

RESTRUCTURING U.S. MILITARY JUSTICE THROUGH A COMPARATIVE ANALYSIS OF ISRAEL DEFENSE FORCES

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The military justice system is broken. Currently, commanders have almost complete discretion to decide how to handle an allegation of military sexual assault. This unchecked command discretion chills victim reporting and fosters a culture of sexual assault that is unparalleled in the civilian criminal justice system. Command discretion is further flawed because commanders are unable to dispose of sexual assault cases in an unbiased and educated manner. Congress has failed to adequately safeguard sexual assault victims' rights in past and present National Defense Authorization Acts. Proposed legislation in the Military Justice Improvement Act, however, restructures the military justice system to provide a system that removes sexual assault allegations from the chain of command, while preserving the commanding officer's authority to dispose of crimes unique to the military. The Military Justice Improvement Act is modeled on Israel's Military Justice Law that removed sexual assault allegations from the chain command. Removing the allegations of sexual assault from the chain of command increased reporting and prosecution rates. Notably, removing these allegations from the chain of command has not affected Israel's military readiness—a frequent argument of proponents who contend that eliminating a commander's discretion to handle these allegations will somehow diminish military readiness. This article compares the current military justice system to the civilian criminal justice system and to Israel's military justice system to highlight the shortcomings of the current system. The article then examines how the Military Justice Improvement Act addresses and remedies the shortcomings of the current military justice system. Finally, the article addresses frequent arguments against military justice reform by reference to the success of Israel's reformed military justice system, and advocates for the adoption of the Military Justice Improvement Act.

[†] The author's first-hand experience serving in the Air Force influenced her decision to write this article to raise awareness to the injustices that are so readily displayed within the military justice system. See CBS News, *Current and Former Cadets Speak out on Sexual Assault at Air Force Academy*, CBS THIS MORNING, Dec. 11, 2017, <https://perma.cc/WP9C-VTZE>. The author would like to thank her significant other, Kristopher Morton, and her academic advisors, Mary Pat Treuthart and Jessica Kiser, for their help editing and critiquing this article.

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INTRODUCTION

Under the current U.S. military justice system, commanding officers have almost complete discretion to decide how to proceed with an allegation of military sexual assault.¹ The command-driven military justice system chills victim reporting, results in victim retaliation, and fails to hold perpetrators accountable.² Proposed legislation in the Military Justice Improvement Act (MJIA) restructures the military justice system to remove the conflicts of interest with commanders and provides adequate justice for victims.³ Opponents of the MJIA speculate that the restructuring will result in commanders' loss of control

1. See 10 U.S.C.S. § 815(b) (LEXIS through PL 115-277); see, e.g., *Cappella v. United States*, 624 F.2d 976, 978 (Ct. Cl. 1980) ("[T]he commanding officer has broad discretion to determine whether a particular alleged offense is sufficiently serious to warrant court-martial rather than non-judicial punishment . . .").

2. See U.S. DEP'T OF DEF., APPENDIX B: STATISTICAL DATA ON SEXUAL ASSAULT 8, 31, 41 (2018), http://sapr.mil/public/docs/reports/FY17_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf. [hereinafter SAPRO REPORT FY17].

3. See *Military Justice Improvement Act*, U.S. SENATE KIRSTEN GILLIBRAND, <https://perma.cc/WT4S-5783> (last visited Dec. 10, 2018) [hereinafter *Military Justice Improvement Act*].

and authority over service members.⁴ However, when the Israel Defense Forces (IDF) restructured Israel's Military Justice Law (MJL) in a similar manner to the MJIA, the IDF saw an increase in reporting and prosecution of sexual assault crimes and an immaterial effect on unit readiness and discipline.⁵

The epidemic of sexual assault within the military is not a new phenomenon. The media frequently reports on the occurrences of sexual assault within the military and the military's systemic failure to provide justice for victims.⁶ In recent years, Congress has attempted to address issues related to military sexual assault by enacting reforms under the National Defense Authorization Acts.⁷

Despite incremental reform and an enhanced congressional focus on the issue of military sexual assault, Congress has failed to protect service members and hold perpetrators accountable for these violent crimes.⁸ Since 2013, advocates for victims of military sexual assault have sought to restructure the

4. See *Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before the S. Comm. on Armed Services*, 113th Cong. 13 (2013) [hereinafter *Hearing Before the S. Comm. on Armed Services 2013*] (statement of General Raymond T. Odierno, Chief of Staff of the Army) (“[M]aking commanders less responsible and less accountable will not work. It will undermine the readiness of the force. It will inhibit our commanders’ ability to shape the climate and discipline of our units. . . . [I]t will hamper the timely delivery of justice to the very people we wish to help . . .”). Lorelei Laird, *An Attack on Assaults: Military Lawyers Confront Changes as Sexual Assault Becomes Big News*, ABA J., Sept. 2013, <https://perma.cc/JC82-3R7G> (explaining that the National Defense Authorization Act for Fiscal Year 2014 originally included a bill that would “authorize a military prosecutor — rather than a commanding officer — to decide whether to prosecute” but this provision was ultimately removed after military leaders said taking this initial disposition authority away from officers would undermine good order and discipline) (internal quotation marks omitted).

5. See *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 91 (statement by Sen. Gillibrand).

6. See Michael Winerip, *Revisiting the Military’s Tailhook Scandal*, N.Y. TIMES (May 13, 2003), <https://perma.cc/L4J6-N22P> (explaining that eighty-three women and seven men were sexually assaulted during the Navy’s 35th Annual Tailhook Symposium in September 1991); Craig Whitlock, *Pentagon Grapples with Sex Crimes By Military Recruiters*, WASH. POST (May 12, 2013), <https://perma.cc/UFA4-LYGD> [hereinafter *Sex Crimes by Military Recruiters*] (stating that more than thirty instructors at the Air Force’s basic-training school at Lackland Air Force Base in Texas are being investigated for sexual assault of recruits); Craig Whitlock, *Air Force General’s Reversal of Pilot’s Sexual-assault Conviction Angers Lawmakers*, WASH. POST (MAR. 8, 2013), <https://perma.cc/72PD-CZAS> (explaining when a three-star General in the Air Force overturned a jury’s conviction for sexual assault of an Air Force pilot); Michael R. Gordon & Helene Cooper, *Their Intimate Photos Were Shared. Now the Marine Corps Wants Them to Speak Up*, N.Y. TIMES (Mar. 10, 2017), <https://perma.cc/4CV2-YAW4> (“The Marine Corps has been rocked by disclosures that an all-male, invitation-only group called Marines United shared thousands of nude and other private photos of Marine Corps women.”).

7. See National Defense Authorization Act For Fiscal Year 2014, 113 Pub. L. 66, 127 Stat. 672 (2013); National Defense Authorization Act for Fiscal year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014); b National Defense Authorization Act for Fiscal year 2016, Pub. L. No 114-92, 129 Stat. 726 (2015); National Defense Authorization Act for Fiscal year 2017, Pub. L. No 114-328, 130 Stat. 2000 (2016).

8. See SAPRO REPORT FY17, *supra* note 2.

military justice system through the MJIA.⁹ The MJIA removes serious crimes from the chain of command and vests power to investigate and charge crimes with military prosecutors.¹⁰ Proponents of the MJIA frequently look to Israel's MJL and the Israel Defense Forces' handling of sexual assault cases for guidance.¹¹ This paper compares the current structure of the Uniform Code of Military Justice (UCMJ) with the MJL to illustrate how congressional reform in the United States has failed to adequately address the issue of military sexual assault.

Part I of this comment examines how sexual assault cases are currently handled under the UCMJ. Part II analyzes how recent sexual assault reforms have not adequately protected victims of military sexual assault. Part III details the criminal and disciplinary process within the IDF and its positive impact on reporting and prevention. Part IV responds to frequent arguments against restructuring the UCMJ to mirror the MJL. Finally, Part V concludes that removing serious crimes from the chain of command in the U.S. system is a necessary and appropriate remedy to address the issue of military sexual assault.

I. THE U.S. MILITARY'S HANDLING OF SEXUAL ASSAULT UNDER THE UCMJ

In the civilian criminal justice system, the steps of a complaint include: investigation, charging, plea bargaining, preliminary hearing, pre-trial motions, and trial.¹² A criminal charge in the military justice system follows a similar pattern as a complaint in the civilian criminal justice system.¹³ There are important distinctions that make the military justice system more confusing and complex than its civilian counterpart. The first major difference is the type of reports—*i.e.*, a restricted and unrestricted report.¹⁴ While the civilian justice system has the criminal complaint,¹⁵ the military justice system offers victims two different ways to report the crime.¹⁶ The second major difference is who is

9. See *Military Justice Improvement Act*, *supra* note 3; Emily Crockett, *The War In Congress Over Rape in the Military, Explained*, VOX (June 8, 2016), <https://perma.cc/N7NN-NBVL>.

10. See *Military Justice Improvement Act*, *supra* note 3.

11. See *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 91 (statement by Sen. Gillibrand).

12. U.S. DEP'T OF JUSTICE, STEPS IN THE FEDERAL CRIMINAL PROCESS, <https://perma.cc/NGD7-RB69> (last visited Oct. 7, 2019).

13. See *Military Justice Process*, PROTECT OUR DEFENDERS, <https://perma.cc/25LD-E6LZ> (last visited Dec. 10, 2018).

14. See U.S. DEP'T OF DEF., REPORTING OPTIONS, <https://perma.cc/QT4D-T4TN> (last visited Oct. 7, 2019).

15. See U.S. DEP'T OF JUSTICE, LEGAL TERMS GLOSSARY, <https://perma.cc/7FBK-TGV5> (last visited Oct. 7, 2019) (defining complaint as "A written statement by the plaintiff stating the wrongs allegedly committed by the defendant.").

