

## PRACTICAL PROBLEMS WITH MODIFYING THE MILITARY JUSTICE SYSTEM TO BETTER HANDLE SEXUAL ASSAULT CASES

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“Treat your men as you would your own beloved sons. And they will  
follow you into the deepest valley.”

Sun Tzu, *The Art of War*

“If he wanted to know the cause of that trouble, he [George Armstrong  
Custer] would have to look to Washington . . . [because] Washington was the  
place all those troubles started.”

Lakota warrior He Dog<sup>1</sup>

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1. PHILIP MARTIN MCCAULAY, *SUN TZU’S THE ART OF WAR* 27 (2009); NATHANIEL PHILBRICK, *THE LAST STAND: CUSTER, SITTING BULL, AND THE BATTLE OF LITTLE BIG HORN* 305 (Penguin Group, 2010) (quoting Lakota warrior He Dog recounting the battle of Little Big Horn).

## INTRODUCTION

In today's military, in which women probably make up a much greater percentage of the force than in Sun Tzu's time, approximately 500 B.C.,<sup>2</sup> perhaps the above quote should read "treat your servicemembers as you would your own beloved offspring . . ."<sup>3</sup> But the wisdom is as valid today as it was 2,500 years ago. Thus, a commander ought to take a sexual assault allegation made by a female servicemember as seriously as a parent would. All too often, however, such does not appear to be the case.

Recent Pentagon data about the increase in the reported number of sexual assaults in the military supports the conclusion that this issue is a serious problem.<sup>4</sup> Between July 1, 2012, and June 30, 2013, the Department of Defense reported 3,553 incidents of sexual assault, a 43 percent increase from the year before.<sup>5</sup> During the same period, there were 219 casualties in the wars in Iraq and Afghanistan.<sup>6</sup> Thus, in that period, soldiers were 15 times more likely to be raped by a comrade than killed by an enemy.

And although one co-author believes that the horror stories about sexual assault victims not getting justice are a minority of the cases, and although the other author, Professor Spak, for this and other reasons, would abolish the military justice system in the United States entirely in times of peace, they agree that, because the dismantling of the military justice system entirely is wildly unlikely, modifications to the system are necessary to treat female soldiers (and male victims) as one's beloved sons and daughters when they are the victims of sexual assault. Actually, more men have suffered sexual assaults in the military than have women, probably because of the fact that many more men serve in the military.<sup>7</sup> And, perhaps because of what author Tomes has

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2. SUN-TZU, *THE ART OF WAR* 296 (Ralph D. Sawyer trans. and ed., Mei-chün Lee Sawyer ed., Westview Press 1994) (indicating that the concept of female warriors was not unheard of 2,500 years ago).

3. Jennifer Steinhauer, *Reports of Military Sexual Assault Rise Sharply*, N.Y. TIMES, Nov. 7, 2013, at A24.

4. *See id.*

5. Caitlin Bancroft, *Pentagon Releases Startling New Statistics on Military Sexual Assault*, POLICY.MIC (Nov. 8, 2013), <http://mic.com/articles/72503/pentagon-releases-startling-new-statistics-on-military-sexual-assault>.

6. *Id.*

7. During 2012, 13,900 male servicemembers experienced unconsented sexual contact as opposed to 12,100 females. Only 380 of the males reported an assault to military authority as opposed to 2,555 females, and only 247 agreed to an investigation as compared to 1,729 females. *See* SEXUAL ASSAULT PREVENTION AND RESPONSE, DEP'T OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY (2012), *available at* <http://www.sapr.mil/index.php/annual-reports> (last visited Nov. 20, 2014). The Baltimore Sun reported that, when men do report a sexual assault, military authorities are less likely to identify a suspect, to refer charges to court-martial, or to discharge the perpetrator than in cases in which the victim is a woman. Critics blame those differences on a military culture that they say has been slow to recognize the possibility that men can be raped—and that situation remains hostile to the victims.

termed “the warrior mystique,” men appear to be even less likely to report sexual assault than women because it is hardly warrior-like to divulge that one was a victim of a sexual assault.<sup>8</sup>

But whether one focuses solely on female victims of sexual assault in the military or adds men, little doubt exists that the military needs to do a better job of handling these cases. One can only wonder, however, what the effect of the “knee-jerk” reaction to some of the worst horror stories by congressional action would be. Is it possible that, consistent with the second opening quote, the reaction from Washington will exacerbate the problem?

Senator Kirsten Gillibrand (D. NY) introduced a bill to reform the military’s way of burying sex abuse cases largely because of the handling of a rape case involving Annapolis midshipmen.<sup>9</sup> Her amendment to the Uniform Code of Military Justice (“U.C.M.J.”) would, among other changes, strip commanders of their authority to decide whether to court-martial servicemembers under their command for sex crimes,<sup>10</sup> apparently out of a belief that commanders would sweep such offenses under the rug so that it would not appear that they had not fostered the proper command climate to prevent such crimes.<sup>11</sup> Senator Claire McCaskill (D. MO) countered with a toned-down version that would increase commander accountability, allow survivors of sex crimes to challenge their unfair discharge from the service (not that they could not already do so),<sup>12</sup> give victims a greater say in whether their cases are litigated in military or civilian courts, and stop servicemembers from using good military character as a defense.<sup>13</sup>

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“For young men, the military justice system is the last place they would seek remedy,” says Nancy J. Parrish, president of Protect Our Defenders, a Washington-based advocacy group for sexual assault victims of both genders. “Male victims face more obstacles, more prejudice against them, more disbelief, more efforts to silence and humiliate them.”

Matthew Hay Brown, *Breaking the Silence*, BALTIMORE SUN (Dec. 14, 2013), <http://data.baltimoresun.com/military-sexual-assaults/>.

8. See Michael I. Spak and Alice M. McCart, *Effect of Military Culture on Responding to Sexual Harassment: The Warrior Mystique*, 83 NEB. L. REV. 79, 80 n.1-2 (2004) (citing interviews with Jonathan P. Tomes).

9. See Military Justice Improvement Act (MJIA), S.1752, 113th Cong. (2013).

10. See Steinhauer, *supra* note 5.

11. See S. 1752, *supra* note 11.

12. See Victims Protection Act of 2014, S. 1917, 113<sup>th</sup> Cong. § 3 (2014). Every service has a discharge review board that can upgrade the discharge characterization, although it cannot reverse the discharge itself. For a good discussion of these boards, see generally *Discharge Review Boards*, MILITARY.COM, <http://www.military.com/benefits/records-and-forms/discharge-review.html> (last visited Nov. 5, 2014).

13. The good military character defense was predicated on the theory that good servicemembers are unlikely to commit crimes. Good character is far from a total defense, but rather is a factor to consider in determining guilt or innocence. In participating in several hundred courts-martial, co-author Tomes never saw this defense prevail except in a few close cases in which the government’s evidence was not compelling. In a case in which the prosecution’s evidence is very weak, this defense may cause the trier of fact (the court

On March 6, 2014, Senator Gillibrand's bill failed to pass by falling short of the 60 votes needed to get past a filibuster.<sup>14</sup> The Senate, however, did vote to move forward with Senator McCaskill's bill, which congressional observers expect to pass.<sup>15</sup> But the eventual passage of the McCaskill bill, if it occurs, or the resurrection of the Gillibrand bill, will not solve the issue for the reasons discussed below. Senator Patrick Leahy (D. VT) has gone so far as to suggest that Congress should consider stripping the military of its authority to prosecute

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members or military judge in a judge alone trial) to find that the trial counsel had not met the burden of proof beyond a reasonable doubt.

Not allowing the defense to adduce such evidence, which normally consists of excellent efficiency reports, letters of commendation, certificates accompanying valor or service medals, and the like, may not be all that helpful because, if the accused is an elite warrior, like a Navy SEAL, a senior non-commissioned officer, or an officer, he will be wearing his good military character on his chest. In one case in which co-author Tomes defended a senior non-commissioned officer, a Sergeant First Class, he wore the ribbons of a Silver Star with Oak Leaf Cluster (denominating a second award) and a Purple Heart with two Oak Leaf Clusters. What more had to be said about his good military character? Is Senator McCaskill going to prohibit accused servicemembers from wearing their authorized decorations on their uniform when they face a court-martial?

The Army Electronic Military Judge's Benchbook provides the instructions that military judges give the court members on this defense, which shows that it is far from a bar to conviction:

CHARACTER—GOOD—OF ACCUSED TO SHOW PROBABILITY OF INNOCENCE

To show the probability of (his) (her) innocence, the defense has produced evidence of the accused's:

(Character for (honesty) (truthfulness) (peacefulness) (\_\_\_\_\_) (if appropriate, specify pertinent military character trait, e.g., obedience to orders, promptness, appearance)).

(In rebuttal the prosecution has produced evidence of \_\_\_\_\_.)

Evidence of the accused's character for \_\_\_\_\_ may be sufficient to cause a reasonable doubt as to (his) (her) guilt.

On the other hand, evidence of the accused's (good character for \_\_\_\_\_) (and) (good military record) may be outweighed by other evidence tending to show the accused's guilt (and the prosecution's evidence of the accused's ((bad) (\_\_\_\_\_) (character for \_\_\_\_\_) (and) ((bad) (\_\_\_\_\_) military record).

U.S. Dep't of Army, *Electronic Military Judges' Benchbook – Army v14.4*, U.S. ARMY TRIAL JUDICIARY (2014), <https://www.jagcnet.army.mil/sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=49C01E1BE32A5FF885257B48005712E2#..>

14. See Zachary D. Spilman, *Gillibrand Bill Filibustered, McCaskill Bill Scheduled for Vote Monday Evening*, NAT'L INST. OF MILITARY JUSTICE BLOG-CAAFLOG.COM (Mar. 6, 2014), <http://www.caaflog.com/2014/03/06/gillibrand-bill-filibustered-mccaskill-bill-scheduled-for-vote-monday-evening/>.

15. See Amanda Marcotte, *What Happened to the Military Sexual Assault Bill in the Senate on Thursday?* SLATE (Mar. 7, 2014), [http://www.slate.com/blogs/xx\\_factor/2014/03/07/military\\_sexual\\_assault\\_bills\\_claire\\_mccaskill\\_defeats\\_kirsten\\_gillibrand.html?wpisrc=burger\\_bar](http://www.slate.com/blogs/xx_factor/2014/03/07/military_sexual_assault_bills_claire_mccaskill_defeats_kirsten_gillibrand.html?wpisrc=burger_bar).

sexual assault cases and shifting the responsibility to state prosecutors.<sup>16</sup> A well-thought out solution is needed, rather than a knee-jerk political maneuver.

