

## THE TRANSFORMATION OF ARTICLE 32: WHY AND WHAT?

*By: Jonathan Lurie\**

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### INTRODUCTION

Last fall, national attention focused on what would usually be a quiet, little-noticed military justice proceeding, a pre-trial investigation that typically precedes a general court-martial. This one, however, was anything but quiet. It involved an alleged rape of a Naval Academy female midshipman by several members of the Annapolis football team. The alleged scenario is unfortunately not an unfamiliar one, either in academics or athletics. In this case, the difference is that the Article 32 investigation turned into a mini trial, replete with abusive and hostile interrogations and cross-examination directed towards the plaintiff—conduct which received widespread media coverage.<sup>1</sup> Some two months later, it was announced that the Naval Academy superintendent, who did not attend any of the pre-trial investigation, decided to court-martial two of the midshipmen allegedly involved, despite a contrary recommendation from the hearing officer involved in the original investigation.<sup>2</sup> That official found “reasonable grounds to believe offenses may have been committed,” but “heavy damage done to the alleged victim’s testimony made it difficult if not impossible to prove the case beyond a reasonable doubt.”<sup>3</sup>

Considering that, as of this writing, no court-martial was concluded let alone convened, where had the “heavy damage” been inflicted, and by whom? The answer lies in the “notorious” Article 32 investigation. Indeed, the military judge who recommended that this case *not* be referred to a court-martial is the same official who permitted the excessive cross-examination of the alleged

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\* Rutgers University.

1. See, e.g., Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, N.Y. TIMES, Sept. 21, 2013, at A1 (I am one of the students of military justice quoted within the article).

2. See Brian Witte, *Naval Chief Explains Court Martials*, STAR-LEDGER (Newark, N.J.), Dec. 10, 2013, at 3. Until recently changed by Congress, as will be discussed below, the convening authority also could determine who served on the court-martial jury, as well uphold or overturn the jury’s findings.

3. *Id.*

victim, later characterized as causing “heavy damage” to the her testimony.<sup>4</sup> Although the commander decided to move forward with a court-martial in this case,<sup>5</sup> one wonders why he ignored the advice of his hearing officer. While his action in this case can be lauded, in most instances when a commander makes a decision as to who should be prosecuted for serious offenses, that officer has had – at best – only a few hours of legal training.<sup>6</sup> In a very real sense, these officers are not qualified to make legal decisions as far-reaching as the decision to prosecute an alleged offense. This dearth of training is all the more critical, as in most cases the commander has neither heard any testimony, nor interviewed any witnesses. Why then, in December 2013, did Congress deem it appropriate to make major changes to Article 32, and what might these changes portend? This article first discusses how the original Article 32 has approached the problem of military sexual assault. Next, it examines Congress’ 2013 changes to Article 32. The third section analyzes the military’s reaction to further proposed Article 32 changes. Finally, the article looks to Congressional developments around Article 32 in 2014-2015.

### I. THE “ORIGINAL” ARTICLE 32

Article 32 was part of the original draft of the Uniform Code of Military Justice (UCMJ) enacted by Congress in 1950, and for more than 60 years it had been virtually unchanged. One of several articles concerned with “pre-trial procedure,” Article 32 mandated that a “thorough and impartial investigation” must be completed before any pending matter may be referred to a General Court-Martial (GCM) for trial.<sup>7</sup> Further, during such an investigation, “full opportunity shall be given to the accused to cross examine witnesses against him. . .and to present anything he may desire. . .either in defense or mitigation.”<sup>8</sup> For many years these provisions were touted as an example of the superiority of the Article 32 investigation for the accused, when contrasted with that of the typical civilian grand jury proceeding—held in secret, with no right for the defendant to either cross-examine or to hear witnesses against the defendant.

But change is ongoing, even within the military, where rank and ritual nestle comfortably within a tradition of stability. Far-reaching alterations have taken place in our armed services, and the military of today is not what it was

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4. *Id.*; see also Steinhauer, *Navy Hearing*, *supra* note 1.