16. U.S. DEP'T OF DEF., *supra* note 15.

vested with prosecutorial power—in the military justice system the military commander is vested with prosecutorial power.¹⁷

A. The Report and Initial Investigation

In the military, victims may report sexual assault as either a restricted report or an unrestricted report.¹⁸ A restricted report remains confidential for the purpose of ensuring that the victim receives resources, such as healthcare and mental health counseling, without resulting in an investigation.¹⁹ It is important to emphasize that a restricted report, if it remains confidential, will not result in an investigation nor a subsequent conviction.²⁰ It is important to emphasize that a restricted report, if it remains confidential, will neither result in an investigation nor a subsequent conviction.²¹

If a victim proceeds with an unrestricted report, then the report is referred to a Military Criminal Investigative Office (MCIO) to investigate the alleged conduct.²² The length of an investigation after it is referred to the MCIO varies, but it frequently spans several months from start to finish.²³ Factors affecting the length of MCIO's investigation include: the “[o]ffense(s) alleged[,]” “[l]ocation and availability of the victim, subject, and witnesses[,]” “[a]mount and kind of

17. See Exec. Order No. 12,473, 49 Fed. Reg. 17,152,17,155(Apr.23, 1984)]; *Current Command-Based Military Justice Process*, PROTECT OUR DEFENDERS, <https://perma.cc/26JW-2S39> (last visited Dec. 10, 2018) [hereinafter *Current Command-Based Military Justice Process*].

18. U.S. DEP'T OF DEF., *supra* note 14; see *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 15, at 17 (prepared statement by Gen. Raymond T. Odierno) (“Understanding the intensely personal nature of these crimes, the Army provides victims with [a restricted report option or unrestricted report option] for sexual assault victims in the Army. . . . The choice to make a restricted or unrestricted report is left to the discretion of the victim.”).

19. U.S. DEP'T OF DEF., RESTRICTED REPORTING, <https://perma.cc/R3JC-EEHJ> (last visited Oct. 7, 2019); see also SAPRO REPORT FY17, *supra* note 2, at 5.

20. U.S. DEP'T OF DEF., *supra* note 17 (stating that a restricted report may become an unrestricted report if the victim discloses the assault to a mandatory reporter or the victim chooses to make the report unrestricted); see also *Current Command-Based Military Justice Process*, *supra* note 15 (“A report to anyone other than those authorized to take restricted reports is considered unrestricted and must be investigated by one of the military's criminal investigation units, such as the Air Force Office of Special Investigation . . . A victim can choose to convert a restricted report to an unrestricted report at any time.”).

21. See U.S. DEP'T OF DEF., *supra* note 17 (stating that service members and their adult military dependents have two reporting options – restricted and unrestricted – and that under restricted reporting neither command nor law enforcement is notified); see also *Current Command-Based Military Justice Process*, *supra* note 18 (“A report to anyone other than those authorized to take restricted reports is considered unrestricted and must be investigated by one of the military's criminal investigation units, such as the Air Force Office of Special Investigation (OSI). A victim can choose to convert a restricted report to an unrestricted report at any time.”).

22. See U.S. DEP'T OF DEF., UNRESTRICTED REPORTING, <https://perma.cc/8JV8-8VXC> (last visited Oct. 7, 2019).

23. SAPRO REPORT FY17, *supra* note 2, at 14 (“[S]exual assault investigations and each subject's case disposition can span multiple reporting periods.”).

physical evidence gathered during the investigation[.]” and “[l]ength of time required for crime laboratory analysis of evidence[.]”²⁴

B. Pre-Trial Procedures

After the MCIO investigation is complete, the MCIO forwards a Report of Investigation to the accused’s immediate commander, the staff judge advocate (SJA), and the legal office of convening authority.²⁵ The SJA advises on all legal matters affecting the operations of the Command.²⁶ The immediate commander’s SJA reviews the Report of Investigation and recommends to the immediate commander whether the accused should be charged.²⁷ The commanding officer has several options in dealing with the charges, including: (1) initiating administrative action, (2) imposing nonjudicial punishment, (3) taking no action, or (4) disposing of the charges.²⁸

A commander may dispose of charges by “dismissing any or all of them, forwarding any or all of them to another commander for disposition, or referring any or all of them to a court-martial.”²⁹ If the immediate commander refers the charges to court-martial, then the commander forwards the charges to the convening authority.³⁰ Referral of charges is the first formal step in the court-martial process,³¹ and they may be forwarded to a summary, special, or general court-martial.³²

Prior to trial, the convening authority must seek the advice and consideration from the SJA “before any charge may be referred for trial.”³³ The

24. *Id.*

25. Exec. Order No. 12,473, 49 Fed. Reg. 17,152, 17,166, 17,168 (Apr. 23, 1984); *id.* at 17,155 (explaining that the convening authority is usually a commissioned officer in charge of the accused’s entire unit or the commissioned officer’s successor.); *see also* 10 U.S.C. § 834 (2018); *Current Command-Based Military Justice Process*, *supra* note 18.

26. STAFF JUDGE ADVOCATE, UNITED STATES MILITARY ENTRANCE PROCESSING COMMAND, <https://perma.cc/299N-PFEW> (last visited Feb. 17, 2019).

27. *See* 10 U.S.C. § 806 (b) (2018); *Current Command-Based Military Justice Process*, *supra* note 18.

28. Exec. Order No. 12,473, 49 Fed. Reg. 17,152, 17,165-66 (Apr. 23, 1984) (announcement of codification of the executive order at 3 C.F.R. 202 (1985)).

29. *Id.* at 17, 167.

30. *Current Command-Based Military Justice Process*, *supra* note 18.

31. ESTELA I. VELEZ POLLACK, CONG. RESEARCH SERV., RS21850, MILITARY COURTS-MARTIAL: AN OVERVIEW 3 (2004), <https://perma.cc/AJ9T-NAUJ>; *see also* 10 U.S.C. § 834 (2018) (describing the pre-requisites and requirements for referral of charges).

32. POLLACK, *supra* note 31, at 2 (stating the type of court-martial depends on the “nature and degree of the offense”). A summary courts-martial adjudicates minor offenses. *See* 10 U.S.C. § 820 (2018). A special courts-martial adjudicates any offenses except a capital offense. *See* 10 U.S.C. § 819 (2018). A general courts-martial is reserved for the most serious offenses. *See* 10 U.S.C. § 818 (2018).

33. 10 U.S.C. § 806(b) (2018) (“Convening authorities shall at all times communicate directly with their [SJAs] or legal officers in matters relating to the administration of military justice.”); 10 U.S.C. § 834(a) (2018) (“Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his [SJA] for consideration and advice.”).

SJA's advice must be in writing, and the convening authority may proceed to trial only if the SJA certifies that the charge is supported by the evidence.³⁴ Neither the SJA nor the convening authority are prosecutors and, by law, are not allowed to act as such.³⁵ An SJA likely has minimal experience with, or is far removed from, prosecuting sexual assault cases.³⁶

The pre-trial process in the military justice system is critical to examine because it illustrates the many steps in the process that are ripe for abuse due to inadequate training and undue influence. Commanding officers are inherently conflicted due to the fact that the commanders frequently have personal relationships with the accused.³⁷ These personal relationships between the accused and the commanding officer potentially affect the commanding officer's decision-making process at the expense of the victims' rights.³⁸

For example, Stephanie Gross was raped by a fellow cadet at the U.S. Military Academy in 2013. The rape was violent enough that Gross needed emergency pelvic surgery.³⁹ Gross reported the incident, but military leadership failed to bring sexual assault charges against the male cadet due to insufficient evidence.⁴⁰ The cadet was eventually charged with assault, but not sexual

34. 10 U.S.C. § 834(a)(2)-(3) (2018).

35. 10 U.S.C. § 806(c) (2018); *Current Command-Based Military Justice Process*, *supra* note 18.

36. *Current Command-Based Military Justice Process*, *supra* note 18. See Crockett, *supra* note 10 (“[T]he SJAs themselves often have very limited legal experience. . . . And even if they do know what they’re doing, [SJA’s] have to figure out how to translate a case for a commander who, like many Americans, often doesn’t understand the complexities of sexual assault.”).

37. Exec. Order No. 12,473, 49 Fed. Reg. 17,152, 17,155 (Apr. 23, 1984) (announcement of codification of the executive order at 3 C.F.R. 202 (1985)) (explaining the convening authority is a commissioned officer in charge of the accused’s entire unit.); see *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 197 (statement by Nancy Parrish) (“Until you remove the bias and conflict of interest out of the chain of command, [the military] will not solve this problem.”); see, e.g., Robert Draper, *The Military’s Rough Justice On Sexual Assault*, N.Y. TIMES (Nov. 26, 2014) (explaining that when a jury found an Air Force pilot guilty of rape and sentenced him to a dishonorable discharge and one year’s imprisonment, General Franklin overturned the guilty verdict, released the Air Force officer from prison, and reinstated him at full rank based on letters from friends attesting to the Air Force officer’s character.); see also Mary P. Treuthart, *Feminist-In-Chief? Examining President Obama’s Executive Orders on Women’s Rights Issues*, 91 CHI. KENT L. REV. 171, 201-02 (2016) (explaining when President Obama spoke openly about zero-tolerance for military sexual assault, “military defense lawyers accused the President, as commander-in-chief, of ‘undue command influence’” and a “conflict of interest”).

38. See *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 206 (statement by Nancy Parrish) (explaining that victims do not report because they are disbelieved and the often higher-ranking perpetrator is friends with those that the victim reports too.); Richard, A. Oppel, Jr., *Sexual Misconduct Case Ends With no Jail Time for General*, N.Y. TIMES (Mar. 20, 2014), <https://perma.cc/G7LK-QY9Y> (explaining that a military judge did not sentence Brig. Gen. Jeffery A. Sinclair for sexual misconduct and allowed him to remain in the military).