Interestingly, during this furor over how the military does not properly prosecute sexual misconduct cases, an Army unit brought general court-martial charges against the most senior officer ever brought before such a tribunal to face such charges. Brigadier General Jeffrey Sinclair faced a life sentence for, among other sexually related offenses, sexually assaulting a subordinate female officer<sup>17</sup> who testified that he said that, if she reported the crime, he would kill her and her family “in a way that no one would ever know.”<sup>18</sup> Looking at the Combat Infantry Badge,<sup>19</sup> Ranger Tab,<sup>20</sup> and seven rows of ribbons on his uniform, one might conclude that it would seem like a credible threat. The accused pled guilty to improper relationships with two female Army officers and to adultery.<sup>21</sup> The military judge refused to dismiss the sexual assault charges for illegal command influence, however, and the reader may have to

16. See Donna Casata and Richard Lardner, *Patrick Leahy: Military Sexual Assault Cases Should Be Shifted to State Prosecutors*, HUFFINGTON POST (Aug. 11, 2013), [http://www.huffingtonpost.com/2013/06/11/patrick-leahy-military-sexual-assault\\_n\\_3422637.html](http://www.huffingtonpost.com/2013/06/11/patrick-leahy-military-sexual-assault_n_3422637.html).

17. See Alan Blinder, *Facing Sexual Assault Trial, General Pleads Guilty to Misconduct*, N.Y. TIMES (Mar. 6, 2014), <http://www.nytimes.com/2014/03/07/us/judge-accepts-army-generals-guilty-pleas-to-misconduct-charges.html>. That General Sinclair was only fined \$20,000 and reprimanded but avoided jail time after pleading guilty committing adultery and mistreating his former mistress, an Army captain, indicates that perhaps the military does not take sexual assault cases seriously. See also Gregg Zoroya, *General Avoids Jail Time in Case Involving Affair with Subordinate*, USA TODAY (Mar. 20, 2014), <http://www.usatoday.com/story/news/nation/2014/03/20/sinclair-general-affair-subordinate-army-sexual-assault/6557033/>.

18. Michael Biesecker, *Officer Says US General Sexually Assaulted Her*, ASSOCIATED PRESS (Mar. 8, 2014), <http://bigstory.ap.org/article/officer-says-us-general-sexually-assaulted-her>.

19. For award of the Combat Infantry Badge (“CIB”), a soldier must meet the following three requirements:

- a. Be an infantryman satisfactorily performing infantry duties.
- b. Be assigned to an infantry unit during such time as the unit is engaged in active ground combat.
- c. Actively participate in such ground combat.

See U.S. DEP’T OF ARMY, REG. 600-8-22, MILITARY AWARDS ¶ 8-6 (Sept. 11, 2006).

20. The Ranger tab signifies completion of the 61-day long Ranger School course in small-unit infantry combat tactics in woodland, mountain, and swamp operations. See REG. 600-8-22, *supra* note 14, at ¶ 8-48.

21. See Larry McShane, *Army Captain Cries During General’s Court Martial over Alleged Sexual Misconduct*, N.Y. DAILY NEWS (Mar. 4, 2014), <http://www.nydailynews.com/news/crime/court-martial-starts-army-general-alleged-sexual-misconduct-article-1.1714351>. Adultery is a crime under Article 134, U.C.M.J. The maximum punishment is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year. See Uniform Code of Military Justice § 134, 10 U.S.C. § 934 [hereinafter UCMJ]. The authors know of no court-martial for adultery standing alone although it is often added to a non-consensual sexual offense charge so that, if a married accused testifies that, yes, he had intercourse with the victim, but it was voluntary, he convicts himself of adultery.

decide which way this refusal cuts.<sup>22</sup> The defense moved to dismiss the charges because political considerations influenced the military's handling of the case because the convening authority had rejected a plea bargain<sup>23</sup> under which the accused would have plead guilty to some of the charges in exchange for dropping the sexual assault charges.<sup>24</sup> The military judge found evidence that political considerations had influenced the decision, particularly the political implications of a military grappling with sexual assault cases<sup>25</sup> based in emails between the assistant judge advocate general for military and operational law and the deputy staff judge advocate at Fort Bragg, where the court-martial convened, that expressed concerns about the message that the plea bargain would send across the military.<sup>26</sup> The victim of the sexual assault had opposed the plea agreement—which was the reason that the convening authority gave for rejecting the plea bargain, not any political implications.<sup>27</sup> The judge refused to dismiss the charges, however, but rather gave the defense the option of having a different commanding general and prosecutors consider the rejected plea bargain.<sup>28</sup> The authors believe that the convening authority acted appropriately in protecting the victim by refusing a plea arrangement that would have failed to punish the accused for the much more serious offense than those to which he was willing to plead guilty. Perhaps, convening authorities, some isolated examples notwithstanding, are not so bad. But that theory does not mean that we should not look at how to improve the system.

Regardless of whether the convening authority acted properly, the end result hardly appeared to do justice to the victims or to the military. The pretrial agreement was ultimately approved, and the convening authority dismissed the charges against the real victim.<sup>29</sup> The sentence was for the accused to be reprimanded and to pay a \$20,000 fine—the amount that it cost the government

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22. Paul Woolverton, *Judge in Brig. Gen. Jeff Sinclair Court-Martial Refuses to Dismiss Case*, FAYETTEVILLE OBSERVER (Mar. 10, 2014), [http://www.fayobserver.com/news/local/article\\_fd819dfa-ca10-5c6a-8a37-bdd68c33f6c2.html](http://www.fayobserver.com/news/local/article_fd819dfa-ca10-5c6a-8a37-bdd68c33f6c2.html).

Article 37, U.C.M.J., criminalizes unlawful command influence. UCMJ § 37, 10 U.S.C. § 837 (2012). Rules for Courts-Martial 104(a)(2) states:

No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 104(a)(2) (2012) [hereinafter MCM].

23. See Woolverton, *supra* note 24.

24. *Id.*

25. *Id.*

26. *Id.*

27. See Michael Biesecker, *Judge Won't Dismiss General's Sex Assault Charges*, ASSOCIATED PRESS, Mar. 10, 2014, <http://bigstory.ap.org/article/defense-set-grill-accuser-army-sex-case>.

28. See *id.*

29. See Blinder, *supra* note 19.

for him to secretly visit the victim while on duty.<sup>30</sup> If the general is not administratively retired in a lower grade,<sup>31</sup> this slap on the wrist will permit him to retain \$832,000 in retirement benefits.<sup>32</sup> Certainly, from looking at the awards and decorations on the accused's chest, he had a lot of mitigation, but the sentence seems absurdly light to the authors and certainly gives ammunition to those who would reform the system.

But whether and which of these proposals would be helpful in handling sexual assault cases may be problematic. The U.C.M.J. was amended in late 2013 to address this issue.<sup>33</sup> Buried in the Defense Appropriations Act<sup>34</sup> were provisions that made the following changes: required Article 32b Investigating Officers to be Judge Advocates—that is, trained lawyers—“where practicable;”<sup>35</sup> established a special victims counsel to provide support and advice to the alleged victim;<sup>36</sup> limited the authority of convening authorities<sup>37</sup> to

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30. See Gregg Zoroya, *General Avoids Prison, Will Pay Fine; Guilty of Adultery; Sexual Assault Charge Had Been Dropped*, USA TODAY, Mar. 21, 2014, at 8A; see also Allie Jones, *Convicted Brigadier General Jeffrey Sinclair Could Still Walk Away with a Big Pension*, THE WIRE (Mar. 25, 2014, 12:31 PM), <http://www.thewire.com/politics/2014/03/convicted-brigadier-general-jeffrey-sinclair-could-still-walk-away-with-a-big-pension/359552/>.

31. 10 U.S.C. § 1370 (a) specifies that an officer shall be retired in the highest grade in which he served on active duty satisfactorily as determined by the Service Secretary.

32. See Jones, *supra* note 32. Brigadier General Sinclair's retirement grade would be initially adjudicated before a military administrative board and ultimately decided by the Secretary of the Army, who has stated that he has the final say about Sinclair's rank, and the process will be ongoing. *Id.*

33. See National Defense Authorization Act of 2014, 113 P.L. 66, § 1702, 127 Stat. 672, 953-58

(2013); see also Victims Protection Act of 2014, S. 1917, 113th Cong. (2014).

34. See National Defense Authorization Act § 1702, 127 Stat. at 953-58.

35. See *id.*

36. S. 1917, § 3. Under this provision, special victims counsel must inform the victim of any upcoming hearings, such as hearings regarding pretrial confinement, parole board, clemency, and so on, and inform the victim that he or she can choose to attend any of those. The victim must also be notified in advance of trial dates and be informed of any delays. In addition, the special victims counsels may represent the alleged victims during trial, ensuring that their rights are not violated, such as under the Rape Shield Rule, for example. Military Rule of Evidence 412, the Rape Shield Law, prevents admission of evidence concerning sexual predisposition and behavior of an alleged victim of sexual assault. MCM, *supra* note 24, MIL. R. EVID. 412 (2012).

37. Because courts-martial are not sitting courts, but rather are *ad hoc* tribunals convened (called into existence) by a convening authority, courts-martial are “created” and personnel are assigned to them by convening authorities. The convening authority calls the court into existence, assigns the court members (the military equivalent of jurors) to the panel, and decides what cases are to be referred (sent to) the court-martial for trial. See MCM, *supra* note 24, R.C.M. 306(c)(4) (2012); 10 U.S.C. §§ 822-824 (2012) (specifying who may convene courts-martial). For example, a typical Army general court-martial convening authority is a general officer commanding an Army division, separate brigade, or major installation. See UCMJ § 22, 10 U.S.C. § 822 (2012); see generally Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 Mil. L. Rev. 103, 125 (1992).

disapprove findings of guilt and mitigate the sentence;<sup>38</sup> and provided whistleblower protection for victims.<sup>39</sup> Perhaps, the most draconian provision of these amendments to the U.C.M.J. is the requirement that accused servicemembers convicted of serious sexual assaults must be dishonorably discharged.<sup>40</sup> Although the authors agree that this punishment, which, besides the stigma attached thereto, deprives the accused of all military and veterans' benefits,<sup>41</sup> may be appropriate in the vast majority of sexual assault crimes, particularly those involving force or other coercion, such as exploitation of a superior-subordinate relationship, making such a severe sentence mandatory may not provide justice in all cases. For example, even though the military judge will not instruct the court members that, if they convict the accused, a dishonorable discharge is mandatory, with all the publicity concerning the changes to the U.C.M.J. engendered by the rise in military sexual assaults, the court members will likely know that, if they convict, they have "slammed" an accused who may, by the fruit salad (ribbons for medals for heroism and meritorious service), have demonstrated a stellar military career. This mandatory sentence could lead to jury nullification, in which the court members acquit an accused that the evidence shows is guilty because they do

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38. See National Defense Authorization Act § 1702, 127 Stat. at 953-58. Under this revision of Article 60, U.C.M.J., the convening authority can no longer adjust any findings of guilt for felony offenses where the sentence is longer than six months or contains a discharge. Nor can they change the findings of guilt for any sex offense. Convening authorities may still modify a sentence only if the trial counsel comes forward and says that the accused was very helpful in securing evidence or cooperating with the government in prosecuting someone who was accused of committing an offense or if the sentence is greater than that agreed to in a pretrial agreement (the military version of a plea bargain).

