken the position that “[t]here should be a reexamination of training and guidelines for commanders at the pre-trial stages to enhance uniformity in charging decisions. . . .” Smith, *supra* note 190, at 178.

As a result, this Note advocates for the adoption of further measures, which, when combined with pre-trial training, will curb even purposeful prosecutorial abuses by COs.

B. REVIEW OF COMMANDING OFFICER'S DECISIONS NOT TO  
PROSECUTE WHEN CONTRARY TO JUDGE ADVOCATE  
RECOMMENDATIONS

Although the NDAA for FY14 requires review of a commanding officer's decision not to prosecute,<sup>218</sup> the particulars could be made more effective for use in a military setting. Rather than requiring a review of every decision not to prosecute, the military should require review of only those decisions contrary to an SJA's recommendation. Namely, where a judge advocate recommends trial by court-martial and the CO declines to prefer charges, a review should be mandatory and should be undertaken by a neutral judge advocate (i.e., one who has not had a hand in the case thus far). The review findings should then be made available to the victim. Where the judge advocate finds the CO abused his discretion in declining to prosecute, the CO would then be required to reassess whether prosecution is appropriate. If the CO again declines to prosecute, he would then have to submit a mandatory notice to the judge advocate explaining his reason for doing so. Where the judge advocate continues to believe failure to prosecute is an abuse of the CO's discretion, the judge advocate should have the power to direct the CO to convene a court-martial. An "abuse of discretion" standard of review would require the SJA to give great deference to the CO's decision not to prosecute, thereby preserving commander discretion, while still providing relief in those cases where the CO's refusal is clearly uncalled for after considering the evidence and any special factors counseling hesitation.

Subjecting the commander's decision to such a review would provide for more transparency in a CO's decision, settling victims' fears that their reports of sexual assault will be unfairly dismissed on account of improper command influence<sup>219</sup> or a conflict

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218. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1744(a), 127 Stat. 672, 980–81 (2013).

219. See Smith, *supra* note 190, at 169–73 (providing an overview of the problem of improper command influence on the prosecutorial decision in military sexual assault cases).

of interest,<sup>220</sup> while still allowing the CO authority to make the initial recommendation. Further, subjecting the decision to JAG approval keeps the decision within the military community, which is important for maintaining the fine balance between the military and civilian justice systems<sup>221</sup> while also ensuring that legal experience and training play a significant role in the prosecutorial recommendation. Limiting the cases subject to review also promotes efficiency, a central goal of the military's justice system,<sup>222</sup> by forwarding only those cases most likely to be considered an abuse of discretion. The decision to prosecute has historically been the immediate CO's decision and should remain so, but judge advocate-driven review of the final decision would promote justice, making COs accountable for their decisions, and ensure that the matter remains squarely within military jurisdiction.

### C. JUDICIAL REVIEW OF COMMANDERS' POST-CONVICTION ACTIONS

The current statutory scheme, provided by NDAA for FY14, completely strips the convening authority of his or her post-trial review authority to commute, suspend, or otherwise alter the findings or sentence of a Service member convicted of sexual assault charges.<sup>223</sup> However, for the reasons discussed,<sup>224</sup> such COs must retain their current authority, as guaranteed by the UCMJ.<sup>225</sup> Instead, the convening authority's decision to alter an accused's sentence or findings following conviction should be subject to judicial (or judge advocate) approval, while still allowing him or her to institute the process for overturning or otherwise amending conviction. Additionally, due to the various factors

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220. Thomas G. Becker, *In Defense of American Military Justice . . . Again: Is Congress Giving the Military Justice System A Fair Shake?*, 40 THE REPORTER, no. 1, 2013, at 6, 7–8.

221. In criticizing the STOP Act, H.R. 3435, 112th Cong. § 5(b) (2011), which, similar to Senator Gillibrand's amendment, would strip commanders of disposition authority over allegations of sexual assault, Becker, a former JAG for the Department of the Air Force, concludes that "[t]he military system must continue to mirror the civilian system by retaining the authority and prosecutorial process within the community unique to the alleged perpetrator and victim." *Id.* at 9.

222. *Manual for Courts-Martial*, 49 Fed. Reg. 17152, 17154 (1984).

223. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672, 954 (2013).

224. *See supra* Part IV.B.

225. 10 U.S.C.A. § 860(c) (West 2013).

that must necessarily affect a court-martial's decision to convict or regarding what sentence to impose, the military should implement guidelines for convening authorities regarding the alteration of court-martial imposed findings and sentences. For instance, the military could allow the convening authority to commute or lessen sentences only in certain instances and require such actions to be reviewed and approved by the original court-martial decision makers.<sup>226</sup> Such guidelines and a review following an otherwise final decision would help to ensure that the convening authority is taking into account all relevant factors, not just the effect on the accused,<sup>227</sup> and offer the added transparency a similar review process would provide pre-court-martial.