39. Tara Copp, *Female Cadets Testify About Being Sexually Assaulted at Their Service Academies*, STARS AND STRIPES (May 2, 2017), <https://perma.cc/PW2Q-EG5C>.

40. *Id.*

assault.⁴¹ When Stephanie Gross spoke about the incident years later, she stated, “I do not blame West Point as an institution I blame a systematic failure of leadership, who relied on blind loyalty to make judgments about an individual they had never spoken to.”⁴²

C. Convening a Court-martial

If the SJA recommends a case proceed to trial and the convening authority agrees, then the convening authority may convene a court-martial.⁴³ Similar to the civilian system,⁴⁴ the court-martial must have jurisdiction over the accused for the trial to be proper.⁴⁵ The convening authority maintains significant control over the trial process. Functions vested with the commander within the trial process include: (1) charging an accused with a criminal offense;⁴⁶ (2) determining what charges (if any) will be sent to trial;⁴⁷ (3) controlling whether any expert witnesses will testify;⁴⁸ (4) placing a suspect in pretrial confinement;⁴⁹ (5) entering into plea agreements;⁵⁰ (6) picking the jury;⁵¹ and (7) countless other responsibilities.⁵²

The system forces military prosecutors to obtain commander permission at every stage during the court-martial, which simultaneously obstructs prosecutorial ability to adequately carry out justice for victims.⁵³ Prosecutors are forced to make legal arguments and present evidence without the ability to

41. *Id.*

42. Vera Bergengruen, *Sex Assault Reports Have Doubled in the Military Since 2012, But That's the Good News*, McCLATCHY DC BUREAU (May 2, 2017).

43. See 10 U.S.C. § 834(a)(2) (2018).

44. *Criminal Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019) (Defining criminal jurisdiction as “a court’s power to hear criminal cases.”).

45. See 10 U.S.C.S. § 817 (LexisNexis, Lexis Advance through Pub. L. 116-65) (“Each armed force has court-martial jurisdiction over all persons subject to [§ 802].”); 10 U.S.C.S § 802 (Lexis Advance) (listing the persons subject to the UCMJ).

46. See 10 U.S.C.S § 834 (Lexis Advance); Exec. Order No. 12,473 49 Fed. Reg. § 17,635 (April 23, 1984) (citing to Rule 401).

47. See 10 U.S.C.S § 834 (Lexis Advance); Exec. Order No. 12,473 49 Fed. Reg. § 17,635 (April 23, 1984) (citing to Rule 407).

48. Exec. Order No. 12,473 49 Fed. Reg. § 17,635 (April 23, 1984) (citing to Rule 703(d) (“A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary . . .”).

49. See 10 U.S.C.S § 810 (Lexis Advance); *United States v. Otero*, 5 M.J. 781, 783 (A.C.M.R. 1978) (“Commander must first consider lesser restrictions or conditions and conclude that they would be inadequate before he may impose pretrial confinement.”).

50. See 10 U.S.C.S. § 853a (Lexis Advance).

51. 10 U.S.C.S. § 825 (Lexis Advance); *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 88 (statement by Sen. Graham) (responding to Gen. Gross’ question that the convening authority has the authority to pick the jury provided the jury members “outrank the individual on . . . trial”).

52. See generally 10 U.S.C.S §§ 830–860 (Lexis Advance); *Military Justice Overview* 1, 3, PROTECT OUR DEFENDERS, <https://perma.cc/JWM4-K38N> (last visited October 26, 2019) [hereinafter *Military Justice Overview*].

53. *Id.* at 4.

exercise discretion or make the strategic legal decisions that must be made to provide justice in any military criminal trial.⁵⁴

The system also creates an atmosphere ripe for abuse from defense attorneys.⁵⁵ In 2013, a female midshipman from the U.S. Naval Academy was put on the stand as a witness after bringing charges against three midshipmen who raped her at an off-campus party.⁵⁶ While on the stand, the defense attorneys proceeded to “[ask] her whether she was wearing a bra or panties” the night she was sexually assaulted, “how wide she opens her mouth during oral sex,” and whether “she ‘felt like a ho’ the next morning.”⁵⁷ This, in effect, shifted the blame to the victim.

Colonel Don Christensen, former Air Force prosecutor of sexual assault, stated that he quit his job as a military prosecutor out of frustration with the “absurdly obstructive bureaucracy.”⁵⁸ An additional military prosecutor, who wished to remain anonymous, summarized the cumbersome process, below:

I am a prosecutor in the Armed Forces in one of the busiest litigation offices in the world . . . [T]he convening authority concept creates so many barriers to effective, efficient justice. It causes massive delays in investigation and adjudication decisions, cases are lost or overturned on appeal due to errors [sic] and victims [do not] want to come forward because of distrust in the chain of command. . . . We are overwhelmed in my office by how many sexual assault cases we have. We are understaffed and have so much pressure on us with these cases. I could better serve victims and move cases much quicker to resolution if I had discretion and did not have to brief commands and deal with the bureaucratic system we have in place. Executing a court-martial is an administrative nightmare *due to the convening authority concept*. Rather than work on prosecuting the case, I have to worry about witness travel not being completed or done right by the convening authority, the convening order not being drafted properly, or if jurors will be informed properly and will attend. It is a truly broken system . . . Allowing military prosecution offices to truly run as [civilian prosecutor’s office run] would drastically improve our

54. See Crockett, *supra* note 10 (“[P]rosecutors have to fight military bureaucracy at every turn to make even the most basic decisions — including whether a case has enough evidence to move forward to trial in the first place.”).

55. See, e.g., Petula Dvorak, *Naval Academy Case Exposes a Backward America*, WASH. POST (Sept. 2, 2013), https://www.washingtonpost.com/local/naval-academy-case-exposes-a-backward-america/2013/09/02/d421a78a-13f3-11e3-a100-66fa8fd9a50c_story.html?utm_term=.3980b70e5851.

56. *Id.*

57. *Id.*

58. Crockett, *supra* note 10.

ability to seek justice swiftly and protect the victims. It would also greatly increase the trust in our system.⁵⁹

In the civilian context, prosecutorial discretion is essential to the criminal justice process,⁶⁰ and prosecutors are granted broad discretion to enforce criminal law.⁶¹ Any interference with the free exercise of the discretionary powers of prosecutors is a proscribed interference with the constitutional separation of powers.⁶² The U.S. military system does not protect prosecutorial discretion in the same way the civilian criminal justice system protects it.

Conflicts of interests and biases remain pervasive in the court-martial process. In 2017, Marine Colonel Daniel H. Wilson, was found guilty of sexually abusing the six-year-old of one of his subordinate Marines.⁶³ Normally, the accused is accompanied by an escort term of enlisted service members, known as “chasers,” to bring the accused to and from the courtroom.⁶⁴ However, when a senior seven-year colonel such as Colonel Daniel H. Wilson, sexually abuses a six-year-old, the military upgrades chasers to colonels “out of respect for the rank of the accused.”⁶⁵ In other words, even in the case of sexually assaulting a child, the military makes accommodations for rank.⁶⁶ Prior to Wilson sexually abusing a six-year-old, Wilson had been reprimanded for harassing female employees and asking a subordinate Marine for a “‘boudoir-style’ photograph of his wife, and a pair of her underwear.”⁶⁷ Under the current U.S. military justice system, commanders are inherently conflicted, lack the training and expertise to appreciate the legal complexities underlying a case, and, as a result, deny victims an essential element of criminal justice procedure —due process.

D. Post-Trial Procedures

If a prosecutor gets a conviction by court-martial, then the convening authority initiates procedures for post-trial review.⁶⁸ Similar to the pre-trial

59. *Military Justice Overview*, *supra* note 52, at 4 (emphasis added).

60. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996).

61. *Id.*

62. *See* United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) (“It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.” (footnote omitted)); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 10 (2009).

63. James Laporta, *Exclusive: U.S. Government Sued for \$25 Million for Failing to Investigate Marine Colonel Later Convicted of Sexual Abuse*, NEWSWEEK (July 6, 2018), <https://perma.cc/NV2V-W64M>.

64. Hope Hodge Seck, *Convicting A Colonel: Even At Trial, Accommodations Made For Rank*, TASK & PURPOSE (Sept. 12, 2017), <https://perma.cc/NB96-9XWR>.

65. *Id.*

66. *Id.*

67. *See* Laporta, *supra* note 58.

68. National Defense Authorization Act For Fiscal Year 2017, Pub. L. No. 114-328, § 5321, 130 Stat. 2000, 2924 (2016)

process, the convening authority must seek the support and consideration of the SJA for post-trial review matters.⁶⁹ At this time, the convening authority “may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.”⁷⁰ The only limitations to the convening authority’s power to reduce a sentence are: (1) it must be put in writing and made part of the record;⁷¹ (2) the severity of the sentence may not be increased;⁷² and (3) a finding of not guilty may not be reconsidered.⁷³ Prior to the National Defense Authorization Act for fiscal year 2014 (NDAA FY 14), the convening authority had the discretion to set aside a finding of guilty (effectively dismissing the charge) or alter the conviction to a lesser charge.⁷⁴

E. The Issues with Command Discretion

This so called “command discretion” vests the commanding officer with prosecutorial authority akin to “prosecutorial discretion” in the civilian criminal justice system.⁷⁵ While Commanders may be qualified to perform the role they were trained to handle within the military—“they are pilots, infantry officers, surface warfare officers, and artillery officers”—they are not equipped to handle sexual assault allegations.⁷⁶ Commanders are not lawyers and lack the training or experience required to understand the legal complexities of sexual assault which means the commanders often fail to deliver fair and impartial justice for the victims.⁷⁷ Furthermore, commanders are responsible for thousands of service members and must maintain the day-to-day order and discipline of their units.⁷⁸

69. *Id.*

70. National Defense Authorization Act For Fiscal Year 2017, Pub. L. No. 114-328, § 5321, 130 Stat. 2000, 2924 (2016).

71. *Id.*

72. *Id.*

73. *Id.*

74. National Defense Authorization Act For Fiscal Year 2014, 113 P.L. 66 § 1702(b), 127 Stat. 672, 956 (2013).

75. Manual for Courts-Martial, *supra* note 15, at R.103(6); *see Current Command-Based Military Justice Process*, *supra* note 15.