Note that the various services' Courts of Criminal Appeal, which must review the record of trial in any case of trial by court-martial in which the sentence, as approved by the convening authority, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more. UCMJ § 86, 10 U.S.C. § 866 (2006). This appellate court system is the only appellate court system that can set aside the findings of guilt based on lack of evidence in the record to support the findings.

39. See National Defense Authorization Act § 1709, 127 Stat. at 950.

40. See *id.* § 1705.

41. See JONATHAN P. TOMES, *THE SERVICEMEMBER'S LEGAL GUIDE* 45 (5th ed. 2005); U.S. Dep't of Army, *Electronic Military Judges' Benchbook – Navy Marine Corps v14.4*, U.S. ARMY TRIAL JUDICIARY (2014), <https://www.jagcnet.army.mil/sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=49C01E1BE32A5FF885257B48005712E2#>. The Electronic Military Judges' Benchbook does not allow the military judge to specifically inform the court members of the collateral effects of punitive discharges:

There are many administrative and practical effects that may result from a conviction or a particular punishment, among them the possible forfeiture of pay and allowances under Article 58b. Other administrative regulations may impact on the accused's entitlement to pay and allowances as well. All effects are not predictable and it would be speculative of me to instruct you on all the possible collateral consequences of the sentence you select.

*Id.*

not want to adjudge a mandatory harsh sentence or for other reasons, such as a belief that the law is unjust in a particular case.<sup>42</sup> Thus, a strong possibility exists that a mandatory sentence to dismissal could lead to an unjust verdict.

In addition, this emphasis on the award of a dishonorable discharge leads to the specter of unlawful command influence. When President Obama proclaimed that those who commit sexual assault in the military should be “prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged,”<sup>43</sup> it had an effect that he had not intended, raising the issue of illegal command influence. Illegal command influence is an attempt to coerce, or by any unauthorized means, influence the action of a court martial in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority’s judicial acts.<sup>44</sup> One reporter noted the possible consequences of this language:

In at least a dozen sexual assault cases since the president’s remarks at the White House in May, judges and defense lawyers have said that Mr. Obama’s words as commander in chief amounted to “unlawful command influence,” tainting trials as a result. Military law experts said that those cases were only the beginning and that the president’s remarks were certain to complicate almost all prosecutions for sexual assault.<sup>45</sup>

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42. See, e.g., *United States v. Green*, 556 F.2d 71 (D.C. Cir. 1977). In one case in which co-author Tomes obtained a not guilty verdict in a court-martial for assaulting a trainee, he used jury nullification to obtain the acquittal by putting his client on the stand to make a judicial confession that, yes, he had struck the trainee but that you, the court members, would have done so, too. *Oral history of J. Tomes*. Tomes, at that time a captain, had caused the accused to exercise his right to have one-third of the court members be enlisted under R.C.M. 503 so that the noncommissioned officers on the panel would be sympathetic to his noncommissioned client drill sergeant. *MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 503* (1998). At , it was the quickest finding of “not guilty” in Fort Knox court-martial history, taking less than ten minutes for the court members to adjourn, enter the jury room, vote to acquit, and return to the courtroom to announce their findings. See generally, Doug Linder, *Jury Nullification* (2001), <http://law2.umkc.edu/faculty/projects/ftrials/zenger/nullification.html>.

When co-author Tomes was a military judge, he had difficulty imposing what was called in Army lawyer slang “a Big Chicken Dinner”—that is, a bad conduct discharge—or the worse punitive discharge—a dishonorable discharge (the officer version is a “dismissal”)—when the accused had a Silver Star or higher valor award and other indicia of “been there, done that,” such as a Combat Infantry Badge and/or jump wings, perhaps because he had those ribbons and medals on his chest, as well. But having served in combat and having empathy for fellow warriors is hardly a prerequisite for being appointed a military judge or achieving high rank as a military lawyer, Rear Admiral A. J. Chegwidden, the Navy Judge Advocate General in the television series *JAG*, who was purportedly a former Navy SEAL notwithstanding.

43. Steinhauer, *supra* note 5.

44. See MCM, *supra* note 24, R.C.M. 104(a)(1). Illegal command influence is an offense under Article 37, U.C.M.J., although the authors are unaware of any prosecutions for the offense. See UCMJ § 37, 10 USC § 837 (2012).

45. See Steinhauer, *supra* note 5.

If these and other unintended consequences exist in this enacted legislation, what are the issues inherent in the proposed legislation?

### I. ISSUES IN MODIFYING THE SYSTEM

A number of different issues exist with respect to modifying the system to properly handle these cases without depriving accused servicemembers of their rights as guaranteed by the Constitution and the Uniform Code of Military Justice.<sup>46</sup> These issues include jurisdictional, substantive, procedural, and practical issues, as well as the issue of unintended consequences.

#### A. Jurisdictional Issues

With respect to current court-martial jurisdiction, courts-martial have the power to hear and decide only criminal cases.<sup>47</sup> More specifically, court-martial jurisdiction requires both the person and the offense be within the scope of the limited authority that Congress has granted military courts-martial. For a court-martial to exercise jurisdiction over the person, the defendant must be a person subject to the U.C.M.J. at the time of the offense, and his or her status must not have been terminated before the trial.<sup>48</sup> Before 1987, the military had to demonstrate “service-connection” before court-martial jurisdiction existed over one subject to the U.C.M.J.—that is, some connection between the accused and

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46. See generally U.S. CONST.; UCMJ, 10 U.S.C. §§ 801-946 (2012). The only protection of the Bill of Rights that explicitly denies servicemembers its protection is the Fifth Amendment, which exempts from its requirement of a grand jury indictment in cases of “capital or otherwise infamous crime(s)” those cases arising “in the land and naval forces.” U.S. Const. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”) U.S. Const. amend. V. Other constitutional rights are certainly limited, however, by the nature of military service. For example, the military has no provision for bail, commanders may authorize searches, and the like. See JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 113-174 (1974).

47. See UCMJ, 10 U.S.C. §§ 816-21 (2012); BLACK’S LAW DICTIONARY 991 (4th ed. 1968) (defining jurisdiction as “the authority by which courts and judicial officers take cognizance of and decide cases”).

48. See UCMJ § 2, 10 U.S.C. § 802 (2012). This article specifies the general source of jurisdiction over servicemembers:

The following persons are subject to this chapter:

- (1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces, from the dates when they are required by terms of the call or order to obey it.

*Id.* Article 2 also lists 11 other categories of persons who are subject to the U.C.M.J.

the military other than the accused's military status for offenses committed off post.<sup>49</sup>

In *Solorio v. United States*,<sup>50</sup> however, the U.S. Supreme Court overruled *O'Callahan*, holding that the jurisdiction of a court-martial depends solely on the accused's status as a member of the armed forces and should not take into account the service connection of the crime charged. Thus, the military has court-martial jurisdiction over servicemembers regardless of where the offense occurred, subject only to the sovereignty of foreign nations as contained in Status of Forces Agreements.<sup>51</sup> But if the military cedes jurisdiction to civilian courts, either foreign or domestic, will those courts have jurisdiction?

Sexual assaults by U.S. military personnel can certainly take place anywhere in the world from the United States to a foreign country in which our forces were invited to a foreign country in which we are an invading or "peacekeeping" force, either under some international law authority, such as a United Nations Resolution, or without such a sanction.

When U.S. forces are invited into the host nation, the two countries typically enter into a Status of Forces Agreement, which, among other things, specifies which country has jurisdiction over crimes committed by visiting nations. The South Korean Status of Forces Agreement,<sup>52</sup> for example, has three types of jurisdiction: exclusive Korean jurisdiction over offenses that violate only Korean law, U.S. jurisdiction over offenses that violate only U.S. law, and concurrent jurisdiction over offenses that violate both Korean and U.S. law. In the latter case, the party to the Agreement has primary concurrent jurisdiction over the offense if the victim is a national of that country but will give sympathetic consideration to a request for waiver of the primary concurrent jurisdiction if requested by the other party.<sup>53</sup> Rape, for example,

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49. See *O'Callahan v. Parker*, 395 U.S. 258, 261, 266 (1969). This ruling was largely predicated on the denial of the right to a grand jury indictment and a trial by one's peers when a servicemember was prosecuted by a court-martial rather than a civilian court for an offense that occurred off post, as well as the U.S. Supreme Court's expressed distrust of the military justice system. The Court granted certiorari on the following issue:

Does a court-martial, held under the Articles of War, Tit. 10, U.S.C. § 801 et seq., have jurisdiction to try a member of the Armed Forces who is charged with an offense cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by grand jury and trial by petit jury in a civilian court?

*Id.* at 261.

50. See *Solorio v. United States*, 483 U.S. 435, 450-51 (1987).

51. R. Chuck Mason, CONG. RES. SERV., STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? (2012), available at <http://fas.org/sgp/crs/natsec/RL34531.pdf>.

52. The Mutual Defense Treaty between the Republic of Korea and the United States, Regarding Facilities and Areas and Statuses of United States Armed Forces in the Republic of Korea, U.S.-Kor., January 18, 2001, T.I.A.S. 13138, [hereinafter "Mutual Defense Treaty"].

53. Mutual Defense Treaty, *supra* note 54, Art. XXII, § 1-3.

would violate both Article 120 of the U.C.M.J.<sup>54</sup> and Article 297 of the Korean Criminal Act.<sup>55</sup> Note, however, that the U.C.M.J.'s punishment for rape is "[punishment] as a general court-martial may direct,"<sup>56</sup> whereas the Korean penalty is imprisonment for a definite term of at least three years unless the offender is a habitual offender, which carries a more severe penalty.<sup>57</sup> And rape of a minor can result in a sentence of up to five years under Article 302 of the Criminal Act.<sup>58</sup> Thus, rape and certain other sexual assault cases would violate both U.S. and Korean law and fall within the concurrent jurisdiction provisions of the Agreement.<sup>59</sup> Under this provision, the U.S. would have primary concurrent jurisdiction if the victim of a rape is a U.S. servicemember, unless the victim is a Korean national either with dual citizenship or simply serving in the U.S. forces as a Korean national.<sup>60</sup> In that case, Korea would have primary concurrent jurisdiction, which it would have to waive for the United States to try the accused by court-martial or otherwise.<sup>61</sup> But if the United States has waived jurisdiction over sexual assault offenses committed by servicemembers

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54. UCMJ § 120, 10 U.S.C. § 920 (2012). This section defines rape as sexual intercourse by a person, executed by force and without consent of the victim. It may be committed on a victim of any age. Any penetration, however, slight, is sufficient to complete the offense.