5. Witte, *supra* note 2.

6. This is the experience of the author, who has researched military justice and studied the military justice system for many years. However, the Military Justice Manual requires Investigating Officers to be either “in the grade of lieutenant commander or higher or have legal training. It is strongly recommended that the IO be a Coast Guard Judge Advocate, and a CA should consult his or her staff judge advocate before appointing a non-lawyer.” See U.S. DEP’T OF HOMELAND SEC., *MILITARY JUSTICE MANUAL* (Apr. 2011), available at [http://www.uscg.mil/directives/cim/5000-5999/CIM\\_5810\\_1e.pdf](http://www.uscg.mil/directives/cim/5000-5999/CIM_5810_1e.pdf).

7. 10 U.S.C. § 832(a) (2012). The statute was amended in 2013; the amendments are discussed in Section III, *infra*.

8. 10 U.S.C. § 832(b) (2012).

when the UCMJ was enacted in 1950. Now we have an all-volunteer military; now we have armed services which are better integrated in terms of gender than ever before; now disputes over matters of sexual preference no longer corrode military life; now contemporary American culture has made inroads into the military environment. A key result of these very real transformations can be seen in sexual assault cases, where for many years the military environment reflected the old maxim “to get along, go along.” This maxim has decreasing validity in military justice.

Recently, the Pentagon released a report stating that approximately 26,000 members of the military were victims of “unwanted sexual contact,” the “overwhelming majority of which did not lead to disciplinary action.”<sup>9</sup> This figure from 2012 increased from 19,000 military victims only two years before.<sup>10</sup> Indeed, there may be many more cases which were not reported. The fear of retaliation for initiating a complaint, coupled with impunity, if not immunity, for suspected wrongdoers would indicate that these numbers are, if anything, below an accurate count,<sup>11</sup> which has been impossible to attain. What is certain is that in the first three quarters of the 2013 fiscal year, “there were 3,553 sexual assault complaints. . . a nearly 50 percent increase over the same period a year earlier.”<sup>12</sup>

Which brings us back to Article 32: originally intended to protect the defendant, somehow Article 32 evolved into a device for abusive cross-examination of the plaintiff. To be sure, the presiding officer easily could have restrained defense counsel from the type of abusive cross-examination inflicted on the complainant. In a civilian criminal trial for alleged rape, for example, exploration of the woman’s sexual past is traditionally off-limits, or at least subject to tight restrictions imposed by the court.<sup>13</sup> Some critics of current military justice have suggested removing sexual assault cases from the military chain of command, and creating a new, independent prosecuting authority to try them.<sup>14</sup>

However, many generations of practice have given the military establishment –both active and retired – noteworthy experience in influencing Congress, less in enacting legislation than in ensuring that certain proposed statutes never become law. Thus, the proposal to take sexual assault cases out

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9. Eugene R. Fidell, *Goodbye to George III*, SLATE (Dec. 6, 2013, 11:46 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/12/sexual\\_assault\\_in\\_the\\_military\\_commanders\\_shouldn\\_t\\_be\\_the\\_prosecutors.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/12/sexual_assault_in_the_military_commanders_shouldn_t_be_the_prosecutors.html).

10. Steinhauer, *Navy Hearing*, *supra* note 1.

11. See Nick Schwellenbach, *Fear of Reprisal: the Quiet Accomplice in the Military’s Sexual Assault Epidemic*, TIME (May 9, 2013), <http://nation.time.com/2013/05/09/fear-of-reprisal-the-quiet-accomplice-in-the-militarys-sexual-assault-epidemic/>.

12. Jonathan Weisman & Jennifer Steinhauer, *Bill Protects Victims of Assaults in Military*, N.Y. TIMES, Dec. 10, 2013, at A17.

13. See, e.g., Fed. R. Evid. 412.

14. See, e.g., Gary Trudeau & Loree Sutton, *When Rapists Wear Uniforms*, WASH. POST, July 1, 2012, at A19; Juana Summers, *Winnefeld’s Chain of Command Takedown – Hagel to Announce New Military Sexual Assault Directives*, POLITICO (Aug. 1, 2013, 9:38 AM), <http://www.politico.com/morningdefense/0813/morningdefense11306.html>.

of the chain of command in the military, as sponsored by Senator Kirsten Gillibrand (D-N.Y.), was deleted from the Defense authorization bill.<sup>15</sup> The bill, which was signed into law late in December, 2013, was accompanied by a veiled warning to the military from President Obama to tighten up its administration of military justice.<sup>16</sup> But changes *were* made in the military justice system, beginning with Article 32. Indeed, it is not unreasonable to observe that, by the amendment process, Congress appears to have gutted the original Article 32 almost in its entirety.