76. Military Justice Overview, *supra* note 15.

77. *See Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 41 (prepared statement by Gen. James. F. Amos) (“The commanding officer’s broad authority under Article 60 was established during a time when the key participants of the trial—the prosecutors, defense counsel, and military judges—were not professional lawyers, and when there was not a comprehensive system of appellate review”); *Military Justice Overview*, *supra* note 48 (“While these commanders are highly skilled in the areas central to their military role, they are inherently ill equipped to make the technical legal determinations required in the administration of fair, impartial justice.”).

78. *See Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 273 (statement by Gen. Altenburg) (“[Commander responsibilities] include “weapons training, equipment maintenance, esprit, morale, teamwork, physical health, emotional health, and the trust in each other to die for each other that ensures combat effectiveness in defense of the Nation.”); *id.* at 88 (statement by Sen. Graham) (arguing that the responsibilities of commanders are very unique and that “very few of us have the authority to order somebody into battle”).

In other words, military justice accounts for a small fraction of their duties and is often overlooked.⁷⁹

Further complicating the issue is the fact that the military is a system dependent on supervisor recommendations for promotion.⁸⁰ This is significant because it adds incentive for commanders to pursue, or fail to pursue, certain actions for political or self-interested reasons.⁸¹ For example, Lieutenant General Craig A. Franklin, commander of the Third Air Force in Europe, overturned a guilty verdict of sexual assault because the accused, an Air Force fighter pilot, was a “doting father and husband” who had been selected for promotion.⁸² The pilot returned to active duty despite a guilty verdict of sexual assault from an all-male jury.⁸³ Simply put, a commanding officer’s wide-ranging authority to control the prosecution almost invariably creates conflicts of interest.⁸⁴

II. INEFFECTIVE CHANGES TO THE MILITARY’S HANDLING OF SEXUAL ASSAULT CASES

While sexual assault is deeply disturbing in civilian society, it has added dangers for service members and for military effectiveness. The number of reported sexual assaults within the military has continued to increase in recent years;⁸⁵ however, these reports represent only a fraction of the actual number of sexual assaults because victims do not report the crimes due to an inherent lack of trust in the system.⁸⁶ Congress has tried to resolve the problem through reforms under National Defense Authorization Acts.⁸⁷ Unfortunately, the reforms have not adequately addressed the issue of sexual assault in the military.

79. See Military Justice Overview, *supra* note 14.

80. See Meghann Myers, *Leveling the Playing Field: Big Changes to NCO Promotions on the Way*, ARMY TIMES (Jan. 8., 2018), <https://perma.cc/HW9H-UKEC>.

81. See Military Justice Overview, *supra* note 14; see, e.g., Craig Whitlock, *Air Force General Defends Overturning Sexual-assault Conviction*, WASH. POST (April 10, 2013), <https://perma.cc/9ED3-4AB5> (explaining the reasons why an Air Force General overturned a sexual assault conviction).

82. Whitlock, *supra* note 80.

83. *Id.*

84. See Manual for Courts-Martial, *supra* note 15, at R. 103(6) (explaining the convening authority is a commissioned officer in charge of the accused entire unit); see, e.g., Whitlock, *supra* note 76.

85. See SAPRO REPORT FY17, *supra* note 2, at 8 (reporting that fiscal year 2017 received 6,769 reports of sexual assault).

86. Compare *id.* (reporting that FY 2017 received 6,769 reports of sexual assault), with NBC News, *Sexual Assault Reports in U.S. Military Reach Record High: Pentagon*, NBC NEWS (May 1, 2017), <https://perma.cc/YJ48-KLYB> (stating that an anonymous survey, conducted every two years, found nearly 15,000 service members experienced some kind of sexual assault in 2016).

87. See National Defense Authorization Act For Fiscal Year 2014, 113 P.L. 66, 127 Stat. 672 (2013); National Defense Authorization Act for Fiscal year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014); National Defense Authorization Act for Fiscal year 2016, Pub. L. No 114-92, 129 Stat. 726 (2015); National Defense Authorization Act for Fiscal year 2017, Pub. L. No 114-328, 130 Stat. 2000 (2016).

This section first examines the history of congressional reporting mandates for military sexual assault and examines the Department of Defense's (DoD) campaign to address the issue. Next, this section discusses how the most recent congressional sexual assault reforms have failed to adequately protect victims and bring their perpetrators to justice. Third, this section utilizes the most recent Sexual Assault Prevention and Response (SAPRO) report to show that the problems related to sexual assault within the military are still pervasive and wide spread. Finally, this section concludes by explaining the significance of the numbers reported in the most recent SAPRO report.

A. Pressure from Congress, SAPRO, and President Obama

In the past two decades, Congress and the media have scrutinized the military's handling of sexual assault allegations.⁸⁸ The problem was so pervasive that Congress mandated the DoD to collect data and submit annual reports of military sexual assault under the Ronald W. Reagan National Defense Authorization Act of 2004.⁸⁹ An additional recommendation from the Ronald W. Reagan National Defense Authorization Act of 2004 led to the formation of the Joint Task Force for SAPRO in October 2004.⁹⁰ SAPRO established five priorities to address sexual assault in the military: (1) foster a culture that prevents sexual assault and subsequent victim retaliation; (2) rebuild a system that instills victims' trust and confidence through quality assistance and advocacy; (3) increase timely results for all investigations of sexual assault allegations; (4) improve accountability in sexual assault allegations; and (5) continue collecting quality data for future assessment.⁹¹

Notably, reforms addressing military sexual assault have come not only by congressional mandates, but also pursuant to executive orders.⁹² In commenting on the problem, President Obama stated, "The bottom line is, I have no tolerance for this. . . . If we find out somebody's engaging in this stuff, they've got to be held accountable, prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged — period."⁹³ Obama instructed then-Secretary of Defense Chuck Hagel "to step up the game exponentially."⁹⁴

88. See Winerip, *supra* note 6; *Sex Crimes by Military Recruiters*, *supra* note 6.

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

90. U.S. Dep't of Def., *Mission & History*, U.S. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, <https://perma.cc/X2R9-XGE9> (last visited Oct. 21, 2019).

91. U.S. DEP'T. OF DEF., DEPARTMENT OF DEFENSE SEXUAL ASSAULT PREVENTION AND RESPONSE STRATEGIC PLAN, 2017 – 2021 (2016), https://www.sapr.mil/public/docs/strategic-plan/DoD_SAPR_Strategic_Plan_2017-2021_Signed.pdf

92. See, e.g., Exec. Order No. 13,696, 80 Fed. Reg. 35,785 (June 22, 2015).

93. Craig Whitlock, *Obama Delivers Blunt Message on Sexual Assaults in Military*, WASH. POST (May 7, 2013), <https://perma.cc/N3M7-BXSB>.

94. *Id.*

B. Recent Reforms Under National Defense Authorization Acts

Arguably, one of the most significant reforms to the UCMJ was in NDAA FY 14. The NDAA FY 14 required defense counsel to make requests to interview sexual assault victims through trial counsel or a Sexual Assault Victim Advocate.⁹⁵ It also revised Article 32 to grant victims the right to refuse to testify during preliminary hearings.⁹⁶ Prior to NDAA FY 14, the Article 32 process—*i.e.*, a probable cause hearing—was often used as a tool by the defense for investigation and discovery which provided minimal protections for a victim appearing before the investigation.⁹⁷ NDAA FY 14 refocused Article 32 hearings on the question of probable cause and gave victims the option to refuse to testify at the hearing.⁹⁸ Most importantly, NDAA FY 14 revoked the unlimited commander discretion to disprove findings of guilt post-trial.⁹⁹ Prior to this change, a convening authority had the power to overturn a verdict and reduce a sentence.¹⁰⁰ The injustice caused by this authority was brought to light when various high profile prosecutions resulted in overturned sexual assault convictions.¹⁰¹ NDAA FY 14 also extended the Crime Victims' Rights Act in the UCMJ¹⁰² and eliminated the five-year statute of limitations for sexual assault and sexual assault of a child.¹⁰³

The NDAA FY 15 eliminated the “good character defense” that allowed a perpetrator to show the probability of innocence for sexual assault allegations by demonstrating his or her “good military character.”¹⁰⁴ Prior to this change, an accused was able to provide evidence of “good military character” as a complete

95. 10 U.S.C.S § 846(b)(2) (LexisNexis 2019) (repealed 2016); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1704, 127 Stat. 672, 958-59 (2013).

96. 10 U.S.C.S § 832(d)(3) (LexisNexis 2018); National Defense Authorization Act for Fiscal Year 2014 § 1702, 127 Stat. at 954.

97. *Policy Achievements*, PROTECT OUR DEFENDERS, <https://perma.cc/B3CE-UW3A> (last visited Sept. 24, 2019) [hereinafter *Policy Achievements*]; see, e.g., Dvorak, *supra* note 54 (explaining that military defense attorneys placed sexual assault victim on the stand and asked whether she was wearing a bra or panties the night she was sexually assaulted, how wide she opens her mouth during oral sex, and whether she “felt like a ho” the next morning).

98. 10 U.S.C.S § 832(a)(2)(B), 832(d)(3); *Policy Achievements*, *supra* note 97.

99. 10 U.S.C.S § 860(c)(3)(B) (LexisNexis 2019) (repealed 2016); National Defense Authorization Act for Fiscal Year 2014 §§ 1702, 1705, 127 Stat. at 954-60.