55. Hyongsa sosong beob [Criminal Procedure Act], Act No. 297, October 3, 1953 (S. Kor.), available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3f49e3ed4&skip=0&query=korea%20criminal%20code> [hereinafter Criminal Procedure Act].

56. See UCMJ § 56, 10 U.S.C. § 856.

57. See Criminal Procedure Act, *supra* note 57, at § 297.

58. See *id.* at § 302.

59. See Agreement under Article 4 of the Mutual Defense Treaty between the Republic of Korea and the United States, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, U.S.-Kor., at art. XXII, July 9, 1966, T.I.A.S. 6127 [hereinafter Agreement under Article 4].

60. See *id.* According to data from the Department of Defense, more than 65,000 immigrants (non-U.S. citizens and naturalized citizens) were serving on active duty in the U.S. Armed Forces as of February 2008. Since September 2001, U.S. Citizenship and Immigration Services (USCIS) has naturalized more than 37,250 foreign-born members of the U.S. Armed Forces and has granted posthumous citizenship to 111 servicemembers. As of February 2008, 11,182 foreign-born women were on active duty in the U.S. armed forces, representing 17.2 percent of all foreign-born servicemembers. Jeanne Batalova, *Immigrants in the U.S. Armed Forces*, MIGRATION POLICY INST. (May 15, 2008), <http://www.migrationpolicy.org/article/immigrants-us-armed-forces>.

61. See Agreement under Article 4, *supra* note 61. The potential for problems in this concurrent jurisdiction was dramatically illustrated in a court-martial in which co-author Tomes defended a U.S. Marine charged with manslaughter of another Marine, a charge that carried a two-year maximum sentence, and assault with a deadly weapon on three Koreans, which totaled 27 years' potential confinement. The U.S. military neglected to obtain a waiver of Korea's primary concurrent jurisdiction and, upon motion, the military judge dismissed the charges involving the Korean national alleged victims. Korea did not prosecute the accused. See *United States v. Koke*, 32 M.J. 876 (N.M.C.R. 1991); *aff'd* 34 M.J. 313 (C.M.A. 1992) (opinion on unrelated grounds to the jurisdictional issue—whether the withdrawal of the charges from the court-martial to refer it to another court-martial was proper).

against any U.S. servicemember, is Korea likely to be interested in prosecuting the case unless the victim is a Korean national serving in the U.S. Armed Forces and perhaps not even then? And does a minimum sentence of at least three years really vindicate the victim and appropriately punish the offender?

And if the sexual assault takes place in a foreign nation in which the United States does not have a Status of Forces Agreement, either because we are engaged in a peacekeeping force under the auspices of the United Nations or other international body or are engaged in combat operations on our own, who will have jurisdiction if the U.S. military does not, such as if we removed military commanders' authority to prosecute such crimes? The World Court in The Hague, which would seem to be prejudicial to U.S. forces fighting what Europeans may view as an unjust war?<sup>62</sup> Some U.S. federal court if empowered to exercise such jurisdiction under an Act of Congress and such jurisdiction does not violate a treaty or Status of Forces Agreement?

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62. The United States is not a participant in the International Criminal Court. That court was established to bring to justice the perpetrators of the worst crimes known to humankind—war crimes, crimes against humanity, and genocide—especially when national courts are unable or unwilling to do so. NGO COALITION FOR THE INTERNATIONAL CRIMINAL COURT, *DETERRING FUTURE GENOCIDES: THE INTERNATIONAL CRIMINAL COURT* (2014), available at <http://www.iccnw.org/documents/FS-ICCandGenocide.pdf>. Positions in the United States concerning the ICC have varied. The Clinton Administration signed the Rome Statute on December 31, 2000, but did not submit it for Senate ratification. See H.R. Con. Res. 265, 111th Cong. (2010) (enacted). The Bush administration stated that it would not join the ICC. *Id.* In fact, the Bush administration opposition resulted in the enactment of the American Service-Members' Protection Act, intended to protect U.S. military personnel and other elected and appointed officials of the U.S. government against criminal prosecution by an international criminal court to which the United States is not party. American Service-Members' Protection Act (ASPA), 22 U.S.C. §§ 7421-33 (2012). The Obama Administration has subsequently re-established a working relationship with the court. See Harold Hongju Koh, Legal Advisor U.S. Dep't of State, Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference (June 15, 2010) (transcript available at [http://web.archive.org/web/20120112210935/http://www.state.gov/j/gcj/us\\_releases/remarks/143178.htm](http://web.archive.org/web/20120112210935/http://www.state.gov/j/gcj/us_releases/remarks/143178.htm)).

Nor is it certain that that court could prosecute a sexual assault. Its jurisdiction extends to four core international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. Rome Statute of the International Criminal Court, 1 July 2002, Part II, art. 5, 2187 U.N.T.S. 90, available at <http://legal.un.org/icc/statute/romefra.htm> [hereinafter Rome Statute]. Under the Rome Statute, the ICC can investigate and prosecute only the four core international crimes in situations where states are "unable" or "unwilling" to do so themselves. *Id.* The court has jurisdiction over crimes only if they are committed in the territory of a state party or if they are committed by a national of a state party; an exception to this rule is that the ICC may also have jurisdiction over crimes if its jurisdiction is authorized by the United Nations Security Council. *Id.*

The ASPA contains prohibitions on the United States providing military aid to countries that had ratified the treaty establishing the ICC; however, a number of exceptions to this prohibition exist, such as for NATO members, major non-NATO allies, and countries that entered into an agreement with the United States not to hand over U.S. nationals to the ICC. ASPA, 22 U.S.C. § 7426 (2012). In addition, ASPA contained provisions prohibiting U.S. cooperation with the ICC and permitting the President to authorize military force to free any U.S. military personnel held by the ICC. See *id.* § 7426-27. The act was later modified to permit U.S. cooperation with the ICC when dealing with U.S. enemies. See *id.*

The U.S. Special Maritime & Territorial Jurisdiction would not appear to provide a jurisdictional basis for prosecution because it applies only to

The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State,<sup>63</sup>

among other bases for jurisdiction not relevant here.<sup>64</sup> Certainly, Congress could empower a federal court to handle cases involving sexual assault by a

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63. 18 U.S.C. § 7(1) (2012).

64. 18 U.S.C. § 7(2)-(9). The remainder of the jurisdictional bases are these:

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

military member overseas, but that situation would pose the practical problems detailed in Parts II.C. and D., *infra*. And what of the potential difficulties of renegotiating Status of Forces Agreements to place the responsibility of prosecuting U.S. forces servicemembers for sexual assaults on host nations?

Nor is the situation any clearer when the offense occurs within the United States or its territories. Current jurisdiction over offenses committed by servicemembers against servicemembers off post within the United States—that is, not on federal government property—could certainly be tried by either the military or the civilian authorities or both.<sup>65</sup> Typically, in the authors'

(9)With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act—

(A)the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and

(B)residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

*Id.* Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title.

Note that the crimes with extraterritorial jurisdiction under the Special Maritime & Territorial Jurisdiction do not include rape, although they do include sexual abuse, 18 U.S.C. § 2242, aggravated sexual abuse, 18 U.S.C. § 2241, abusive sexual conduct, 18 U.S.C. 2244, and 18 U.S.C. § 3261, criminal offenses committed by certain members of the armed forces by persons employed by or accompanying the armed forces outside the United States. It is an open question whether this latter section will provide for jurisdiction because, as currently enacted, it provides “that [n]othing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.” 18 U.S.C. § 3261(c) (2012).

For a complete discussion of extraterritorial jurisdiction, see CHARLES DOYLE, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW, CONG. RES. SERV. (2012), available at <http://fas.org/sgp/crs/misc/94-166.pdf>.

Nor do any treaty-related offenses under 18 U.S.C. § 32(b), which generally proscribe terrorist acts and crimes against internationally protected persons, appear to be a jurisdictional basis for prosecuting military sexual assault cases. *See id.* at 42-45. Likewise, no other federal crime subject to federal prosecution when committed overseas appears to provide a jurisdictional basis. *See id.* at 48-63.

65. The Double Jeopardy Clause of the Fifth Amendment protects only against multiple prosecutions for the same offense by the same sovereign.

It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government (*Barron v. City of Baltimore*, 7 Pet. 243, 8 L. Ed. 672), and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority. Here the same act was an offense against the state of Washington, because a violation

experience, the prosecutors of the two jurisdictions, military and civilian, meet and decide which jurisdiction is better able to successfully prosecute the case, considering such factors as expense, conviction rates, the necessity for specialized military expertise, civilian-military relationships, and the like. Again, in the authors' experience, this calculus almost always results in the military handling the offense by trial by court-martial or other disciplinary proceeding, such as an administrative discharge board.<sup>66</sup>

The issue is more problematic when the alleged offense occurs on a military installation or other federal enclave. Three types of jurisdiction exist

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of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy.

United States v. Lanza, 260 U.S. 377, 382 (1922).

R.C.M. 201(d)(2) *Exclusive and nonexclusive jurisdiction*, specifies that “[a]n act or omission which violates both the code and local criminal law, foreign or domestic, may be tried by a court-martial, or by a proper civilian tribunal, foreign or domestic, or subject to R.C.M. 907(b)(2)(C) (relating to double jeopardy and prosecution barred by Presidential pardon) and regulations of the Secretary concerned, or both.” MCM, *supra* note 24, R.C.M. 201(d)(2); MCM, *supra* note 24, R.C.M. 907(b)(2)(C). The Discussion of this Rule notes that in such cases the determination of which agency should exercise jurisdiction should normally be made through consultation or prior agreement between appropriate military officials and appropriate civilian authorities, such as the U.S. Attorney or equivalent. *See* Dep’t of Defense Instruction on Implementation of the Memorandum of Understanding Between the Dep’t of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes, Dep’t of Defense Directive No. 5525.7 (June 18, 2007), <http://www.dtic.mil/whs/directives/corres/pdf/552507p.pdf>.

66. Often, when sexual assault prosecutions by court-martial are problematic because the evidence is weak or the alleged victim either wants to withdraw the charge or not testify, convening authorities, upon the advice of their judge advocates, refer the matter to an administrative discharge board, which can consider hearsay, such as the alleged victim’s written statement if the victim is unavailable to testify; consider other evidence that may not be admissible at a court-martial; and only has to find the misconduct occurred by a preponderance of the evidence rather than beyond a reasonable doubt. Although an administrative discharge board may not sentence the defender to confinement, it may discharge him with an other-than-honorable discharge. *See, e.g.*, Army National Guard and Army Reserve: Enlisted Administrative Separations, U.S. DEP’T OF ARMY, REG. 135–178, §§ 2-3, 2-9 (2014). This is the functional equivalent of a bad conduct discharge and will deprive the discharged servicemember of most military and veterans’ benefits.