## II. THE “TRANSFORMATION” OF ARTICLE 32

The first Congressional change to Article 32 involved the substitution of the words “preliminary hearing” in place of “investigation.”<sup>17</sup> This is more than mere semantics. It may well have been intended to make it very clear that no matter what an Article 32 investigation might have been, it was *not* a trial. In law, a hearing is usually much less formal than a trial, and the type of hostile cross-examination mentioned earlier would not be acceptable. Indeed, the “new” preliminary hearing” is now limited to only four specific functions: a) Determining whether there is probable cause to believe that an offense has been committed and the accused committed the offense; b) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused; c) Considering the form of charges; and d) Recommending an appropriate disposition for the case.<sup>18</sup>

In the context of these four functions, the accused still retains the right to cross-examine witnesses, as well as to present additional evidence “in defense and mitigation,” although the evidence must be “relevant to the limited purpose of the hearing.”<sup>19</sup> One wonders, however, if a defendant will be able to call witnesses during the course of the hearing. Such a “right” appears not to be mentioned in the new Article 32. More significantly, “the presentation of evidence and examination (including cross-examination of witnesses at a preliminary hearing), shall be limited to the matters relevant to the limited purposes of the hearing.”<sup>20</sup> Further, the convening authority (“CA”) can no longer set aside a finding of “guilty” or substitute a finding of guilty for a lesser offense.<sup>21</sup> Indeed, the CA “may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a

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15. Sahil Kapur, *Gillibrand Sexual Assault Bill Dropped From Defense Authorization Agreement*, TALKING POINTS MEMO (Dec. 10, 2013, 1:40 PM), <http://talkingpointsmemo.com/livewire/gillibrand-sexual-assault-bill-dropped-from-defense-authorization-agreement>.

16. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2014, 2013 DAILY COMP. PRES. DOC. 876 (Dec. 26, 2013), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201300876/pdf/DCPD-201300876.pdf>.

17. 10 U.S.C.A. § 832(a)(2) (West 2014).

18. *Id.*

19. 10 U.S.C.A. § 832(d)(2) (West 2014).

20. 10 U.S.C.A. § 832(d)(4) (West 2014).

21. 10 U.S.C.A. § 860(f) (West 2014).

sentence of dismissal, dishonorable discharge, or bad conduct discharge.”<sup>22</sup> Finally, when a defendant subject to the UCMJ is found guilty of sexual assault or a related offense, any punishment meted out by a general court-martial “must include, at a minimum, dismissal or dishonorable discharge.”<sup>23</sup> These changes undercut the traditional authority of the CA to an extent previously unseen in the UCMJ. They not only further legitimized the independence of the court-martial from the chain of command, but they strengthened the mandated penalties for sexual assault and related offenses.

It will be recalled that in the “notorious” cross-examination conducted on behalf of the Annapolis football team defendants, their counsel subjected the complainant to what at best can be described as barely on the cusp of acceptable trial conduct, and at worst totally beyond appropriate trial procedure. It is interesting, therefore, to note the new provisions in the revised Article 32 dealing with testimony from a “complaining witness.” Trial counsel, meaning the prosecuting officer, must give notice to the defense counsel that a complaining witness will be called to testify.<sup>24</sup> “If requested by an alleged victim of an alleged sex-related offense . . . any interview of the victim by defense counsel shall take place only in the presence of trial counsel, a counsel for the victim, or a Sexual Assault Victim Advocate.”<sup>25</sup> To be sure, this change refers to a pre-trial interview, rather than the actual Article 32 “hearing.” However, given the narrow boundaries of the four functions for which a hearing may be convened, I think it is reasonable to assume that finding probable cause will never again involve an alleged victim being questioned on the stand for more than 20 hours, as happened in the Naval Academy case.<sup>26</sup>

In terms of these far-reaching changes to Article 32, it would certainly seem that “important progress has been made with respect to preliminary investigations.”<sup>27</sup> But the changes noted above are as significant for what they did *not* do as for what they accomplished. In the first place, the military remains in general control of its military justice system. True, the CA has lost some flexibility concerning the court-martial, and alternatives for action on a guilty verdict have surely been limited. However, the CA still decides whether or not to convene a court-martial in the first instance, and still determines who will compose its membership.<sup>28</sup> Further, the hierarchical nature of military life

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22. 10 U.S.C.A. § 860(c)(4) (West 2014).