100. *Policy Achievements*, *supra* note 97; see also National Defense Authorization Act for Fiscal Year 2014 §§ 1702, 1705, 127 Stat. at 955-56.

101. *Policy Achievements*, *supra* note 97; see also, e.g., Oppel, *supra* note 38; Whitlock, *supra* note 80.

102. 10 U.S.C.S. § 806b (LexisNexis 2019); National Defense Authorization Act for Fiscal Year 2014 § 1701, 127 Stat. at 952-54.

103. 10 U.S.C.S. § 843(a) (LexisNexis 2019) (“[P]erson charged with . . . rape or sexual assault, or rape or sexual assault of a child . . . may be tried and punished at any time without limitation.”); see also National Defense Authorization Act for Fiscal Year 2014 § 1703, 127 Stat. at 958.

104. National Defense Authorization Act for Fiscal Year 2015 § 536, Pub. L. No. 113-291, 128 Stat. 3292, 3368 (2014).

defense to criminal charges.¹⁰⁵ Under the law—which has no parallel in the civilian justice system—“good military character” was considered sufficient to raise reasonable doubt.¹⁰⁶ NDAA FY 16 and NDAA FY 17 largely focused on reporting mandates in the SAPRO’s published annual reports.¹⁰⁷

C. *The SAPRO 2017 Annual Report*

The most recent SAPRO report shows that the reforms addressing the issue have failed to prevent sexual assaults, failed to curb victim retaliation, and failed to increase the conviction rates. In Fiscal Year 2017, there were a total of 6,769 reported incidences of sexual assault involving service members, a nearly 10% increase from the number reported in Fiscal Year 2016.¹⁰⁸ From a DoD anonymous survey conducted every two years, it is estimated that more than 14,900 active duty service members have experienced sexual assault.¹⁰⁹ Of those 6769 reported incidences of sexual assault, 1659 of the reports were restricted reports—that means 1659 incidents of sexual assault went uninvestigated.¹¹⁰

The remaining 5110 were unrestricted reports.¹¹¹ However, 100 of those unrestricted reported cases did not meet the elements of proof for sexual assault,¹¹² thirty-four cases did not fall within MCIOs’ legal authority to investigate,¹¹³ and 1110 cases were outside of the DoD’s legal authority.¹¹⁴ In other words, only 3567 of the cases involved service members whom the DoD could consider for possible action.¹¹⁵ Of those 3567 cases, commanders dismissed 1270 due to “insufficient evidence of an offense, the victim declining to participate in the military justice process, or the statute of limitations

105. *Policy Achievements, supra* note 97; *see also* National Defense Authorization Act for Fiscal Year 2015 § 536, 128 Stat. at 3368.

106. *Policy Achievements, supra* note 97; *see also* National Defense Authorization Act for Fiscal Year 2015 § 536, 128 Stat. at 3368.

107. *See*, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016); National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015); Kristy N. Kamarck, Don J. Jansen, Lawrence Kapp, R. Chuck Mason & Barbara Salazar Torreon, CONG. RESEARCH SERV., FY2017 NATIONAL DEFENSE AUTHORIZATION ACT: SELECTED MILITARY PERSONNEL ISSUES(2017), <https://perma.cc/PHA9-454Q> (summarizing the FY 2017 Act); Julie Carson, JUDICIAL PROCEEDINGS PANEL, NDAA PROVISIONS REGARDING SEXUAL ASSAULT IN THE MILITARY FY 2004 – FY 2016(2016), <https://perma.cc/WK9N-A877> (summarizing sexual assault provisions of the NDAA from 2004-2016).

108. SAPRO REPORT FY17, *supra* note 2 at 8.

109. NBC News, *supra* note 85.

110. SAPRO REPORT FY17, *supra* note 2 at 5, 8.

111. *Id.* at 8.

112. *Id.* at 14.

113. *Id.*

114. *Id.* at 17 (“1,110 cases were outside of DoD’s legal authority [because] . . . MCIOs could not identify a subject despite a criminal investigation, a subject was a civilian or foreign national not under the military’s jurisdiction, or a subject had died or deserted before DoD could take disciplinary action.”). Further, 102 cases involved service members prosecuted by a civilian/foreign authority. *Id.*

115. *Id.* at 18.

expiring.”¹¹⁶ Additionally, commanders dismissed seventy-nine more cases because the allegations were “false” or “baseless.”¹¹⁷ In other words, commanders concluded that only 2218 reports of the total 6769 reported incidences of sexual assault had sufficient evidence to support some form of disciplinary action.¹¹⁸

Fifty-four percent of those cases were recommended for court-martial, 20% entered into nonjudicial punishment under Article 15, and 26% received adverse administrative action.¹¹⁹ Of the 54% (774) of reports recommended for court-martial, only 406 cases proceeded to trial.¹²⁰ At trial, only 285 of the 406 cases (7.9% of total cases) resulted in some type of conviction, and only 166 (3.2% of total cases) were convicted of a nonconsensual sex offense.¹²¹ This conviction rate is the lowest conviction rate in the past decade.¹²² Furthermore, 129,000 service members (one in four women, one in fifteen men) faced severe and persistent sexual harassment.¹²³

D. *The Significance of the Numbers Reported in the SAPRO 2017 Report*

Despite the significant changes to the UCMJ aimed at protecting victims, obstacles remain and sexual assault continues to occur at an alarming rate.¹²⁴ First, victims continue to mistrust the system due to a lack of accountability and victim retaliation.¹²⁵ In Fiscal Year 2017, 70% of victims experienced some kind of retaliation from a DoD authority member after reporting an incident of sexual

116. *Id.* at 21. The UCMJ was amended to remove the statute of limitation in sexual assault cases. 10 U.S.C. § 843(a) (2018).

117. SAPRO REPORT FY17, *supra* note 2, at 21.

118. *Id.* at 22.

119. *Id.*

120. *Id.* at 23.

121. *Facts on United States Military Sexual Violence*, PROTECT OUR DEFENDERS, <https://perma.cc/MW33-K3LC> (last updated June 2018) [hereinafter *Facts on Military Sexual Violence*]; see SAPRO REPORT FY17, *supra* note 2, at 23.

122. See Geoff Ziezulewicz, *UCMJ Crackdown: Why Mattis Thinks Commanders Have Gone Soft on Misconduct*, MILITARY TIMES (Sept. 10, 2018) <https://perma.cc/NFS5-P67E> (“The total [number] of general, special and summary court-martial cases handled by the Army, Navy, Air Force and Marines has plummeted by nearly 70 percent during the past decade . . .”).

123. *Facts on Military Sexual Violence*, *supra* note 121.

124. Carson, *supra* note 107.

125. *Facts on Military Sexual Violence*, *supra* note 121 (reporting that one in four victims who did not report the crime did so because they feared retaliation from their command, and one in three victims who did not report the crime feared the process would be unfair or nothing would be done); Jennifer Steinhauer, *Reports of Military Sexual Assault Rise Sharply*, N.Y. TIMES (Nov. 7, 2013), <https://perma.cc/2EVJ-3Y5C> (“[T]he trust that any justice will be served has been irreparably broken under the current system, where commanders hold all the cards . . .”).

assault.¹²⁶ Over 41% of those retaliation experiences were actions prohibited by military law.¹²⁷

Additionally, in Fiscal Year 2017, 14% of sexual assault victims declined to participate in the justice process.¹²⁸ This number is significant because it marks a 9% increase over the averages of the four previous years.¹²⁹ While some members of Congress point to the increased reporting to show the reforms have worked, other members are not convinced.¹³⁰ As Senator Gillibrand (D-NY) stated, the increase in reporting is not an indicator of continued trust in the military justice system; rather, it “disappointingly shows a flat overall reporting rate and a retaliation rate against survivors that remains at an unacceptable [rate] for a third year in a row.”¹³¹

Furthermore, the reforms failed to eliminate commanding officers’ inherent conflicts of interest and did not improve commanders’ training for handling sexual assault allegations. Commanders remain ill equipped to handle sexual assault cases and this is evidenced by the failure of commanders to hold perpetrators accountable.¹³² The most recent SAPRO Annual Report noted that prosecution and conviction rates for sex offenses decreased by 70% over the past decade.¹³³

Commanders still have the power to dispose of sexual assault charged with non-judicial punishments under Article 15 of the UCMJ or through an administrative action.¹³⁴ Although Congress clearly stated, in NDAA FY 14, that any sexual assault charges that are not dismissed “should be disposed of by court-martial rather than by non-judicial punishment or administrative action[,]” Congress failed to explicitly prohibit non-judicial or administrative disposal of cases.¹³⁵ Thus, commanders—who, again, have likely received little education or training on the matter—continue to disregard Congress’ clear intent and dispose of sexual assault charges with non-judicial punishment or administrative

126. U.S. DEP’T OF DEF., APPENDIX C: METRICS AND MILITARY JUSTICE INDICATORS ON SEXUAL ASSAULT in ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 21 (2018) [hereinafter SAPRO METRICS FY17]; *Cf. Facts on Military Sexual Violence*, *supra* note 121 (“58% of women and 60% of men who reported a sexual assault face[d] retaliation.”); *see generally Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 197 (statement by Nancy Parrish) (“The retaliation is not about peer pressure. The retaliation is about the lower-ranking victim being disbelieved by the higher-ranking perpetrators and their friends.”).

127. SAPRO METRICS FY17, *supra* note 126, at 21.

128. *Id.* at 16.

129. *Id.*

130. *See* NBC News, *supra* note 85.

131. *Id.*

132. Ziezulewicz, *supra* note 122; *Facts on Military Sexual Violence*, *supra* note 121 (reporting that only 3.2% of the accused in unrestricted reports were convicted of a nonconsensual sex offense in 2017).

