A WHITE PAPER

ON

AMERICAN MILITARY JUSTICE: RETAINING THE COMMANDER'S AUTHORITY TO ENFORCE DISCIPLINE AND JUSTICE

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I. Purpose and Overview of Paper

This white paper recommends that Congress reject proposals that would remove a commander's prosecutorial discretion and instead place it in the hands of senior armed forces lawyers.

There are currently two proposed legislative provisions that would adversely affect the commander's prosecutorial discretion and undermine the commander's ability to enforce good order and discipline. The first proposed provision was included in Section 540F of the 2020 National Defense Authorization Act, where Congress mandated that the Department of Defense report to the congressional armed services committees on the feasibility of creating a pilot program that would remove a commander's authority to prefer, and refer to trial, court-martial charges for serious offenses and instead place that authority in the hands of senior armed forces lawyers.[3] As we finalize this White Paper, the Department of Defense has not yet released that report.

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[2] Currently Associate Dean for Academic Affairs at George Washington University Law School, teaching military justice as a professorial lecturer in law, with over 30 years of experience with the military justice system, including as an active duty Army judge advocate serving as an appellate judge, prosecutor, special assistant U.S. attorney, and assistant professor at the United States Military Academy, West Point. She has served on numerous Departments of Defense, Army, Navy, and Air Force panels tasked with studying the military justice system, including the Department of Defense UCMJ Code Committee. This paper does not reflect George Washington University Law School, George Washington University, or the Department of Defense.

[3] Sec. 540F, Pub. L. No. 116-92, 133 Stat. 1198 (Dec. 19, 2019). That section provides:

> SEC. 540F. REPORT ON MILITARY JUSTICE SYSTEM INVOLVING ALTERNATIVE AUTHORITY FOR DETERMINING WHETHER TO PREFER OR REFER CHANGES FOR FELONY OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE.
>
> **(a) REPORT REQUIRED**.—

The second proposal appears in the "Military Justice Improvement Act of 2020" (S.4049) which would dramatically reduce the commander's authority and responsibility for preferring and referring felony-level offenses to trial by court-martial, and transfer that authority to senior judge advocates.

In summary, we believe that:

- Commanders play a critical and necessary role in the American military justice system (*See* Section III, *infra*);

> (1) IN GENERAL.—Not later than 300 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the results of a study, conducted for purposes of the report, on the feasibility and advisability of an alternative military justice system in which determinations as to whether to prefer or refer charges for trial by court-martial for any offense specified in paragraph (2) is made by a judge advocate in grade O–6 or higher who has significant experience in criminal litigation and is outside of the chain of command of the member subject to the charges rather than by a commanding officer of the member who is in the chain of command of the member.
> (2) SPECIFIED OFFENSE.—An offense specified in this paragraph is any offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), for which the maximum punishment authorized includes confinement for more than one year.
>
> **(b) ELEMENTS**.—The study required for purposes of the report under subsection (a) shall address the following:
>
> > (1) Relevant procedural, legal, and policy implications and considerations of the alternative military justice system described in subsection (a).
> > (2) An analysis of the following in connection with the implementation and maintenance of the alternative military justice system: (A) Legal personnel requirements. (B) Changes in force structure. (C) Amendments to law. (D) Impacts on the timeliness and efficiency of legal processes and court-martial adjudications. (E) Potential legal challenges to the system. (F) Potential changes in prosecution and conviction rates. (G) Potential impacts on the preservation of good order and discipline, including the ability of a commander to carry out nonjudicial punishment and other administrative actions. (H) Such other considerations as the Secretary considers appropriate.
> > (3) A comparative analysis of the military justice systems of relevant foreign allies with the current military justice system of the United States and the alternative military justice system, including whether or not approaches of the military justice systems of such allies to determinations described in subsection (a) are appropriate for the military justice system of the United States.
> > (4) An assessment of the feasibility and advisability of conducting a pilot program to assess the feasibility and advisability of the alternative military justice system, and, if the pilot program is determined to be feasible and advisable— (A) an analysis of potential legal issues in connection with the pilot program, including potential issues for appeals; and (B) recommendations on the following: (i) The populations to be subject to the pilot program. (ii) The duration of the pilot program. (iii) Metrics to measure the effectiveness of the pilot program. (iv) The resources to be used to conduct the pilot program.