23. 10 U.S.C.A. § 856(b) (West 2014).

24. 10 U.S.C.A. § 846(b)(2) (West 2014).

25. 10 U.S.C.A. § 846(b)(1) (West 2014).

26. Interview with Professor Eugene Fidell, Yale Law School (January 28, 2014). See also Annys Shin, *Judge Finds Midshipmen Not Guilty in Naval Academy Sexual Assault Case*, WASH. POST, Mar. 20, 2014, available at [http://www.washingtonpost.com/local/judge-to-rule-in-naval-academy-sexual-assault-case-after-hearing-closing-arguments/2014/03/20/d9211394-b040-11e3-b8b3-44b1d1cd4c1f\\_story.html](http://www.washingtonpost.com/local/judge-to-rule-in-naval-academy-sexual-assault-case-after-hearing-closing-arguments/2014/03/20/d9211394-b040-11e3-b8b3-44b1d1cd4c1f_story.html).

27. Jonathan Weisman and Jennifer Steinhauer, *Negotiators Reach Compromise on Defense Bill*, N.Y. TIMES, December 10, 2013, at A17 (statement by Professor Eugene Fidell).

28. 10 U.S.C.A. § 823 (West 2014).

remains unchanged. Yale Law School Professor Eugene Fidell is accurate when he notes that “real reform in the structure of military justice has been put off.”<sup>29</sup> Given the incremental and episodic nature of congressional response, further change may not come any time soon.

The “transformation” of Article 32 must be seen in context. The military institution is at heart conservative in nature. Change comes slowly, and more often than not, when enacted, it is a result of civilian imposition rather than voluntary military innovation. Three examples can readily be cited. The decision to integrate the military in terms of race came only after President Truman ordered it.<sup>30</sup> Similarly, the decision to admit women to the service academies resulted from congressional pressure.<sup>31</sup> Most recently, the congressional decision to repeal the inappropriate and unnecessary statute known as “Don’t Ask, Don’t Tell” probably rendered a future Supreme Court decision concerning gays in the military unnecessary.<sup>32</sup> In all three instances the military argued that matters of morale, preparedness, and its favorite justification, “military necessity,” required what had been, not what should be.<sup>33</sup>

Mention has already been made of the proposal to take sexual assault cases out of the chain of military command. Senator Gillibrand’s proposed statute would authorize a new body of lawyers to investigate and prosecute a number of serious cases, including, but not limited to, sexual assaults.<sup>34</sup> Her bill would strip the commander of authority in sexual assault cases and vest it in a commissioned officer with significant experience in trials by general or special court-martial and who is outside of the chain of the command of the member subject to charges.<sup>35</sup> This officer would thus be free from the possible conflicting concerns confronting a commander deciding whether or not to prosecute a case.

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29. Weisman & Steinhauer, *Bill Protects Victims*, *supra* note 12.

30. See 8 GEN. COLIN L. POWELL, PRESIDENT TRUMAN AND THE DESEGREGATION OF THE ARMED FORCES: A 50TH ANNIVERSARY VIEW OF EXECUTIVE ORDER 9981, at 27 (1998). See also HARRY S. TRUMAN LIBRARY & MUSEUM, *This Day in Truman History: July 26, 1948: President Truman issues Executive Order No. 9981 Desegregating the Military*, <http://www.trumanlibrary.org/anniversaries/desegblurb.htm> (last visited Sept. 11, 2014).

31. See Kelly Schloesser, *The First Women of West Point*, ARMY LIVE BLOG (Oct. 27, 2010), <http://www.army.mil/article/47238/>.

32. See generally National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 133-66 (2013) (the most recent defense appropriation bill, which contained the changes to Article 32 described above, also included a little-noticed provision decriminalizing sodomy. Now sodomy of whatever character is permitted unless it be “by force or without the consent of the other person.” *Id.* at § 1707 (codified as amended at 10 U.S.C.A § 925(a) (West 2014). The article, however, still retains the old definition of sodomy—even though it be legal—as “unnatural carnal copulation with another person of the same or opposite sex.” *Id.*).