In the Army, for example, Army Active Duty Enlisted Administrative Separations, U.S. DEP’T OF ARMY, REG. 635-200, ch. 14 (2011) prescribes procedures for separating personnel for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave. Rape and other sexual assaults clearly qualify as the commission of a serious offense. *Id.* § 14-12(c). *Commission of a serious offense*, specifies that commission of a serious military or civil offense, if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense under the MCM, *supra* note 24. And rape and other serious sexual assaults certainly so qualify. Active Duty Enlisted Administrative Separations, U.S. DEP’T OF ARMY, REG. 635-200 §§ 14-1, 14-12c (2011).

on such properties: exclusive federal, concurrent, and proprietary use.<sup>67</sup> In exclusive jurisdiction enclaves, only the federal government, including the military, has jurisdiction over criminal offenses committed there.<sup>68</sup> In concurrent jurisdiction enclaves, both the federal government and the state in which the enclave is located have jurisdiction (although, unlike under the typical Status of Forces Agreements, the status of the victim is irrelevant insofar as determining who has primary concurrent jurisdiction).<sup>69</sup> In proprietary use jurisdiction enclaves, the United States is more like a lessee rather than an owner, and the state has all criminal jurisdiction.<sup>70</sup> The United States may retrocede—that is, give back—its exclusive or concurrent federal jurisdiction to the state.<sup>71</sup> The state must, however, accept the retrocession, or the enclave may become a “jurisdictional black hole.”<sup>72</sup> And even if the state has jurisdiction, will it want to exercise it, considering the practical issues in Parts II.C. and D., *infra*? Why would a state court want jurisdiction over military sex crimes against servicemembers committed on a military installation, even if it has jurisdiction? Perhaps only if the victim was the offspring of a major contributor to the politicians running the county?

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67. 18 U.S.C. § 7 (2012).

68. *See, e.g.*, “Commander’s Security Authority,” AIR FORCE HOUSING PRIVATIZATION (April 2013), <http://www.afcec.af.mil/shared/media/document/AFD-130607-065.pdf>.

69. *See supra* notes 50-52 and accompanying text.

70. Three methods exist by which the United States obtains exclusive or concurrent jurisdiction over federal lands in a state: (1) a state statute consenting to the purchase of land by the United States for the purposes enumerated in U.S. CONST. art. I, § 8, cl. 17; (2) a state cession statute; and (3) a reservation of federal jurisdiction upon the admission of a state into the Union. *See Collins v. Yosemite Park Co.*, 304 U.S. 518, 528-29 (1938). Since February 1, 1940, the United States acquires no jurisdiction over federal lands in a state until the head or other authorized officer of the department or agency that has custody of the lands formally accepts the jurisdiction offered by state law. *See* 40 U.S.C. § 255 (2012); *Adams v. United States*, 319 U.S. 312, 313 (1943).

71. *E.g.*, Mo. Rev. Stat. §§ 12.010-12.028 (1999) (Governor may accept cession of jurisdiction in federal enclaves. Section 12.028 provides: “By appropriate executive order, the governor may accept on behalf of the state full or partial cession or retrocession of federal jurisdiction, criminal or civil, over any lands, except Indian lands, in federal enclaves within the state where such cession or retrocession has been offered by appropriate federal authority. An executive order accepting a cession or retrocession of jurisdiction shall be filed in the office of the secretary of state and in the office of the recorder of the county in which the affected real estate is located”).

72. In one case that co-author Tomes tried in Cass County, Missouri, the defendant, a Navy Petty Officer, was charged with promoting child pornography (by taking a nude picture of his goddaughter) in his military quarters on Richards-Gebaur Air Force Base in Belton, Missouri. Attorney Tomes learned that the federal government had ceded its criminal jurisdiction to Missouri but that Missouri had not accepted it. Hence, a jurisdictional black hole. The Prosecuting Attorney dismissed the case, perhaps out of a concern that Cass County would lose all past convictions, because jurisdiction is never waived, if an appellate court ruled that Cass County and the state of Missouri had no jurisdiction over the base. *State v. Sorenson*, CR 398-756 FX (Cass County Cir. Ct. Mar. 30, 1999) (order by prosecuting attorney dismissing the case).

And even assuming that Congress could solve these issues,<sup>73</sup> should an existing court, such as the United States District Court for the District of Columbia, be granted the power to adjudicate all such cases? Or should all federal district courts be empowered to try military sex crimes occurring within their territory with overseas cases tried in a particular district court? The practical problems inherent in this solution are discussed in Parts II.C. and D., *infra*.

### B. Substantive Law Issues

Assuming that the jurisdictional issues could be resolved, what law applies? Will the foreign or federal court apply the definition of rape,<sup>74</sup> sodomy,<sup>75</sup> indecent assault,<sup>76</sup> or indecent acts with another<sup>77</sup> as enumerated in the U.C.M.J. or substitute their own definitions? Is a French court going to accept the military's definition of sexual harassment?<sup>78</sup> If jurisdiction over a rape or sexual assault case is ceded to a state court, which definition applies? The U.C.M.J. or the state law definition? It would seem that the state would be unwilling to apply the U.C.M.J. definition in its courts. And will all the sexual

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73. U.S. CONST. art. III established the U.S. Supreme Court and empowered Congress to establish inferior courts, which was largely done by the Judiciary Act, Sept. 24, 1789, c. 20, 1 Stat. 73. U.S. CONST. art. III, § 2 requires that defendants be tried by juries and in the state in which the crime was committed. U.S. CONST. amend. VI requires the jury to be selected from a judicial districts ascertained by statute. In *Beavers v. Henkel*, 194 U.S. 73, 83 (1904), the U.S. Supreme Court ruled that the place where the offense is charged to have occurred determines a trial's location. Where multiple districts are alleged to have been locations of the crime, any of them may be chosen for the trial. In cases of offenses not committed in any state (for example, offenses committed at sea), the place of trial may be determined by Congress. Thus, it would appear that Congress must determine the place of trial for sexual assault cases committed outside a U.S. jurisdiction.

74. UCMJ § 120, 10 U.S.C. § 920 (2012).

75. UCMJ § 125, 10 U.S.C. § 925 (2012).

76. *Id.*

77. *Id.*

78. Loi 2012-954 du 6 août 2012 relative au harcèlement sexuel [Law 2012-954 of August 6, 2012,

concerning sexual harassment], JOURNAL OFFICIEL DE LA REPUBLIC FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 7, 2012, p. 12021. Its definition is "Harassment is the fact of imposing on a person, in a repetitive fashion, statement or behavior of a sexual connotation which violate a person's dignity by virtue of their degrading or humiliating character or create as concerns such person an intimidating, hostile or offensive situation." In the original French : « Le harcèlement sexuel est le fait d'imposer à une personne, de façon répétée, des propos ou

comportements à connotation sexuelle qui soit portent atteinte à sa dignité en raison de leur caractère

dégradant ou humiliant, soit créent à son encontre une situation intimidante, hostile ou offensante. » In the Army, sexual harassment is defined as a form of gender discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. U.S. DEP'T OF ARMY, REG. 600-20 § 7-4 (2014). Are these definitions identical? One would think not because the Army's definition seems broader.

offenses in the U.C.M.J. be crimes under state law? Do state courts really want to litigate whether the defendant was subject to the U.C.M.J. or had been discharged before the offense allegedly occurred, and, if not, does it matter?

Another issue that may be of particular importance to the victims of sexual assaults is whether the military's Rape Shield Law<sup>79</sup> protects them or whether no such protection or a lesser protection of another jurisdiction's law applies?<sup>80</sup> Professor Michelle J. Anderson has characterized rape shield laws as follows:

Despite the progress wrought by the passage of rape shield laws, the chastity requirement survived in a modified form. All rape shield laws admit evidence of the sexual history between the complainant and the defendant himself. Many of them admitted evidence of the sexual history between the complainant and third parties as well . . . Cases managed to slip past rape shields when they involved women previously intimate with the defendant, women who frequented bars to attract new sexual partners, prostitutes, or other women deemed similarly promiscuous. Although most rape shield laws . . . appear to bar the admission of a rape complainant's sexual history except under limited and carefully defined circumstances, their exceptions routinely gut the protection they purport to offer.<sup>81</sup>

Thus, prosecution of an accused rapist or other sexual offender in a forum other than a court-martial may both subject the victim to more harm and make

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79. Mil. R. of Evid. 412 (generally prohibiting evidence of a victim's behavior or sexual predisposition, with some exceptions). The Rule reads:

**Rule 412. Sex Offense Cases: Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition.**

- (a) Evidence Generally Inadmissible—The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
- (1) Evidence offered to prove any alleged victim engaged in other sexual behavior.
- (2) Evidence offered to prove any alleged victim's sexual predisposition.
- (b) Exceptions—
- (1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:
- (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than an accused was the source of semen, injury or other physical evidence;
- (B) evidence of specific instances of behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
- (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

80. MCM, *supra* note 24, R.C.M. 412 (1998 ed.).

81. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. Law Rev. 51, 55 (2002).

it less likely that the offender will be brought to justice. This issue may be speculative, but, nonetheless, should be considered before doing away with court-martial jurisdiction for these offenses.

And will an astute defense counsel make something out of the Sixth Amendment to the U.S. Constitution, which states, in pertinent part, that “the accused shall enjoy . . . a right to a speedy and public trial, by an impartial jury of the State and district wherein the crimes shall have been committed?”<sup>82</sup> What if the crime was committed in Kabul, Afghanistan?

Further, the military has more specific rules concerning cruel and unusual punishment than the Eighth Amendment’s general prohibition against cruel and unusual punishment.<sup>83</sup> For example, is the punishment cruel and unusual under the civilian court system, which, if it is, could result in the release of the offender? Or does Congress have to make the U.C.M.J.’s prohibition against cruel and unusual punishment inapplicable to cases transferred to civilian authorities? Think of the litigation costs inherent in such issues. Perhaps, these proposed statutes should be titled “The Military Civilian Defense Counsel’s Full Employment Act.”

Finally, because courts-martial are Article I courts and federal district courts are Article III courts,<sup>84</sup> is a constitutional amendment necessary to transfer sexual assault cases from a court created under the executive power to an Article III court?

Some issues seem to be subject to characterization as either substantive or procedural, such as the right to bail and the right to a speedy trial.<sup>85</sup> This type of issue will be discussed below.

### C. Procedural Law Issues

The U.C.M.J. provides a number of due process protections for accused servicemembers that may be eviscerated by ceding military jurisdiction to domestic or foreign civilian jurisdictions, such as the right to counsel;<sup>86</sup> the right to a speedy trial;<sup>87</sup> the right to a military magistrate review of pretrial

82. Emphasis added.

83. UCMJ § 55, 10 U.S.C. § 855 (2012) (prohibiting punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, and such punishments may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited).