133. Ziezulewicz, *supra* note 122; *Facts on Military Sexual Violence*, *supra* note 121.

134. 10 U.S.C. § 815(b) (2018); *See* National Defense Authorization Act for Fiscal year 2014, Pub. L. No. 113-66, § 1752, 127 Stat. 672, 984 (2013).

135. 10 U.S.C. § 815 (2018); National Defense Authorization Act for Fiscal year 2014, Pub. L. No. 113-66, § 1752, 127 Stat. 672, 984 (2013).

action.¹³⁶ Commanders continue to dispose of over 46% of sexual assault cases with administrative or non-judicial punishment.¹³⁷

III. SEXUAL ASSAULT UNDER THE MJL IN ISRAEL

Military Justice Improvement Act (“MJIA”) proponents,¹³⁸ such as Senator Gillibrand, cite to Israel Defense Forces’ Military Justice Law (“MJL”) to support restructuring the U.S. military justice system.¹³⁹ The Israeli system is “profoundly different” from the current U.S. system.¹⁴⁰ Amos N. Guiora, a University of Utah law professor and former Israeli Military Advocate General (“MAG”), stated “the primary difference [between the two systems] relates to the ‘balance of power’ between the commander and the [MAG].”¹⁴¹ While the U.S. military system erodes the essential separation of powers between the judicial branch and the executive branch to deliver impartial justice,¹⁴² the Israel Defense Forces (“IDF”) protects the separation of powers with the independent role of the MAG. Other major differences between the approach of the U.S. and Israel are: (1) the requirement imposed on commanders to immediately report all instances of sexual assault and harassment,¹⁴³ (2) the prosecutorial discretion vested in the independent MAG officers,¹⁴⁴ and (3) lack of commander influence in disciplinary proceedings related to sexual assault cases.¹⁴⁵

136. See National Defense Authorization Act for Fiscal year 2014, Pub. L. No. 113-66, § 1752, 127 Stat. 672, 984 (2013) (stating that disposing of sexual assault charges with non-judicial punishment or administrative action is against “the sense” of Congress).

137. See SAPRO REPORT FY17, *supra* note 2, at 22.

138. *MJIA: Senate Supporters*, U.S. SENATE KIRSTEN GILLIBRAND, <https://perma.cc/N8T4-TM8H> (last visited Dec. 10, 2018) (listing the senate supports of the MJIA, such as Ted Cruz (R-TX) and Rand Paul (R-KY)).

139. See *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 91 (statement by Sen. Gillibrand).

140. *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 219 (prepared statement by Amos N. Guiora).

141. *Id.*

142. See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[T]he decision of a prosecutor . . . has long been regarded as the special province of the Executive Branch.”); Krauss, *supra* note 61.

143. *Military Justice System of Sexual Offense: Israel*, LIBRARY OF CONGRESS (June 6, 2015), <https://perma.cc/27LW-SGJT>, [hereinafter *Military Justice System of Sexual Offense: Israel*].

144. Ruth Levush, *Israel*, in *MILITARY JUSTICE: ADJUDICATIONS OF SEXUAL OFFENSES* 42, 44 (Library of Congress, 2013).

145. *Military Justice System of Sexual Offense: Israel*, *supra* note 144; see *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 219-20 (statement by Amos N. Guiora).

A. *Reporting, Investigating, and Prosecuting a Sexual Assault in the Israel Defense Forces*

The IDF is a compulsory service, so all eligible men and women are required to serve at age eighteen.¹⁴⁶ Men serve for three years, and women serve for two years.¹⁴⁷ Currently, IDF has 176,500 active duty service members,¹⁴⁸ and women comprise 33% (approximately 58,833) of the IDF.¹⁴⁹ By contrast, the U.S. is comprised of an all-voluntary military, but federal law requires men between the ages of eighteen to twenty-five to register for the Selective Service.¹⁵⁰ The U.S. military has 1.3 million active duty military members, and 14% are female.¹⁵¹

The MJL establishes a system for the adjudication of IDF active service soldiers, reservists, and military contractors accused of committing a military or criminal offense.¹⁵² The MJL has been in effect since 1955, and for the most part, it has undergone limited statutory reforms.¹⁵³ The primary changes to the MJL involve amendments for the adjudication of sexual offenses within the IDF,¹⁵⁴ related to the authority to pursue an adjudication of military sexual assault and where that adjudication occurs.¹⁵⁵ The amendments were largely enacted to support Israel's zero-tolerance policy for military sexual assault and to promote transparent policies.¹⁵⁶ Members of the IDF contend the reforms related to sexual assault adjudication have "significantly enhanced" victims' trust in the system and increased accountability for perpetrators.¹⁵⁷

146. ISRAEL MINISTRY OF FOREIGN AFFAIRS, STATE: ISRAEL DEFENSE FORCES (IDF), <https://perma.cc/2KL3-AAM2> (last visited Dec. 10, 2018) ("Deferments [for compulsory military service] may be granted to qualified students at institutions of higher education. New immigrants may be deferred or serve for shorter periods of time, depending on their age and personal status on entering the country.").

147. *Id.*

148. Lisa m. Schenck, *Fact Sheet on Israeli Military Justice 1* (GEO. WASH. UNIV. L. SCH., 2013), <https://perma.cc/6FLA-J98H>.

149. *Id.*

150. Tina Griego, *American May Never Have a Draft Again. But We're Still Punishing Low-income Men For Not Registering*, WASH. POST (Oct. 16, 2014), <https://perma.cc/98QG-7KWB>.

151. CNN Staff, *By The Numbers: Women in the U.S. Military*, CNN (Jan. 24, 2013), <https://perma.cc/JZG4-5RSP>.

152. Levush, *supra* note 145 at 42.

153. *Id.* at 42-43.

154. *Id.* at 43.

155. *Id.*

156. Sarah Cummings, *Military Sexual Assault: A Comparative Case Study of Sexual Assault Policies in the United States, Israel, and Norway*, BRIDGEWATER STATE UNIVERSITY, 2018, at 71-2, <https://perma.cc/W6BA-XPW8>; Levush, *supra* note 145, at 42 ("New circumstances arising from changing times, the passage of the Law for the Prevention of Sexual Harassment . . . and requirements introduced by the Supreme Court have resulted in the need [for] new policies [within the IDF].").

157. *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 219 (prepared statement by Amos N. Guiora).

The MJL divides power between the military judicial system and the MAG.¹⁵⁸ While the primary actor in the U.S. system is the commander, the primary actor in the IDF is the MAG.¹⁵⁹ MAGs are legal advisors to commanders and conduct courts-martial; however, unlike their U.S. counterpart, MAGs operate independently.¹⁶⁰ MAGs are appointed by the Minister of Defense,¹⁶¹ thus, when acting in their advisory and legal capacity, MAGs do not fall within a commander's chain of command,¹⁶² nor does the commander determine the MAG's salary or impact the MAG's promotional opportunity.¹⁶³

Unlike commanders in the U.S. system who are forced to prosecute someone in their chain of command,¹⁶⁴ MAGs' independence removes that potential conflict of interest.¹⁶⁵ While MAGs are not subordinate to commanders, they are subordinate to the Attorney General in matters of arraignment and general policy.¹⁶⁶ A significant difference between the U.S. system and the Israel system is that the decision "whether to adjudicate sex offenses . . . *can only* be made by the . . . [MAG] and not by commanders . . ." ¹⁶⁷ IDF commanders retain the authority to try minor offenses that do not involve a sexual crime under the "Disciplinary Law."¹⁶⁸

Similar to the choice in the U.S. between a court-martial or nonjudicial punishment under Article 15, the MJL provides for adjudication of sexual assault by military courts or disciplinary proceedings depending on the severity of the offense.¹⁶⁹ Both the military courts and disciplinary proceedings have processes in place to remove any conflicts of interest.¹⁷⁰

The MJL allows victims of sexual assault or harassment to report either within their unit or outside their unit.¹⁷¹ If victims report within their unit, the

158. Schenck, *supra* note 149, at 2.

159. Compare Manual for Courts-Martial, *supra* note 18, at Rule 402, with Levush, *supra* note 145, at 45 ("The decision as to whether to adjudicate a matter by military court is made by the MAG.").

160. Schenck, *supra* note 149, at 2.

161. Levush, *supra* note 145, at 45 ("The decision as to whether to adjudicate a matter by military court is made by the MAG.").

162. Schenck, *supra* note 149, at 2.

163. *Id.*

164. See Manual for Courts-Martial, *supra* note 18, at Rule 103(6).

165. Schenck, *supra* note 149, at 2.

166. Schenck, *supra* note 149, at 2 (citing HJL 4723/96, Avivit Atiyah v. Attorney General, 51(3) P.D. 714 (holding the MAG must accept the Attorney General's legal interpretation of provisions and that the Attorney General may intervene in "special interest" matters which exceed the realm of military law or general policy)).

167. *Id.* at 4 (emphasis added).

168. *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 259, 261 (statements by Admiral DeRenzi & Gen. Ary).

169. *Military Justice System of Sexual Offense: Israel*, *supra* note 144.

170. Major Gen. Menachem Finkelstein & Yifat Tomar, *The Israel Military Legal System – Overview of the Current Situation and a Glimpse into the Future*, 52 A.F. L. REV. 137, 140-41 (2002).