33. Helene Cooper, *Senate Rejects Blocking Military Commanders From Sexual Assault Cases*, N.Y. TIMES, March 7, 2014, at A11.

34. Military Justice Improvement Act of 2013, S. 1752, 113 Cong. § 2(a)(4)(A) (2013).

35. *Id.*

### III. MILITARY REACTION TO “PROGRESS” PROPOSED IN THE GILLIBRAND BILL

The military’s reaction to proposals such as Sen. Gillibrand’s has been predictably strident. Typical opposition is based on the long-held assumption that “in the military everything important is commander-led,” especially in matters of morals and discipline.<sup>36</sup> To make this point, as Professor Fidell observes, the military and its partisans “have flooded the field with white papers, legal memos, op-eds, testimony, visits from congressional liaison officers [also known as lobbyists], and letters festooned with the signatures of retired generals and admirals.”<sup>37</sup> Stripped of verbiage, their argument is simply that the military knows best and outsiders should not interfere. Because civilians *are* outside of the military, they are presumably unable to understand the nuances of military life and should, to use a bit of military jargon, “butt out.” If one were to accept this line of reasoning, it is not unfair to observe that a) the military would still not be integrated, b) women would still not be enrolled in the service academies, and c) gays would still need to lie, dissemble, or face forced separation from the military for simply telling the truth about who they are. Each of these reforms was “imposed” upon the military by the civilian polity, to which the military is always supposed to be subordinate, in accordance with our founding fathers.<sup>38</sup>

Whether such subordination has actually existed throughout our history, including the present, remains a matter of ongoing debate, but is beyond the scope of this article.<sup>39</sup> However, it must be emphasized that Congress’ unwillingness to alter the fundamental command structure in administering Article 32 hearings is persuasive evidence that the influence of the military establishment extends far beyond the battlefield. Professor Fidell is correct when he observes that the desperate efforts of the military “to preserve the status quo might be more persuasive if the armed forces had a better record of deterring sexual assault under the current system.”<sup>40</sup> Congress can do better

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36. See, e.g., CHARLES J. DUNLAP, JR., TOP TEN REASONS SEN. GILLIBRAND’S BILL IS THE WRONG SOLUTION TO MILITARY SEXUAL ASSAULT CASES 1 (2013) available at [http://scholarship.law.duke.edu/faculty\\_scholarship/3153/](http://scholarship.law.duke.edu/faculty_scholarship/3153/) (“Lawyers, even those thoroughly expert in the law and indisputably well-intentioned, simply do not, and could not, have the broader insights and experience that commanders acquire through years of leadership”).

37. Fidell, *Goodbye to George III*, *supra* note 9.

38. See generally Michael Barone, *War is Too Important to be Left to the Generals*, WKLY. STANDARD, June 10, 2002, at 31 (one might recall the famous quote attributed to Georges Clemenceau that “war is too important to be left to the generals.” Gillibrand, I think, may well feel the same way about military justice).

39. See JONATHAN LURIE, ARMING MILITARY JUSTICE: THE ORIGINS OF THE U.S. COURT OF MILITARY APPEALS (1992); JONATHAN LURIE, ARMING MILITARY JUSTICE: THE HISTORY OF THE U.S. COURT OF APPEALS FOR THE ARMED FORCES 1951-1980 (1998); JONATHAN LURIE, THE SUPREME COURT AND MILITARY JUSTICE (2013).