84. *Article I and Article III tribunals*, LAW GURU.COM WIKI (last visited Nov. 6, 2014, 12:52 PM), [http://wiki.lawguru.com/index.php/Article\\_I\\_and\\_Article\\_III\\_tribunals](http://wiki.lawguru.com/index.php/Article_I_and_Article_III_tribunals) (citing U.S. CONST. art. I and III).

85. See, e.g., Kimberly A. Orem, *Evolution of an Eighth Amendment Dichotomy: Substantive and Procedural Protections within the Cruel and Unusual Punishment Clause in Capital Cases*, 12 CAP. DEF. J. 345, 346 (2000), available at: <http://scholarlycommons.law.wlu.edu/wlucdj/vol12/iss2/5>.

86. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence”); see also *United States v. Cain*, 59 M.J. 285, 294 (C.A.A.F. 2004).

87. MCM, *supra* note 24, R.C.M. 706 (2012).

confinement, which must consider lesser restraints, such as restriction or arrest in quarters;<sup>88</sup> what discovery and production of witnesses changes will result;<sup>89</sup> what appellate review is available;<sup>90</sup> and where and under what conditions confinement is served, including parole possibilities.<sup>91</sup>

The U.S. Constitution does provide for a right to counsel, but military law provides for a greater right. The Sixth Amendment to the U.S. Constitution simply states that the accused shall enjoy the right to have the assistance of counsel for his defense.<sup>92</sup> This right does not, however, require that counsel be provided at government expense to all those accused of a crime.<sup>93</sup> Generally speaking, civilian jurisdictions have to provide counsel only to indigent defendants. Being indigent, however, is not a prerequisite to free military counsel. Rule for Courts-Martial 506 specifies that the accused has a right to be represented before a general or special court-martial by civilian counsel at no expense to the government and either by military counsel detailed under Article 27, U.C.M.J.,<sup>94</sup> or by military counsel of the accused's own selection if reasonably available. If a servicemember is tried in a civilian court for a military sexual assault, will he qualify for a public defender from that jurisdiction?

The military's right to a speedy trial is greater than the constitutional right under the Sixth Amendment, which simply says that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial."<sup>95</sup> In *Barker v. Wingo*, the U.S. Supreme Court laid down a four-part case-by-case balancing test for determining whether the defendant's speedy trial right has been violated:

- *Length of delay.* A delay of a year or more from the date on which the speedy trial right "attaches" (the date of arrest or indictment, whichever first occurs) was termed "presumptively

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88. *Id.* 305(i)(1).

89. *Id.* 701 and 703 (Rule 701 contains the discovery rules and specifies the right to the production of witnesses along with Rule 703).

90. *Id.* 1112, 1203(c), 1204, and 67(h)(1)(2) (review by a judge advocate is provided for by R.C.M. 1112, by a service Court of Criminal Appeals, in R.C.M. 1203(c), by the Court of Appeals for the Armed Forces in R.C.M. 1204, and to the Supreme Court in UCMJ § 67(h)(1)(2), 10 U.S.C. 867(h)(1)(2) and R.C.M. 1205).

91. *Id.* 305(g).

92. U.S. CONST. amend. VI.

93. The U.S. Supreme Court has held, since as early as 1961, that counsel had to be provided at no expense to defendants in capital cases when they so requested, even if there was no "ignorance, feeble mindedness, illiteracy, or the like." *Gideon v. Wainwright*, 372 U.S. 335 (1963) (finding that counsel must be provided to indigent defendants in all felony cases).

94. Defense counsel under this article must be a judge advocate who is a graduate of an accredited law school or a member of the bar of a Federal Court or of the highest court of a state and be certified as competent to perform such duties by the Judge Advocate General of the Armed Service of which he is a member. UCMG § 27(b), 10 U.S.C. § 827(b) (2012). *See also* MCM *supra* note 24, R.C.M. 506.

95. U.S. CONST. amend. VI.

prejudicial,” but the Court has never explicitly ruled that any absolute time limit applies.

- *Reason for the delay.* The prosecution may not excessively delay the trial for its own advantage, but a trial may be delayed to secure the presence of an absent witness or other practical considerations (e.g., change of venue).
- *Time and manner in which the defendant has asserted his right.* If a defendant agrees to the delay when it works to his own benefit, he cannot later claim that he has been unduly delayed.
- *Degree of prejudice to the defendant which the delay has caused.*<sup>96</sup>

The military’s speedy trial right is stricter than the constitutional one. Under R.C.M. 707, the accused must be brought to trial within 120 days of the earlier of the prefferal of charges or the impositions of restraint (such as pretrial confinement or restriction to limits).<sup>97</sup> Failure to afford a speedy trial can result in the dismissal of the charges.<sup>98</sup> The authors’ experience is that civilian criminal prosecutions can drag on for months, if not years, whereas military courts-martial seldom do. Such delay, while perhaps harming the accused, who may be incarcerated for a lengthy period, can certainly harm the victim by adding to the adverse effects of the sexual assault the inability to get closure for a prolonged period.<sup>99</sup>

96. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

97. *See* MCM, *supra* note 24, R.C.M. 304(a)(2)-(4) and 707(a) (2012).

98. MCM, *supra* note 24, R.C.M. 707(d). Under this rule, the charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether the dismissal is with prejudice, the court shall consider, among others, each of the following factors:

- Seriousness of the offense.
- Facts and circumstances of the case that lead to dismissal.
- Impact of a reprosecution on the administration of justice.
- Any prejudice to the accused resulting from the denial of a speedy trial.

99. *The Closure Myth*, EQUAL JUSTICE USA (last visited Oct. 27, 2014), <http://ejusa.org/learn/victims>. Although the article pertains to the delay inherent in death penalty cases, its analysis would seem to pertain to delay in reaching a resolution of a non-death penalty case involving sexual assault. It states:

To be meaningful, justice should be swift and sure. The death penalty is neither. It prolongs pain for victims’ families, dragging them through an agonizing and lengthy process that holds out the promise of an execution at the beginning but often results in a different sentence in the end. Meanwhile, it showers scarce resources on a few cherry-picked cases while the real needs of the vast majority of victims’ families are ignored.

*Id.* The article continues with a quote from the family of a victim:

[The death penalty means victims’ families are] putting their lives on hold for years, sometimes decades, as they attend new hearings and appeals and relive the murder. —Gail Rice, whose brother Bruce VanderJagt, a Denver policeman, was murdered in 1997.

Pretrial confinement differs for servicemembers depending on whether they face court-martial or a civilian trial. The Seventh Amendment prohibits excessive bail, whereas the U.C.M.J. does not provide a right to bail. Rules for Courts-Martial 305 governs pretrial confinement and defines it as physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.<sup>100</sup> The Rule specifies that no person may be ordered into confinement except upon probable cause, defined as a reasonable belief that the servicemember committed an offense triable by court-martial, and confinement is required by the circumstances.<sup>101</sup> Pretrial restraint can also consist of restrictions on liberty short of confinement, including restrictions on liberty (do not contact the victim), restriction to specified limits (the unit area, the installation, and the like), and arrest, typically in quarters.<sup>102</sup>

Removing sexual assault cases from court-martial jurisdiction raises questions in this area. Besides the harm to low-ranking accused who cannot make bail and may be confined pending trial when their military unit would only restrict them to a specified area, such as the installation, is it possible that such offenders would make bail and further harm the victims? This possibility appears greater in civilian jurisdictions than military, where a military judge or magistrate must find, among others, that the prisoner will not engage in serious criminal misconduct, such as intimidation of witnesses or other obstruction of justice or other offenses that pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States.<sup>103</sup> The Rule requires review of pretrial confinement by a neutral and detached officer, typically a military judge or magistrate, within 48 hours and, again, after seven days.<sup>104</sup> Although this thought is perhaps speculative, it would seem that the military would be more likely to keep an accused sexual offender in confinement, considering that the accused has no right to bail, than a civilian court, thereby threatening the victim or others. At the least, this issue is one that needs to be considered before deciding to remove court-martial jurisdiction over sexual assault cases.

Will civilian discovery and production of witnesses deprive or limit accused servicemembers of full discovery or full production of witnesses in sexual assault cases? Under R.C.M. 703(b), each party is entitled to the production of any witness whose testimony on a matter in issue is relevant and necessary.<sup>105</sup> Although the defense must submit a request to the trial counsel for the production of witnesses, the trial counsel must produce the witnesses unless

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*Id.* Sexual assault victims may certainly face similar harm, dragging out their pain, preventing closure, and the like from the likely increased delay in such trials inherent in the civilian system, even assuming that civilian prosecutors would take such cases seriously.

100. *See* MCM, *supra* note 24, R.C.M. 305(a) (2012).

101. *Id.* 305(d).

102. *Id.* 304.

103. *Id.* 305(h)(2)(B).

104. *Id.* 305(i).

105. *Id.* Rule 703(b).

the witnesses' production is not required under the rule.<sup>106</sup> If the trial counsel denies the request, the matter may be submitted to the military judge.<sup>107</sup> If the judge grants the request, the trial counsel must produce the witness, or the judge must abate the proceedings.<sup>108</sup> Civilian courts are unlikely to produce defense witnesses if the prosecution must pay for them other than perhaps a court-ordered expert witness, such as in a mitigation expert in a death penalty case.<sup>109</sup>

What appellate review will be available? Removing sexual assault cases from military jurisdiction likely will result in civilian review rather than that of the various services' courts of criminal appeals, quite possibly to the convicted servicemembers' detriment. Under R.C.M. 1203, certain servicemembers have a mandatory review of their conviction and sentence by their service's court of criminal appeals.<sup>110</sup> This review, unlike any civilian appellate court, includes reviewing whether the record of trial includes sufficient evidence to prove guilt beyond a reasonable doubt.<sup>111</sup> Although omitting this greater protection for the convicted sexual offender may not help the victim, unless convicting the wrong alleged offender leaves the real perpetrator free to strike again, it is a significant protection against an innocent who has been accused being convicted. Co-author Tomes obtained an acquittal in a court-martial for rape by adducing the statement of the law enforcement officer that, when he was transporting the

106. *Id.* Rule 703(c)(2)(D).

107. *Id.*

108. Halt until the witness is produced.

109. *See, e.g.*, VA. CODE ANN. § 19.2-264.3:1 (LexisNexis 2008) (providing a mental health expert to determine *inter alia* "whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense"); OHIO REV. CODE ANN. § 2929.024 (LexisNexis 2004) (requiring the court to provide an indigent defendant charged with aggravated murder expert assistance whenever necessary for proper representation during the sentencing phase of the trial). *See generally*, Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. REV., 359, 373-377 (1997).

110. MCM *supra* note 24, R.C.M. 1201(a) (2012) (requiring the Judge Advocate General of the concerned service to refer to that service's court of criminal appeals cases in which—

(1) the sentence, as approved by the convening authority, extends to death or

(2)(A) the sentence, as approved extends to dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for one year or longer, and

(3) The accused has not waived or withdrawn appellate review).