171. Schenck, *supra* note 149, at 4.

commanders must inform the MAG of the allegations.¹⁷² If the victim chooses to report outside of their unit directly to the MAG, their report will not be forwarded to the commander if the soldier requested confidentiality or when the commander is the subject of the complaint.¹⁷³ Unlike the U.S.'s restricted reporting system, when a victim reports a crime of serious violence, such as a rape or a forced sodomy allegation, the complaint must be transferred to the Military Investigative Police ("MIP") or the Israeli police when the alleged perpetrator is a civilian, even in the absence of the victim's consent.¹⁷⁴ In accordance with GSO 33.0145, victims of sexual assault and harassment may file both criminal offenses and civil wrongs—*i.e.*, a claim for criminal punishment and a claim for compensation.¹⁷⁵

After a report is filed, the victim decides whether to have the allegation investigated by an investigative officer or by the MIP.¹⁷⁶ Unlike the U.S. system,¹⁷⁷ the MIP is an independent unit which is not subordinate to military commanders.¹⁷⁸ The independence of the police unit within the IDF allows the soldiers to carry out investigations without any undue influence from a commander.¹⁷⁹ The evidence gathered from criminal investigations is transferred to the MAG for evaluation.¹⁸⁰

After a report is investigated, MAGs may prosecute sexual assault allegations in military courts by issuing an indictment or through the use of disciplinary proceedings.¹⁸¹ In the U.S. system, major prosecutorial decisions fall on commanders.¹⁸² In contrast, under the MJL, MAGs act as legal counsel to the military commanders and retain authority to enforce the MJL.¹⁸³ As a result, military commanders in the IDF receive advice from trained, independent lawyers.¹⁸⁴ For example, a MAG may file a charge sheet, order a preliminary investigation, and arraign soldiers for both military and civilian offenses.¹⁸⁵ As Professor Amos Guiora explains, "[t]he decision to create a system whereby indictment decisions are in the exclusive bailiwick of the [MAG] reflects a

172. *Id.*

173. Levush, *supra* note 145, at 49.

174. *Id.*

175. *Id.* at 48.

176. *Id.* at 49.

177. ROBERT K. WRIGHT, JR., *MILITARY POLICE 9* (1992) (stating military police report violations of orders given by them in the proper execution of their duties regardless of the grade or status of the offender) (comp.).

178. Schenck, *supra* note 149, at 4.

179. *See Military Justice System of Sexual Offense: Israel*, *supra* note 144.

180. *Id.*

181. *Id.* (stating that it depends on the severity of the offense whether the MAG will issue an indictment or use disciplinary proceedings.).

182. *See* 10 U.S.C. §§ 830-860 (2018).

183. Levush, *supra* note 145, at 45. *See, e.g., The IDF Military Justice System*, Isr. Def. Forces, <https://perma.cc/4NFS-PLJ4> (last visited October 24, 2019).

184. Schenck, *supra* note 167, at 2.

185. Schenck, *supra* note 149, at 2.

profound belief that the separation between [MAGs] and commanders is necessary in order to prevent undue command influence.”¹⁸⁶

If the MAG chooses not to issue an indictment, then the MAG may proceed with disciplinary action.¹⁸⁷ The decision “whether to adjudicate sexual offenses in disciplinary proceedings *can only* be made by the [MAG] and not by commanders”¹⁸⁸ So, unlike the U.S. system, the MJL specifically carves out sexual offenses from the commanders’ jurisdiction to determine whether to prosecute a crime.¹⁸⁹ A MAG’s ability to decide to proceed with a disciplinary proceeding is not unlimited. Sex offenses can be adjudicated in disciplinary proceedings only if: (1) they are a “lighter” sex offenses; and (2) they are adjudicated by an adjudication officer (“AO”).¹⁹⁰ AO’s must have “either a legal education or special training in handling sexual harassment cases at the IDF School of Military Justice” and must have a rank of at least Lieutenant Colonel.¹⁹¹ The MAG selects the AO from a comprehensive database of AOs that have received the required training for each proceeding.¹⁹² Notably, the amendment to remove disciplinary determination authority from the military chain of command in lighter offenses was supported by defense attorneys who specialized in this field.¹⁹³

Furthermore, pursuant to GSO 33.014, victims of sexual offenses may seek assistance and treatment from: (1) their commanders (except where the commander is the alleged offender themselves);¹⁹⁴ (2) “soldiers appointed by the commander to handle sexual harassment complaints; (3) the unit’s medical or mental health officers; and (4) the Equal Employment Office personnel.”¹⁹⁵ The MJL also allows reassignment to a different unit for victims of sexual assault.¹⁹⁶ While the DoD has SAPRO, the responsibility for the development and implementation of policies for the prevention of “harm of a sexual nature” in the Israeli military context is shared by the unit commanders, AOs, and the General Staff Command Advisor for Women’s Matters through the Equal Employment Office.¹⁹⁷

186. *Hearing Before the S. Comm. on Armed Services 2013, supra note 4, at 219* (statement of Amos N. Guiora).

187. Levush, *supra* note 145, at 45.

188. Levush, *supra* note 145, at 45 (emphasis added).

189. Military Justice System of Sexual Offense: Israel, *supra* note 144.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Levush, *supra* note 145, at 49.

195. *Id.*

196. *Id.* (“Victims may be reassigned to a different unit after having been heard and following consultation with their commander.”).

197. Military Justice System of Sexual Offense: Israel, *supra* note 144.

B. The MJIA in the U.S. As Compare to the MJL In Israel

Since 2013, advocates have pushed for the adoption of MJIA to restructure the military justice system.¹⁹⁸ The MJIA would move prosecution of sexual assaults and other felony-level charges outside of the command structure to military prosecutors.¹⁹⁹ This change in structure allows victims to go outside the chain of command for the criminal justice process, removes potential conflicts of interest, and places prosecutorial discretion in the hands of trained lawyers.²⁰⁰ This restructuring is essential; commanders have continuously demonstrated they are ill equipped and unable to properly investigate, prosecute, and review convictions of military sexual assault.²⁰¹ Historically, many victims have been reluctant to report sexual offenses because they do not trust their commanders to handle the case properly—the new structure should help alleviate this issue.²⁰²

Many of the elements of the MJIA are similar to the MJL.²⁰³ The MJIA mimics the MJL by placing the decision whether to prosecute sexual assault cases with independent, trained, professional military prosecutors.²⁰⁴ Allowing trained prosecutors to handle prosecuting sexual assault cases will remove the potential for conflicts of interest commonly found in the chain of command structure and help establish trust in the system. Members of the IDF contend similar reforms made in the MJL “significantly enhanced” victims’ trust in the system and increased accountability for perpetrators.²⁰⁵

Furthermore, IDF commanders retain the authority to try minor offenses under the MJL that do not involve a sexual crime under the “Disciplinary Law.”²⁰⁶ The MJIA preserves similar authority by keeping the decision whether to prosecute thirty-seven crimes uniquely military in nature with commanders.²⁰⁷

198. Crockett, *supra* note 10.

199. See *Military Justice Improvement Act*, *supra* note 3; Service Women’s Action Network, *Military Justice Improvement Act of 2017 (MJIA) (S-2141)*, SERVICE WOMEN’S ACTION NETWORK (May 2018), <https://perma.cc/VLF7-35B4>.

200. See Service Women’s Action Network, *supra* note 200.

201. See generally SAPRO REPORT FY17, *supra* note 2 (providing statistical data on the military’s efficacy in addressing reports of sexual assault).

202. See *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 90 (statement by Sen. Gillibrand) (“After speaking to victims, they have told us that the reason they do not report these crimes is because they fear retaliation. More than half say they think nothing is going to be done, and close to half say they fear they will have negative consequences. They will be retaliated against.”); *Facts on Military Sexual Violence*, *supra* note 121.

203. Compare *Military Justice Improvement Act*, *supra* note 3, with *Military Justice System of Sexual Offense: Israel*, *supra* note 144.

204. See *Military Justice Improvement Act*, *supra* note 3; *Military Justice System of Sexual Offense: Israel*, *supra* note 144.

205. *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 219 (prepared statement by Amos N. Guiora).

206. *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 261 (statement by Gen. Ary).

207. *Military Justice Improvement Act: Excluded Crimes*, U.S. SENATE KIRSTEN GILLIBRAND, <https://perma.cc/DLH9-ZMZP> (last visited Dec. 10, 2018) (listing the crimes

The idea to preserve commander authority over military crimes ensures that felony-level crimes are disposed of by trained and experienced lawyers, while military crimes are disposed of by trained military commanders.²⁰⁸ In other words, commanders will no longer administer justice for crimes they do not have the training to understand. Both the IDF and the MJIA remove serious crimes from commanders' influence and oversight.²⁰⁹

C. The Implications of IDF Removing Sexual Assault Allegations from the Chain of Command

The United States should amend the UCMJ to mirror the MJL or adopt the MJIA because it removes the conflicts of interest and biases in the chain of command and provides justice to victims. On average, 19% of investigations result in indictments under the MAG's supervision in the IDF.²¹⁰ By contrast, only 7.9% of cases resulted in some type of conviction under commander supervision in the U.S.²¹¹ Israel's decision to take serious crime out of the chain of command has increased reporting by 80% in the last five years.²¹² Removing serious crimes from the chain of command may also have a preventative effect on sexual assault. As of 2016, one in six Israeli female soldiers reported experiencing some kind of sexual harassment,²¹³ while one in four U.S. female soldiers experienced sexual harassment.²¹⁴

As one expert notes, the increased reporting might be attributed to "recent high profile prosecutions" and the shift in the balance of power created by Israel's military sexual assault reforms.²¹⁵ During testimony before the senate committee, advocates of the MJIA stated the increase in reporting can be attributed to two key reforms: (1) the requirement imposed on commanders to immediately report all instances of sexual assault and harassment; and (2) the forceful prosecution policy implemented by MAGs who are not in the chain of

that remain within the chain of command, such as absent without leave and failure to obey order).

208. See *Military Justice Improvement Act*, *supra* note 3; *Military Justice Overview*, *supra* note 52.

209. See *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 261 (statement by Gen. Chipman); *Military Justice Improvement Act: Excluded Crimes*, *supra* note 204.

210. Gili Cohen, *Indictments for Sex Crimes in IDF Doubled in 2012*, HAARETZ (June 15, 2013), <https://www.haaretz.com/indictments-for-sex-crimes-in-idf-on-rise-1.5279731>.