- Transferring prosecutorial discretion from commanders to judge advocates will undermine commanders' authority to maintain good order and discipline (*See* Section IV, *infra*);

- Transferring the decision to prosecute and refer charges to a court-martial will create unintended consequences (*See* Section V, *infra*);

- Changing the American military justice system to emulate the systems of other countries is not warranted or advisable. Comparison of sexual assault prosecution rates of the United States military with four United States allies in 2013 (*see* Appendix) and with three allies more recently do not support adopting their systems of removal of command responsibility for prosecuting serious sex crimes (*See* Section VI, *infra*);

- The Proposed Amendments Will Adversely Affect the Delicate Balance Between Justice and Discipline (*See* Section VII, *infra*);

- Recent Studies of Command Decisions to Prosecute Sexual Assaults Demonstrate that the Current System is Working (*See* Section VIII, *infra*);

- Congress Should Await Implementation of the Reforms Outlined in the Military Justice Act of 2016 for Oversight and Accountability (*See* Section IX, *infra*); and

- Congress should reaffirm the role of the commander to enforce good order and discipline (*See* Section X, *infra*).

II. Overview and Background of Proposals to Limit the Commander's Role in the Military Justice System

As noted, *supra*, there are currently two pieces of legislation pending in Congress that would shift prosecutorial discretion from commanders to senior judge advocates, in an attempt to emulate the systems used in other countries. Not all cases would be affected by the shift in responsibilities from commanders to senior judge advocates. Only disposition of serious offenses would be affected; offenses that are apparently considered to be military in nature, and not common law offenses, would not be affected.

While neither of the proposed legislative provisions outline any problems that they are designed to address, attempts to remove commanders from the military justice system are not new. Similar legislation was proposed and rejected in 2013.[4] Since that time a series of advisory panels comprised of civilian, non-

[4] In 2013, Senator Gillibrand sponsored the Military Justice Improvement Act (MJIA) which proposed that commanders would no longer have jurisdiction over specified offenses and the commander's power to grant post-trial clemency would be limited. S. 967, 113th Cong. (2013). As with the currently proposed legislation, her bill would have required that for offenses where the maximum punishment included confinement for more than one year (in effect a felony grade offense), the decision to file court-martial charges and refer charges to general or special courts-martial would be made by someone in the rank of at least 0-6, with significant experience in trying courts-martial, and outside the chain of command. *Id.* That responsibility would be handled by officers established by the Chiefs of Staff of each Service. *Id.* Although Senator Gillibrand's bill had bipartisan support, it eventually failed in the Senate by a close vote. *See* Laura Basset, *Senators Shoot Down Gillibrand's Military Sexual Assault Reform Bill*, THE

governmental experts have reviewed the role of the commander and rejected such a wide-sweeping change because such change was not justified. Specifically, the Response Systems to Adult Sexual Assault Crimes Panel (RSP) (congressionally mandated to assess the impact of removing disposition authority from commanders) in June 2014 reported that:

> Congress should not further limit the authority of convening authorities under the UCMJ to refer charges of sexual assault crimes to trial by court-martial . . . [and] [a]fter reviewing the practices of Allied militaries and available civilian statistics and hearing from many witnesses, the Panel determined the evidence [did] not support a conclusion that removing convening authority from senior commanders [would] reduce the incidence of sexual assault . . . or improve the quality of investigations or prosecutions . . . ."[5]

And even before the extensive changes enacted in the Military Justice Acts of 2016 and 2018, the Panel warned that systematic changes "should be considered carefully in the context of the many changes" made to the "form and function of the military system."[6] In 2015, the Military Justice Review Group focused on measures to improve the process rather than revisiting the issue after the RSP's thorough review, and specifically recommended "[re]taining the current procedures for the exercise of disposition discretion based upon the interlocking responsibilities of military commanders, [S]taff [J]udge [A]dvocates, and judge advocates."[7] In 2019, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) (tasked with reviewing specific case dispositions), based on a review of 164 military investigative cases, found that "commanders' disposition of penetrative sexual assault complaints [were] reasonable in 95% of the cases."[8] *See* Section VIII, *infra*.

Furthermore, since 2013, extensive substantive changes to the Uniform Code of Military Justice (UCMJ) (e.g., the Military Justice Acts of 2016 and 2018) and Manual for Courts-Martial have been put in place and those changes require time for implementation and reassessment of the military justice system before additional reforms should be made. Provisions are in place requiring that convening authorities' decisions not to refer sexual assault cases must be reviewed *(See* Section IX, *infra*.) and substantially limiting their clemency authority. An appendix to the Manual for Courts-Martial now provides commanders with factors they should consider in all misconduct cases (e.g., 'interests of justice," "the views of the victim as to disposition," "the harm caused to any victim of the offense," and "good order and discipline"), inappropriate factors (e.g., "the accused's race or religion" and "political pressure"), and special

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HUFFINGTON POST (Dec. 11, 2013, 2:10 PM), http://www.huffingtonpost.com/2014/12/11/gillibrandsmilitary-sexual-assault_n_6309108.html.

[5] Response Systems to Adult Sexual Assault Crimes Panel Report (June 27, 2014) at 6, available at https://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf.

[6] *Id*.