111. MCM *supra* note 24, R.C.M. 1203(b) (2012). Discussion specifies that a Court of Criminal Appeals may affirm only such findings of guilty as it finds correct in law *and in fact* and determines on the basis of the entire record should be approved. The court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the court-martial saw and heard the evidence. *See, e.g.*, U.S. v. Middleton (not reported in M.J.) 927697 (N.M. Ct. Crim. App.) (evidence factually insufficient to prove beyond a reasonable doubt that the appellant intended to overcome any resistance with force and have sexual intercourse and commit sodomy with the complainant against her will).

alleged victims to the hospital, they said, "This will teach our dates not to spend any money on us."

And the limitations on adducing evidence at an Article 32b investigation or doing away with such an investigation totally by removing sexual assault cases from military jurisdiction may not be a panacea. Besides the potential harm to the accused from perhaps having to undergo a court-martial in a case in which he could have adduced evidence at an Article 32b investigation to show that he was not guilty, limitations on or doing away with an Article 32b investigation has costs, not the least of which are the additional costs and the dragging out time invested in of the process and potential embarrassment of the alleged victim.<sup>112</sup>

Will a convicted servicemember be returned to military control to be confined in the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas, or another military confinement facility, or in a federal or a state civilian facility? Why is this question an issue? The possibility of early release because of parole, credit for good time, and perhaps a judge's order that overcrowding is cruel and unusual punishment and that inmates must be released may result in an offender being released far earlier in a civilian confinement scenario than if confined in a military facility, again perhaps threatening the victim or at least adding to the victim's unease and inability to put the matter in the past behind her. And all this discussion assumes that the civilian court imposes as lengthy a period of confinement as a military court would. Furthermore, each state would have different rules for parole and other release from confinement. Has any of the proposed legislation considered this issue? It appears not. And as will be indicated in the practical problems section below, who is going to pay for these confinements? The U.S. Government Accountability Office has noted that, over

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112. In one case in which co-author Tomes and his law partner, Richard D. Dvorak, defended an Army Sergeant for alleged fraternization, they, as required by R.C.M. 701(b)(1), provided to the trial counsel (prosecutor) notice of their client's alibi. The alleged victim (because those who had had sexual relations with her outranked her) had entered into an agreement that she would not be prosecuted but rather given a discharge if she "testified truthfully." R.C.M. 704(c) authorizes convening authorities to grant immunity to witnesses. Although the alleged fraternizee (not that there is such a word) testified in her initial sworn statement, under oath at the Article 32b investigation, and at preliminary hearings at the trial before the actual trial on the merits testified that the fraternization had occurred in a picnic area on post on Saturday night, she produced a diary the day before the trial in front of the court members recounting that the fraternization had occurred on the day before she had said that it had in her sworn testimony. Over vehement defense objection, such as hearsay, surprise, and failure to produce the evidence under the military's discovery rules, the military judge inexplicably allowed the diary into evidence. Cross-examination of the alleged victim was not pretty, although it complied with Article 31(c)'s prohibition compelling persons to make statements or produce evidence if not material and would tend to degrade the person. After the final cross-examination question and counsel's statement, "No further questions," the alleged victim gratuitously stated, "I guess this makes me look like a lying slut." The accused was acquitted. Other exculpatory evidence included her lack of knowledge of certain physical characteristics of the accused that intercourse could not have failed to disclose and military police logs showing that their patrols saw no activity at the picnic area at the time in question. See Connie Parish, *Sergeant Acquitted in USDB Court-Martial*, THE LEAVENWORTH TIMES, March 5, 1999, at 1.

the period from 1996 to 2006, the cost to confine Federal Bureau of Prison inmates in non-BOP facilities—that is, state or private prisons—has nearly tripled from about \$250 million in fiscal year 1996 to about \$700 million in FY 2006.<sup>113</sup> Another report by the organization, “The Price of Prisons,” states that the cost of incarcerating one inmate in Fiscal Year 2010 was \$31,307 per year. It added that “[i]n states like Connecticut, Washington state, New York, it’s anywhere from \$50,000 to \$60,000.”<sup>114</sup> Will removing court-martial jurisdiction over sexual assault cases and requiring the states to try them result in another unfunded federal mandate on already fiscally strapped states?

And other procedural law issues may arise as this unfolding legislation plays out.

#### D. Practical Issues

Besides the costs inherent in non-military imprisonment and procedural law issues discussed immediately above, other costs are inherent in these proposals. Among them are the following costs:

- Costs inherent in the investigation of such allegations. Will the services’ criminal investigation divisions investigate the crime, or will the FBI (for federal jurisdiction cases) or state law enforcement agencies have to investigate the complaints with their attendant costs?
- Will the military’s crime laboratories handle the evidence in such cases, or again, will civilian crime laboratories have to assume the duties, with their attendant costs and delays, which may contribute to the speedy trial issues?
- Costs inherent in the trial of such cases, including travel costs for witnesses, who, in a military case, may have been reassigned all over the globe,<sup>115</sup> expert witness fees, mental health evaluations as to fitness to stand trial and whether a mental health issue

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113. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-6, COSTS OF PRISONS (2007), available at <http://www.gao.gov/products/GAO-08-6> (Report to the Subcommittees on Commerce, Justice, and Science, House and Senate Appropriations Committees).

114. *The Cost of a Nation of Incarceration*, CBS NEWS, April 23, 2012, <http://www.cbsnews.com/news/the-cost-of-a-nation-of-incarceration/>.

115. In one case in which co-author Tomes defended a sailor in Yokosuka, Japan, on internet pornography charges, the cost of bringing witnesses to Yokosuka from the East Coast of the United States and from all over the Pacific was in excess of \$100,000. When attorney Tomes submitted a winning motion that would have delayed the trial and resulted in all the witnesses having to come back later, the Navy entered into a plea bargain that protected the client from a punitive discharge, loss of more than one grade in rank, and more than a couple months’ confinement. Because, in the military, a pretrial agreement just sets a ceiling on the sentence and if the judge or jury adjudges a lighter one, the lighter one is the sentence, the accused was sentenced to a reprimand. Better than a dishonorable discharge and the 65 years’ confinement that he had been facing.

constitutes a defense,<sup>116</sup> salaries and associated expenses for public defenders if the accused servicemember qualifies for such assistance of counsel, and the like.<sup>117</sup>

- Costs of appeals (and potential retrials if an appeal succeeds).

Another issue is whether U.S. Attorneys or state prosecutors, such as state or county attorneys, will be willing to work with or even talk to military victim's advocates as provided for in the National Defense Authorization Act for fiscal year 2014. Most busy state's attorneys are, in the authors' opinion, unlikely to deal with yet another bureaucratic issue, especially for a victim who may not be a voting member of that jurisdiction but rather have suffered a sexual assault only as a result of being there on military orders.

And what about the further congestion of civilian courts? Could adding military sexual offenses further clog the courts so that prosecutors enter into so-called "sweetheart" (probably the wrong word to use here) deals to move cases along? This congestion could certainly also affect the speedy trial issue discussed above if defendants in military sexual assault cases do not plead guilty to get a favorable plea bargain.

Even if any change does not remove sexual assault crimes from court-martial jurisdiction, removing commanders from the process, as proposed by Senator Gillibrand in her Military Justice Improvement Act (MJIA) S.1752, may not be salutatory. In co-author Tomes' experience, commanders, especially those who have the quasi-judicial role of being a convening authority, take their lawyer's advice in almost all cases.<sup>118</sup> Further, the proposal to replace the commander's role with seasoned military trial and defense counsel is not well thought out. First, not many seasoned military trial and defense counsel exist. When co-author Tomes tried courts-martial, the forces still had conscripted individuals, and he would try five to eight cases a week on average. Now, with an all-volunteer force, a military trial counsel (prosecutor) or defense counsel is lucky to try five to eight a year, and most of those are guilty pleas because, in the authors' opinions, the dearth of cases makes counsel leery to actually try cases. Further, the ability to try cases is

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116. And if the rape includes a murder and is prosecuted as a capital offense, what about the costs of government-provided mitigation experts? See Jonathan P. Tomes, *Damned If You Do*, *supra* note 111 at 359..

117. The Ohio Justice and Policy Center, for example, estimated the cost of prosecuting adult criminal cases in Hamilton County, Ohio, to be \$42,000 per courthouse hour, a figure that does not appear to cover all the pretrial investigative costs but did include post-trial incarceration costs. OHIO JUST. & POL'Y CTR., \$42,000 FOR A COURTHOUSE HOUR (2010), available at [www.ohiojpc.org/text/publications/court%20cost.pdf](http://www.ohiojpc.org/text/publications/court%20cost.pdf).

118. The only case in which a convening authority did not take the author's recommendation when he was trial counsel (prosecutor) was a case in which a female non-commissioned officer was a victim of disrespect and disobedience of her order. The evidence was weak, however, and Tomes recommended not trying the case so that the accused could not brag about how the commander had tried to court-martial him but could not. The commander said words to the effect of "Captain Tomes, you are undoubtedly right, but it is more important that I support my female non-commissioned officers than it is that we win the case" and ordered trial. Parenthetically, the accused was convicted.

circumscribed by rank structure. Only first lieutenants, captains, and an occasional major will be assigned as a trial counsel.<sup>119</sup> After one makes field grade (major through colonel), trying cases is not how individuals are promoted. One must “punch his (or her) tickets”: the advanced course for lawyers of his or her service, assignment as a deputy staff judge advocate, an instructorship at a JAGC school, a Pentagon tour, a staff judge advocate position, etc.<sup>120</sup> Likewise, staying in the courtroom instead of punching one’s ticket is not how to get promoted.<sup>121</sup> Nor would assignment to an organization deciding the disposition of military sexual assaults be likely to be viewed as a plum assignment where the best and brightest might volunteer to serve. More likely, it would be a terminal assignment, where colonels or lieutenant colonels who are not going to be promoted any higher would be “put out to pasture.” Although excellent military criminal trial lawyers exist, they are hardly likely to be frothing at the chance to get such an assignment.

The possibility of giving accusers a greater say in whether civilian courts or courts-martial adjudicate their cases raises another practical problem: How does the accused know which is better for their case? How many attorneys intimately know both the military justice system and the civilian system in which the case would be tried, assuming that the jurisdictional issues discussed above could be resolved? Without decrying the ethics of any attorney retained by a sexual assault victim, how many civilian attorneys would automatically default to recommending trial in the civilian court system that they are familiar with rather than recommending letting the military handle the case? Or, vice-versa, if the military victim advocate recommends the familiar military system? Or defaults to the possibly politically correct recommendation to let the civilian

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119. See Military Justice Improvement Act (MJIA), S.1752, 113th Cong. (2013) and accompanying text. However, in the court-martial of Brigadier General Sinclair, the lead trial counsel was a lieutenant colonel, probably because of the high rank of the accused. See Blinder, *supra* note 19.