40. Fidell, *Goodbye to George III*, *supra* note 9.

than blindly accept the military establishment's "unjustified insistence on retaining outdated command-centric features" of its command structure.<sup>41</sup>

Further, it might be noted that other observers besides scholars of military justice are concerned about the limitations of the Article 32 changes. For example, the *Star-Ledger*, the largest newspaper in New Jersey, published an editorial entitled "This Reform Won't Stop Rape."<sup>42</sup> Acknowledging that some progress had been made, the editorial emphasized that the "reforms" stop short of "what's really needed to eradicate rape culture in our military: for the prosecution of these crimes to be taken out of the chain of command altogether."<sup>43</sup> Victims of sexual assault "need an independent prosecutor from the get-go. If commanders retain authority over these decisions, the military will continue to foster a rape culture in which hardly any assaults are ever reported, with only a tiny fraction actually ending in convictions."<sup>44</sup>

The reference to a "rape culture" implies a milieu far beyond the military establishment. It is not surprising then that, barely three weeks later, this newspaper took up a broader and related concern, that of "Rape Culture on Campus." The issue was clear: "Get colleges out of the law enforcement business." In this regard, "appearances can be deceiving. . . a costly private school may do a far worse job than a public university" in handling rape accusations.<sup>45</sup> Again, and here the similarity to military concerns will be obvious, "a school preoccupied with its own image isn't the best authority to handle a serious crime on campus, [along with] a sensitive victim."<sup>46</sup> Colleges should be required to inform the local prosecutor's office of every sex assault allegation, as is the case at my university, Rutgers.<sup>47</sup> The bottom line also applies with equal force to the military: "Treat rape. . . like the serious felony it is."<sup>48</sup>

As of this writing, Senator Gillibrand's bill has not been brought before the Senate for action. Even if it passes the Senate, prospects for the necessary House concurrence seem doubtful. On the other hand, Sen. Gillibrand's current term has just started, and her persistence has already manifested itself.<sup>49</sup> Indeed, the military has been put on notice that further reforms are necessary by none

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41. *Id.*

42. See Julie O'Conner, *This Reform Won't Stop Rape*, STAR-LEDGER (Newark, N.J.), January 2, 2014, at 4.

43. *Id.* The issue of when and why a female in the armed services chooses to report a sexual assault remains complicated, but it seems clear that an independent prosecutor could investigate such a case without endangering the military career aspirations of the complainant.

44. *Id.*

45. Editorial, *Rape Culture on Campus: This Crime Needs to be in the Hands of Outside Investigators*, STAR-LEDGER (Newark, N.J.), January 24, 2014, at 14.

46. *Id.*

47. *Id.*

48. *Id.*

49. See Jennifer Steinhauer, *New York's Junior Senator, Doggedly Refusing to Play the Part*, N.Y. TIMES, December 6, 2013, at A1.

other than its Commander in Chief.<sup>50</sup> Even as the currents of reactionary legal thinking captured his court after World War I, the great Supreme Court Justice Louis Brandeis was fond of saying, “my faith in time is great.”<sup>51</sup> So should be ours, and when we think about the incredible changes that have transformed our society within the last decade, I believe we can expect further reforms in military justice. Whether they will be implemented from within, or imposed from without remains an unanswered question.

#### IV. POSTSCRIPT

The above remarks were completed for the Wisconsin Journal of Law & Gender in Society (WJLGS) symposium on February 21, 2014. Since that time, a number of developments on this subject have occurred, and two of them warrant further discussion here. They are not, however, concerned with Article 32, which remains as it was noted above. The first is the fate of Senator Gillibrand’s bill, and the second takes up the unanimous Senate vote in favor of a proposed alternative, sponsored by Senator McCaskill (D-Mo). On March 6, Sen. Gillibrand’s bill, strongly opposed by the “military establishment,” (see above), failed to receive the requisite 60 votes necessary to defeat a looming Republican filibuster.<sup>52</sup> Her bill fell short by 5 votes, 55-45, and the Senate debate pitted two female Democratic senators against one another, with Sen. McCaskill (D-Mo), successfully blocking Sen. Gillibrand (D-NY) from obtaining a simple aye or nay vote on her measure.<sup>53</sup>

This result was not unexpected, even though it appears that a substantial majority of senators would have voted for Sen. Gillibrand’s bill had it reached the floor.<sup>54</sup> Her supporters’ reaction was typified by Nancy Parrish, president of Protect Our Defenders, one of a number of groups calling for harsher penalties against sexual assault cases in the military. Parrish declared, “It is a travesty that this very practical, conservative measure. . . was blocked by a procedural filibuster.”<sup>55</sup> Examination of Sen. Gillibrand’s proposed statute confirms the accuracy of Parrish’s description. Although the proposed legislation was

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50. Carrie Dann, *Obama Sets One-Year Timeline for Military Sexual Assault Reforms*, NBC NEWS, December 20, 2013, <http://www.nbcnews.com/news/other/obama-sets-one-year-timeline-military-sexual-assault-reforms-f2D11783626>.

51. MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 756 (2009).

52. Ed O’Keefe, *How Kirsten Gillibrand Won by Losing*, WASH. POST BLOG (Mar. 6, 2014, 5:44 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/06/how-kirsten-gillibrand-won-by-losing/>.

53. Michael McAuliff, *Claire McCaskill Vows to Filibuster Kirsten Gillibrand’s Military Sexual Assault Bill*, HUFFINGTON POST (Feb. 6, 2014, 3:37 PM), [http://www.huffingtonpost.com/2014/02/06/mccaskill-gillibrand-military-sexual-assault\\_n\\_4739870.html](http://www.huffingtonpost.com/2014/02/06/mccaskill-gillibrand-military-sexual-assault_n_4739870.html).

54. Eleanor Clift, *Can Senators Get 60 Votes to Stop Sexual Assaults in the Military?*, THE DAILY BEAST (Mar. 5, 2014), <http://www.thedailybeast.com/articles/2014/03/05/can-senators-get-60-votes-to-stop-sexual-assaults-in-the-military.html>.

55. Jay Newton-Small, *Senate Passes Bill Tightening Regs on Sexual Assault in the Military*, TIME (Mar. 10, 2014), <http://time.com/19262/sexual-assault-military-bill-passes-senate/>.

denounced by the military establishment as wrongheaded and inappropriate, it was in fact just as Parrish described it: practical and conservative.

It is true that Sen. Gillibrand intended that, in specific instances concerning alleged military offences, “the determination whether to try such charges by court-martial shall be made by a commissioned officer. . .outside the chain of command of the member subject to such charges.”<sup>56</sup> But this officer had to be available for detail as trial counsel, and needed to possess “significant experience in trials by general or specific court-martial.”<sup>57</sup> In other words, Sen. Gillibrand’s much-vaunted figure, supposedly beyond the chain of command, turns out to be merely an experienced, capable JAG officer, subject to another chain of command, but not the one relevant here.

A second conservative characteristic of Senator Gillibrand’s bill is that it was very limited in its coverage. It applied to articles dealing with conspiracy and solicitation, and of course included crimes of rape, “carnal knowledge,”<sup>58</sup> and assault.<sup>59</sup> But it excluded a wide variety of “military” offenses, including desertion, absence without leave, demonstrating contempt for civilian officials or disrespect to superior officers, assaulting or willfully disobeying a lawful order, mutiny or sedition, misbehavior before the enemy, resistance, breach of arrest and escape, misconduct as a prisoner, spies or espionage, dueling, and malingering.<sup>60</sup> In addition, Sen. Gillibrand excluded coverage under the two most famous catch-all articles: “Conduct unbecoming an officer and a gentleman” and the ubiquitous “general article.”<sup>61</sup> Gillibrand’s reasons for excluding the above from her bill remain unclear, but the fact that it stipulated that “an Officer. . .may not convene a court-martial. . .if the officer is in the chain of the accused or the victim” is significant.<sup>62</sup>

The sanctity of the chain of command, as noted above, was the basis for much of the strident opposition to her bill. If a majority of the Senate were inclined to support it—as may well have been the case—it would make sense for those opposed to resort to parliamentary tactics to prevent Sen. Gillibrand’s bill from reaching the floor. Senator Barbara Boxer (D-Ca) was probably accurate when she noted that “the only reason some are forcing a filibuster on the Gillibrand vote is because they know we have a majority.”<sup>63</sup> For the time

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56. Military Justice Improvement Act of 2013, S. 1752, 113th Cong. § 2(a)(4) (2013).

57. *Id.*

58. Apparently carnal knowledge is the military’s equivalent of adultery, which does not appear to be mentioned in the UCMJ.

59. S. 1752 § 2(a)(2).

60. S. 1752 § 2(a)(3).

61. *Id.* See also 10 U.S.C.A. § 934 (“Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.”).