#### D. NEUTRALITY OF COMMANDING OFFICERS

Finally, the military justice system should require that the commanding officer and convening authority be one who does not interact with the accused or victim on a regular and personal basis. A staff judge advocate (SJA) would be tasked with determining whether the CO's relationship with the accused or victim is so close as to create a significant risk that discretion is likely to be abused in determining how to proceed when a sexual assault is reported within the CO's ranks. Factors casting doubt on the CO's neutrality might include: (1) frequent interaction, (2) a relationship outside the commander-subordinate relationship, and (3) family, relatives, or close personal friends in common with the accused or victim.<sup>228</sup> Where an SJA determines that a CO cannot act impartially, the pre- and post-trial responsibilities connected

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226. Courts-martial are decided by a panel of Armed Service members which may include only commissioned officers, warrant officers if the trial is not one of a commissioned officer, or enlisted members who are not in the same unit as the accused and who are senior to the accused in rank and grade. 10 U.S.C.A. § 825(a)-(d) (West 2013). However, enlisted members are only allowed to serve if the accused specifically requests that the court-martial include enlisted members. *Id.* at § 825(e)(1). In such a case, enlisted members must comprise one-third of the court. *Id.*

227. In a recent Air Force scandal, Lt. Gen. Craig Franklin overturned the conviction of Lt. Col. James Wilkerson for aggravated sexual assault. Kristin Davis, *3rd AF Commander Warned about Overturning Sex Assault Verdict*, AIR FORCE TIMES (Aug. 30, 2013), <http://www.airforcetimes.com/article/20130830/NEWS/308300034/3rd-AF-commander-warned-about-overturning-sex-assault-verdict>. One of Franklin's main concerns after learning of the conviction was whether Wilkerson would lose his retirement and where he would serve his sentence. *Id.*

228. The list is by no means exclusive and serves only as an example of factors that may affect the CO's neutrality. SJAs should consider any and all other lawful factors that may raise a significant doubt as to the CO's ability to make an impartial determination.

with a sexual assault report would be placed in the hands of the CO's immediate superior,<sup>229</sup> thereby, keeping the prosecutorial and post-trial decisions within the accused's own chain of command.

While there is little concrete evidence to support the criticism that immediate commanding officers are improperly influenced to forgo prosecution or otherwise dismiss criminal charges because of their familiarity with the accused,<sup>230</sup> victims are likely to make such an inference. Victims already fear that their reports of sexual assault will be handled improperly or not at all.<sup>231</sup> Close proximity of the commanding officer in charge and the accused surely only exacerbates this distrust. Prioritizing the neutrality of the commanding officer in charge of prosecutorial and post-trial decisions is likely to have a direct impact on the existing low reporting rates. While there is a possibility that the subject of the court-martial may not be held accountable to his or her immediate CO, he or she will still be held accountable to someone in an authoritative role within the military and someone within their chain of command. Thus, such a reform is consistent with the nature of the military and its central tenet of obedience.<sup>232</sup>

## VI. CONCLUSION

In response to the rise of sexual assault reports within the military,<sup>233</sup> lawmakers are clamoring for an immediate solution to this age-old problem.<sup>234</sup> The NDAA for FY14 details those reforms agreed upon by both houses of Congress and President Obama. This legislation combines the original victim-centric proposals of the Pentagon and Senator McCaskill.<sup>235</sup> The reforms

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229. Where the SJA concludes that the CO's immediate superior also has a conflict, the responsibilities would travel up the chain of command until a neutral officer can be found.

230. See Whitlock, *supra* note 118. In the recent case, which initially sparked lawmaker outrage, Lt. Gen. Franklin could not recall ever personally meeting or interacting with the accused, Lt. Col. Wilkerson. *Id.*

231. Steinhauer, *supra* note 120; Hobson & Young, *supra* note 121.

232. *Military Justice Act of 1982, Hearings on S. 2521*, *supra* note 164. See *Military Justice: Joint Hearings*, *supra* note 168.

233. SAPRO FY12 REPORT, *supra* note 3, at 60.

234. *E.g.*, Whitlock, *supra* note 118; Donna Cassata & Richard Lardner, *Military Under Review After Lt. General Overturns Sexual Assault Conviction*, TALKING POINTS MEMO (Mar. 13, 2013), <http://talkingpointsmemo.com/news/military-under-review-after-it-general-overturns-sexual-assault-conviction>.

235. Vanden Brook, *supra* note 1.

give victims of sexual assault greater legal rights,<sup>236</sup> creates a mandatory minimum for sexual assault offenses,<sup>237</sup> subjects commanders' decisions not to prosecute following an investigation of a sexual assault complaint to a formal review process,<sup>238</sup> and denies commanders the authority to overturn or otherwise alter court-martial convictions and sentences.<sup>239</sup> While Senator Gillibrand's amendment was not included in the final version of the NDAA for FY14, her commitment has not wavered and she has introduced the Military Justice Improvement Act as a stand-alone bill.<sup>240</sup> Senator Gillibrand's MJIA would remove the decision of whether to prosecute cases of sexual assault from the commanding officer and instead place it in the hands of a third-party judge advocate.<sup>241</sup>

Neither the NDAA for FY14 nor the MJIA is an effective reform of the military's current procedural handling of sexual assault reports. The NDAA for FY14 fails to address fully the problem of victim distrust in a broken system and misunderstands the nature of the military in removing the convening authority from the post-trial review process entirely. Senator Gillibrand's bill suffers from the same flaw. It eliminates all accountability to one's immediate commander from the military justice system, and is ultimately inappropriate for an institution that demands unquestioning obedience to one's commanding officer. It is only through reforms such as those presented in Part V of this Note that we may one day soon be able to better address the sexual assault crisis within the U.S. military, while still respecting the military as a fighting institution.

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236. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672, 952-54 (2013).

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

238. *Id.* at § 1744(a), 127 Stat. at 980-81.

239. *Id.* at § 1702(b), 127 Stat. at 954

240. Editorial, *supra* note 6.

241. Vanden Brook, *supra* note 1; Friedman, *supra* note 20.