120. Stephen C. Webster, *Free at Last,—Army Intelligence Analyst Buswell ‘The 9/11 NCO’ Speaks Out*, (May 13, 2008), [http://www.amfirstbooks.com/IntroPages/ToolBarTopics/Articles/Featured\\_Authors/may,\\_captain\\_eric/May\\_works.by.others/2008/Stephen\\_C.\\_Webster\\_20080513\\_Army\\_Intelligence\\_Analyst\\_Buswell,\\_%60The\\_9-11\\_NCO;\\_Speaks\\_Out.html](http://www.amfirstbooks.com/IntroPages/ToolBarTopics/Articles/Featured_Authors/may,_captain_eric/May_works.by.others/2008/Stephen_C._Webster_20080513_Army_Intelligence_Analyst_Buswell,_%60The_9-11_NCO;_Speaks_Out.html) (quoting Sergeant First Class Donald Buswell) (“I always wanted to go into the Army. I looked at it as a ticket out, as a way to go different places, see a thing or two in my life. *But before I did that, I was very mindful of punching tickets on the way up.*”) (emphasis added); Steven Dundas, *Marshall, Eisenhower and Senior Military Leadership*, PADRE STEVE’S WORLD (Dec. 18, 2009 23:59), <http://padresteve.com/tag/chief-of-naval-operations/> (“[‘]Better[‘] in the military is in the eye of the beholder and often dependant [sic] on assignments as well as the superiors that one works for. . . [i]f we look at Marshall and his impact one has to ask if [‘]punching tickets[‘] in the combat arms is necessarily optimal when it comes to managing the organization at the service level.”).

121. Co-author Tomes applied for and was selected to be a military judge when he was due to be promoted to major, as this was the only way that he could remain in the courtroom. His decision may not have been career-enhancing, however, especially when, as a military judge, he found that Fort Campbell’s correctional custody facility constituted cruel and unusual punishment and effectively shut it down.

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court, with its possible disinterest in trying the case, greater delay, possibility of bail, and the other possible adverse consequences detailed above?

None of the proposed legislation appears to have thought out the practical consequences of these changes. But what of the unintended consequences?

### *E. Unintended Consequences*

The law of unintended consequences is that the actions of people—and especially of the government—always have effects that are unanticipated or unintended.<sup>122</sup>

No one can be certain of what the unintended consequences of whatever changes to the military justice system may be. Perhaps, we can only speculate. But considering the possible unintended consequences may be helpful in deciding what measures may be salutary and which may be harmful.

For example, for all we know, victims of sexual assault may be even less willing to report sex crimes to civilian authorities than to military ones, fearing

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122. Bob Norton, *Unintended Consequences*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, <http://www.econlib.org/library/Enc/UnintendedConsequences.html> (last modified 2008) (Quoting Norton; the authors' comments follow in brackets):

The first and most complete analysis of the concept of unintended consequences was done in 1936 by the American sociologist Robert K. Merton. In . . . "The Unanticipated Consequences of Purposive Social Action," Merton identified five sources of unanticipated consequences. The first two—and the most pervasive—were "ignorance" and "error." [From the foregoing analysis of the proposals to correct the problems inherent in the military response to sexual assaults, one cannot rule out ignorance and error in the proposals.]

Merton labeled the third source the "imperious immediacy of interest." By that he was referring to instances in which someone wants the intended consequence of an action so much that he purposefully chooses to ignore any unintended effects. . . The Food and Drug Administration, for example, creates enormously destructive unintended consequences with its regulation of pharmaceutical drugs. By requiring that drugs be not only safe but efficacious for a particular use, as it has done since 1962, the FDA has slowed down by years the introduction of each drug. An unintended consequence is that many people die or suffer who would have been able to live or thrive. . . [Again, can one rule out politicians ignoring the unintended consequences if the proposed solution advances their agenda?]

[\*]Basic values[\*] was Merton's fourth source of unintended consequences. The Protestant ethic of hard work and asceticism, he wrote, "paradoxically leads to its own decline through the accumulation of wealth and possessions." [So as discussed above, will the creation of extra protection for sexual assault victims paradoxically lead to more harm to female service members as being lesser beings that need extra protection in the military?]

His final case was the "self-defeating prediction." Here he was referring to the instances when the public prediction of a social development proves false precisely because the prediction changes the course of history. For example, the warnings earlier in [the last] century that population growth would lead to mass starvation helped spur scientific breakthroughs in agricultural productivity because it made it unlikely that the gloomy prophecy will come true.).

the effects of their case being dragged through a non-responsive civilian system.

Nor do we know the effect on morale, good order and discipline, and combat readiness of treating one class of victims differently from others and setting up such a complicated and bureaucratic system for trying such cases. Might not treating female servicemembers as somehow greater victims that need extra protection support the beliefs behind the warrior mystique that only males are warriors, thereby further disadvantaging female servicemembers when it comes to getting good assignments, promotions, military schooling, and the like?

Is it possible that removing military sex offenses from the military justice system will embolden those who might commit such crimes in the belief that the military justice system is more likely to impose a certain and severe punishment (whether that theory is true or not) than a civilian court?

Might not other remedies for victims of military sexual assault better compensate them than removing commanders from the process or removing such crimes from cognizance in the military justice system entirely? For example, Title VII could be made applicable to female servicemembers as it is to civilian employees of the Armed Forces.<sup>123</sup>

If the cases remain in the military justice system, a mandatory discharge result in an acquittal under the theory of jury nullification because the court members do not want to characterize a decorated warrior's service as dishonorable and take away all military and veterans' benefits?<sup>124</sup>

If sexual assault cases are removed to civilian jurisdictions or the commander's authority is otherwise circumscribed, might commanders view sexual assault as someone else's problem? Might they no longer stress that real warriors do not prey on female (or male) victims? Might commanders stop proscribing so called "jody calls" when marching, such as "I don't know but I've been told, Eskimo women are kinda cold." And that rendition is about the most politically correct of such marching chants.<sup>125</sup>

The law of unintended consequences is certainly not limited to tinkering with the military justice system without considering adverse effects of a

123. See Spak and McCart, *supra* note 10, at 81, 104-105.

124. See *supra* notes 7 and 44 and accompanying text. Thanks go to Andrew Brooks, acknowledged for his contribution to this article, *supra* note 1, for fleshing out this issue on jury nullification.

125. *Military Cadence*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Military\\_cadence](http://en.wikipedia.org/wiki/Military_cadence) (last modified Sept. 16, 2014 16:55) ("Prior to women becoming commonplace in Army ranks, misogynistic comedic cadences were more prevalent . . . [such as these, for example]:

See that lady wearing brown? She makes her livin' goin' down. . . She's a deep-sea diver. . . a deep sea diver.

See that lady wearing black? She makes her livin' on her back. . . she's a back-stroke swimmer. . . a back stroke swimmer.

See that lady from the south? She makes her living with her mouth. . . she's a rock 'n' roll singer. . . a rock 'n' roll singer. . .

I don't know but I've been told, Eskimo pussy is mighty cold.").

change.<sup>126</sup> It applies to both governmental and also private interventions, such as in the following examples.

After about 1900, the American public pressured the federal government to fight forest fires in the American West. In response, the government set aside land as national forests and parks to protect them from fires. Although this policy led to fewer forest fires, it led to the growth of forests that resulted in much larger and more damaging fires. Modern research concludes that this policy was misguided and, further, that wildfires are a natural and important part of forest ecology.<sup>127</sup>

The introduction of non-native animals and plants, such as for food, often leads to more harm than good done by the introduced species. For example, the introduction of rabbits to Australia and New Zealand for food by a farmer was followed by an explosive growth in the rabbit population because rabbits have no natural enemies there. As a result of their introduction, they have become a major feral pest and have harmed farmers by in those countries by eating their crops.<sup>128</sup>

The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)<sup>129</sup> the Department of Health and Human Services (“DHHS”) regulations implementing HIPAA, the Health Information Health Information Technology for Economic and Clinical Health Act (“HITECH Act”)<sup>130</sup> modifying HIPAA, and the Omnibus Rule modifying the HITECH Act have certainly had unintended consequences. These laws and regulations have resulted in an expansion of HIPAA business associate liability in general<sup>131</sup> and have resulted in the possible federal regulation of lawyers.<sup>132</sup>

Of course, some actions may have positive unintended consequences. Aspirin, for example, was originally intended only as a pain reliever but is also

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126. See generally Mark J. Perry, *Five examples of the Law of Unintended Consequences*, AEIDEAS (Jan. 12, 2014, 11:41 AM), <http://www.aei-ideas.org/2014/01/five-examples-of-the-law-of-unintended-consequences/>.

127. Christopher Joyce, *How the Smokey Bear Effect Led to Raging Wildfires*, NAT'L PUB. RADIO (August 23, 2012, 6:30AM), <http://www.npr.org/2012/08/23/159373691/how-the-smokey-bear-effect-led-to-raging-wildfires>.

128. *The Rabbit Proof Fence*, PANDORA: AUSTRALIA'S WEB ARCHIVE, <http://pandora.nla.gov.au/pan/43156/20040709-0000/agspsrv34.agric.wa.gov.au/programs/app/barrier/history.htm>.

129. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1396.

130. American Recovery and Reinvestment Act of 2009, Health Information Technology for Economic and Clinical Health Act of 2009 (HITECH Act), Title XIII, Pub. L. 111-5, 123 Stat. 258.

131. See generally Jonathan P. Tomes, *The Law of Unintended (Financial) Consequences: The Expansion of HIPAA Business Associate Liability*, 39 J. OF HEALTH CARE FIN.28, 28-35 (Summer 2013).

132. See generally Jonathan P. Tomes, *Federal Regulation of Lawyers?* 17 AHLA CONNECTIONS 20, 20 (August 2013).

an anticoagulant that can help prevent heart attacks and reduce the severity of and damage from strokes.<sup>133</sup>

But the authors cannot imagine any positive unintended consequences of the proposed legislation. And even if any do indeed exist, they would be well beyond the scope of this article, the purpose of which is to point out the problems with the proposed legislation.

#### CONCLUSION

None of the foregoing is intended to place insurmountable barriers to addressing this very real problem. But what no one needs, least of all the victims of military sexual assaults, is a knee-jerk reaction that does not consider what the best way is to address the problem. What we do not need is Congresspersons who have never spent a day in the military proposing legislation without considering the issues highlighted in this article. And certainly, this article does not propose a perfect solution. The authors hope, however, that this article will serve as a resource to identify problems with various proposals to address this issue and help find realistic and helpful solutions to “treat sexual assault victims as commanders’ beloved offspring.”

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133. *Diseases and Conditions, Heart Disease, Daily Aspirin Therapy: Understand the Benefits and Risks*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/heart-disease/in-depth/daily-aspirin-therapy/ART-20046797> (last modified 2014).