211. See *Facts on Military Sexual Violence*, *supra* note 121.

212. See *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 91 (statement by Sen. Gillibrand).

213. Anna Ahronheim, *1 in 6 Female Soldiers Report Sexual Harassment in IDF*, JERUSALEM POST (Sept. 10, 2017), <https://perma.cc/WNC8-A3NC> (stating one in six female soldiers report sexual harassment in IDF).

214. *Facts on Military Sexual Violence*, *supra* note 121.

215. *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 219, 220 (prepared statement by Amos N. Guiora).

command.²¹⁶ As Senator Gillibrand contended, the increase in reporting and prevention is likely attributed to the removal of command discretion:

[Israel has] taken the serious crimes out of the chain of command . . . because[, in the U.S. system, commanders] . . . are all so dedicated and determined, [but] not all commanders are objective. Not every single commander necessarily wants women in the force. Not every single commander believes what a sexual assault is. Not every single commander can distinguish between a slap on the ass and a rape because they merge all of these crimes together.²¹⁷

Prior to the reforms of the MJL, Israeli commanders expressed reservations about their lack of a role in the decision-making process of criminal indictments for sexual assault,²¹⁸ however, the reformed system properly minimizes command influence in the criminal process to provide fuller accountability and impartiality.²¹⁹

IV. ARGUMENTS AGAINST REMOVING COMMAND DISCRETION FROM THE CHAIN OF COMMAND IN THE U.S. MILITARY

The purpose of military law in the U.S. is to “promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”²²⁰ The main arguments against implementing a neutral decision-maker in military sexual assault cases is that doing so would undermine the purpose of the military justice system and erode the necessary “good order and discipline” among service members.²²¹ Those resistant to the implementation of a neutral decision maker also argue that removing command oversight in criminal adjudications is an “extreme” remedy for an “almost non-existent” problem.²²² Both arguments are fundamentally

216. *Id.* at 220.

217. *Id.* at 91 (statement by Sen. Gillibrand).

218. *Id.* at 219 (statement by Amos N. Guiora).

219. *Id.*

220. *See* Manual for Courts-Martial, *supra* note 15, at Preamble.

221. *See Hearing Before the S. Comm. on Armed Services 2013, supra* note 4, at 103 (statement by Gen. Dempsey) (“Commanders’ decisions regarding the initial disposition of offenses are central to their role and responsibility to maintain the good order and discipline of their units and the individuals they command.”); Charles D. Stimson, *Sexual Assault in the Military: Understanding the Problem and How to fix it*, HERITAGE FOUNDATION (2013), <https://perma.cc/Q9UW-HHSP> (“The military exists to defend the nation. That is its mission. To accomplish that mission, leaders must ensure that those who serve under them are combat ready, and once ordered into armed conflict, combat effective. Maintaining good order and discipline in the armed forces is essential to accomplishing the mission.”).

222. Shelbi Nicole Keehn, *Striking a Balance Between victim and Commanding Officer: Why Current Military Sexual Assault Reform Goes too Far*, 48 Colum. J.L. & Soc. Probs. 461, 487 (2015).

flawed, unsupported by the available data, and highlight the lack of awareness and education on the issue of sexual assault.

A. Maintaining Good Order and Discipline

The military justice system in the U.S. exists to ensure “good order and discipline” across the branches of the military.²²³ Opponents of removing command oversight from criminal prosecution premise their argument on the idea that a commander’s discretion reinforces the commander’s authority and the service member’s subordinate role.²²⁴ From their perspective, the commander’s discretion ensures subordinates will follow orders. The opponents then espouse the view that Congress must implement reforms that address the problem of sexual assault by “[enhancing] and [preserving] a commander’s ability to enforce good order and discipline.”²²⁵ This argument appears to be premised on the hope and belief that “enhancing and preserving a commanders ability to enforce good order and discipline[]” in some way correlates with a system better able to handle the complexities of sexual assault allegations.

This argument is devoid of empirical support and is untenable.²²⁶ Incidents of military sexual assault go straight to the core of maintaining good order and discipline and erode unit cohesion.²²⁷ Within the current structure, commanders are responsible for nearly 15,000 allegations of either unwanted sexual attempts, sexual assaults, or rapes that all occurred in the commanders’ units.²²⁸ This, according to Senator Gillibrand, does “not define, by any definition, . . . good order and discipline.”²²⁹ Put differently, if commanders are unable to maintain good order and discipline under the current system, there is no reason to believe that giving them more authority, or allowing them to maintain their current authority, will help resolve the issues surrounding sexual assault.

The argument that the command oversight within the court-martial process is necessary to “[m]aintain good order and discipline” is also shortsighted because administrating justice and referring cases to courts-martial is a small part of the commander’s job.²³⁰ Commanders are not lawyers and have immense

223. See Stimson, *supra* note 218.

224. Laird, *supra* note 4; see Manual for Courts-Martial, *supra* note 15, at Preamble.

225. See Stimson, *supra* note 218.

226. See *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 166 (prepared statement by Nancy Parrish).

227. See *id.* at 206 (statement by Nancy Parrish) (“[M]ission readiness and unit cohesion . . . is undermined every day by disbelieving the victim. You must remove the bias and conflict of interest.”).

228. See NBC News, *supra* note 81.

229. See *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 91 (statement by Sen. Gillibrand).

230. See *id.* at 273 (statement by Gen. Altenburg). (“[Commander responsibilities] include “weapons training, equipment maintenance, esprit, morale, teamwork, physical health, emotional health, and the trust in each other to die for each other that ensures combat effectiveness in defense of the Nation.”); *id.* at 88 (statement by Sen. Graham) (arguing that the responsibilities of commanders are very unique and that “very few of us have the authority to order somebody into battle”).

responsibilities outside of administering justice.²³¹ It is unlikely that removing a role that plays such a small part in a commander's overall duties will have any negative effects on maintaining good order and discipline. Furthermore, under the MJIA, commanders would still retain the decision whether to prosecute "[thirty-seven] serious crimes uniquely military in nature," such as going absent without leave.²³² The MJIA, influenced by the MJL, was carefully created to retain a commander's authority to prosecute crimes necessary to maintain good order and discipline, while placing crimes, sexual in nature, in the hands of trained prosecutors.²³³

To reiterate, there is no empirical evidence that shows taking away a commander's discretion related to sexual assault prosecutions would in any way undermine good order and discipline. In fact, since Israel and other countries began prosecuting sexual assault cases outside the chain of command, the commanders have not reported any issues related to decreased military readiness and unit cohesion.²³⁴ Indeed, military commanders have consistently failed to specifically explain why removing the "oversight of the criminal process in serious crimes from the commander and placing it in capable and trained prosecutors hands" would eliminate good order and discipline within the ranks.²³⁵

B. "Extreme" Remedies for an "Almost Non-Existent" Problem

Another argument against removing command oversight in military sexual assault cases is that such reforms are "extreme" remedies for an "almost non-existent" problem.²³⁶ According to the author of one recent law review article, "[r]emoving commander discretion in post-conviction review is an extreme remedy to an almost non-existent problem, and one that has become sensationalized in the media due to a small handful of high-profile cases."²³⁷

The author further postulated that "in the last five years, clemency was granted in only 2% of Air Force sexual assault convictions."²³⁸ The author's commentary failed to comprehend the implications the decision to grant clemency has on victims' trust in the military justice system. It is well documented that the primary deterrent for victims to report military sexual

231. *Military Justice Overview*, *supra* note 48.

232. See *Military Justice Improvement Act*, *supra* note 3; *Military Justice Improvement Act: Excluded Crimes*, *supra* note 204.

233. *Military Justice Improvement Act*, *supra* note 3; see *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 91 (statement by Sen. Gillibrand) ("There is a difference between setting the tone, dealing with misdemeanor-level behavior and dealing with some criminal behavior.").

234. See Lindsay Rosenthal & Lawrence Korb, *Twice Betrayed, Bringing Justice to the U.S. Military's Sexual Assault Problem*, CENTER FOR AMERICAN PROGRESS, Nov. 2013, at 3, <https://perma.cc/NBU9-Z2QY>.

235. *Id.*

236. See Keehn, *supra* note 219.

237. *Id.*

238. *Id.*

assault within the military is the inherent mistrust of the system.²³⁹ When a potentially biased decision maker is allowed to grant clemency to a convicted rapist, it does not simply erode a victim's trust in the military justice system, it obliterates the trust.²⁴⁰ Moreover, "when victims are punished and perpetrators go free . . . , trust, the essential ingredient to an effective, functioning military is undermined."²⁴¹ Sexual assault convictions are also the lowest they have been in the past decade; thus, clemency is rarely exercised because the allegation never even reached the court-martial phase.²⁴²

V. CONCLUSION

The U.S. command-driven military system is broken. Despite the recent changes, commanders continue to fail to properly investigate, charge, and prosecute sexual assault violations. As a result of the broken system, service members do not trust commanders to make impartial decisions and properly handle allegations of sexual assault.²⁴³ Notably, when IDF removed the ability of commanders to prosecute allegations of sexual assault, the IDF experienced an increase in the reporting of, and a preventive effect on, occurrences of sexual assault. To deliver impartial justice and hold perpetrators accountable, Congress must adopt the MJIA or further align the U.S. system with the IDF to remove serious crimes from the chain of command.

239. See *Hearing Before the S. Comm. on Armed Services 2013*, *supra* note 4, at 206 (statement by Nancy Parish).

240. See *id.* at 50 (prepared statement by ADM Robert J. Papp, USN). ("The crime of sexual assault not only damages the victim, it undermines morale, degrades readiness and damages mission performance. It is a deliberate act that violates law, policy and our Core Values of Honor, Respect, and Devotion to Duty.")

241. *Id.* at 166 (prepared statement by Nancy Parrish).

242. Ziezulewicz, *supra* note 118.

243. Steinhauer, *supra* note 121.