62. S. 1752 § 3(b).

63. Cooper, *supra* note 33.

being, however, Sen. Gillibrand's bill is gone, but a competing measure<sup>64</sup> sponsored by three female senators received a unanimous vote shortly after the Senate refused to vote on Sen. Gillibrand's measure.<sup>65</sup> Reflecting the idea that something may be better than nothing, the Senate supporters of Gillibrand's ill-fated effort voted for the new bill.

What is the essence of Senator McCaskill's "Victims Protection Act of 2014?"<sup>66</sup> The most significant characteristic of the proposal is that it retained the chain of command.<sup>67</sup> But even within this chain, the bill made a number of changes in the way sexual assault cases are handled within the military. In a sexual assault case where the commander and the military prosecutor disagree on whether or not to prosecute, the case will now be referred to the secretary of the respective armed service involved — a civilian — for a final decision.<sup>68</sup> Sen. Gillibrand's bill would have left this decision solely to the independent prosecutor.<sup>69</sup>

Further, the McCaskill bill mandates that the recently established Special Victims' Counsel must provide advice to a sexual assault victim "on the advantages and disadvantages of prosecution . . . by court-martial or by a civilian court with jurisdiction over the offense."<sup>70</sup> Once the victim expresses such a preference, "while not binding, [it] should be afforded great weight in the determination whether to prosecute the offense by court-martial or by a civilian court."<sup>71</sup> Thus such a request for a civilian trial rather than a court-martial can still be rejected, but only if the "great weight" criterion does not convince.<sup>72</sup> The bill also eliminates the "good soldier" defense in sexual assault cases as a sort of mitigating factor. It states, "[T]he general military character of an accused is not admissible for the purpose of showing the probability of innocence of the accused. . . ."<sup>73</sup> Moreover, the appropriate provisions of the McCaskill bill are to apply to the four military service academies.<sup>74</sup>

Although these changes, as well as other parts of her measure not discussed here, are significant and positive, Sen. McCaskill's bill does nothing to mitigate the evils of the chain of command structure in military sexual assault cases. Although she voted for the competing proposal, Sen. Gillibrand insisted that "we need an objective, trained prosecutor making these decisions about whether a case should go forward, not politics, not the discretion of a

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64. Victims Protection Act of 2014, S. 1917, 113th Cong. (2014).

65. Darren Samuelsohn, *Claire McCaskill's Sexual Assault Bill Passes*, POLITICO (Mar. 10, 2014, 6:30 PM), <http://www.politico.com/story/2014/03/claire-mccaskill-military-sexual-assault-bill-104499.html>.

66. S. 1917.

67. *Id.*

68. S. 1917 § 3(b)(1).

69. Military Justice Improvement Act of 2013, S. 1752, 113th Cong. § 2(a)(4) (2013).

70. S. 1917 § 3(a).

71. S. 1917 § 3(b)(2).

72. *Id.*

73. S. 1917 § 3(g).

74. S. 1917 § 4.

senior officer or a commander who may like the perpetrator or might like the victim, who may value the perpetrator more than the victim.”<sup>75</sup> Professor Fidell aptly described the McCaskill proposal as “piling band-aids on a badly broken 18th century museum piece.”<sup>76</sup>

It only remains to inquire what happened to the three midshipmen charged with sexual assault, mentioned at the very outset of this paper. Two of the cases never came to trial, and the third resulted in an acquittal by a court-martial.<sup>77</sup> Describing the trial of Joshua Tate, lawyer Jason Ehrenberg observed that “we went through this whole process because the superintendent of the Naval Academy fell prey to political pressure. The system, is broken.”<sup>78</sup> So it is, and while there seems to be almost unanimous agreement on this point, consensus breaks down concerning the next step. Senator McCaskill’s bill now goes to the House, with future action unclear. It remains apparent, however, that the military is incapable of providing consistent and effective resolution of sexual assault cases within its ranks on its own.

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75. Editorial , *A Broken Military Justice System*, N.Y. TIMES (Mar. 18, 2014), at A22.

76. *Id.*

77. Helene Cooper, *Former Naval Academy Football Player is Acquitted of Sexual Assault*, N.Y. TIMES (Mar. 21, 2014), at A18. ,

78. Helene Cooper, *Two Cases, One Conclusion on Military Justice*, N.Y. TIMES (Mar. 22, 2014), at A3.