[7] Military Justice Review Group, Report of the Military Justice Review Group Part I: UCMJ Recommendations (Dec. 22, 2015) at 300, available at https://ogc.osd.mil/images/report_part1.pdf.

[8] Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) Third Annual Report (Mar. 26, 2019) at 31, available at https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Report_03_Final_20190326_Web.pdf.

considerations (e.g., "whether the accused might face prosecution in another jurisdiction").[9] Pursuant to the Military Justice Act of 2016, convening authorities must have "periodic training regarding the purposes and administration" of the UCMJ.[10] Additionally, judge advocates are to serve as Article 32, Preliminary Hearing Officers whenever practicable.[11]

III. The UCMJ, the Manual for Courts-Martial, and Regulations Recognize the Critical Role of the Commander in the Military Justice System

A. In General

The UCMJ and the Manual for Courts-Martial entrust the responsibility for the military justice system to commanders at all levels in the chain of command. The commander's critical role in the system has been part of this country's military justice system since the founding of the country.

B. Under the Current System the Commander's Prosecutorial Discretion is Broad

Military courts have recognized that the commander is vested with broad discretion to decide how to best deal with discipline problems in his or her command. The commander's options range from no action, verbal counseling administrative actions (such as a written letter of reprimand in the service member's file), or an administrative discharge, and punitive actions such as nonjudicial punishment or court-martial charges.[12] Decisions on serious allegations are made after consulting with the Staff Judge Advocate or a military prosecutor, who are members of the command.[13] The Staff Judge Advocate is expected to provide sound legal advice based on the nature and extent of the alleged criminal activity, the availability and admissible of evidence against the accused, the needs of the command, the time necessary to investigate and prosecute the case, and the likely outcome of a trial on the merits. Those are the types of decisions that local district attorneys and United States Attorneys make on a daily basis.

However, in the military the decision is the commander's to make, not the lawyer's. That is because the commander, not the lawyer, is responsible for the good order and discipline and morale within the command.

C. Under the Current System it is Critical that the Commander Have Trust and Confidence in His or Her Legal Advisors

Under the current system, Staff Judge Advocates serve as legal advisors for the commanders of major commands, and for the subordinate commands. It is critical that the commanders trust and confide in those legal advisors on matters involving military justice, which in turn impact morale, and good order and discipline. That trust and confidence inures to the overall benefit of the command when the command is deployed and commanders must count on their legal advisors in matters far beyond military justice, such as operational law, international agreements, and important military and civilian personnel matters.

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[9] *See* Non-Binding Disposition Guidance § 2.1, Manual for Courts-Martial 2019, App 2.1-2.
[10] Art. 137(d), UCMJ.
[11] Rule for Courts-Martial 405(d)(A) (2019).
[12] *See* Rule for Courts-Martial 306.
[13] *See* Art. 30, UCMJ.

The proposed amendments—which would remove the commander's legal advisor from the important decision-making process of dealing with serious offenses—will undermine that critical relationship, not only in regards to military justice matters, but also the broader legal issues commanders face at home and when deployed.

IV. The Proposed Changes Would Undermine a Commander's Responsibility to Maintain Good Order and Discipline

A. The Purpose and Function of the Military Justice System—Good Order and Discipline

It is critical that Congress, in considering any amendments to the UCMJ, recall that the primary function and purpose of the military justice system is to enforce good order and discipline in the armed forces.[14]

Traditionally, those who view military justice as primarily a system of justice tend to see the commander's role as a hindrance to justice and a relic of the past. Those who view the system as primarily a system for maintaining good order and discipline, see the commander's role as indispensable. In *Curry v. Secretary of the Army*,[15] the Court of Appeals for the District of Columbia Circuit affirmed the district court's decision that the role of the convening authority in taking various actions in a court-martial case was constitutional. The court stated:

> The power of the convening authority to refer charges to the court-martial is justifiable on two grounds. First, prosecutorial discretion may be essential to efficient use of limited supplies and manpower. The decision to employ resources in a court-martial proceeding is one particularly within the expertise of the convening authority who, as chief administrator as well as troop commander, can best weigh the benefits to be gained from such a proceeding against those that would accrue if men and supplies were used elsewhere. The balance struck is crucial in times of crisis when prudent management of scarce resources is at a premium. Second . . . maintenance of discipline and order is imperative to the successful functioning of the military. The commanding officer's power to refer charges may be necessary to establish and to preserve both.

Most of the governing rules and regulations in the military justice system attempt to balance the need for justice and discipline. More recently, critics have accused commanders of failing to ensure prosecution of those accused of sexual assault. Despite the views of some commentators that the military justice system is primarily a system of justice, the system's function and purpose have not changed since the original Articles of War were adopted in the 1700s. Establishment of the current system's framework in 1950 occurred only after numerous congressional hearings, multiple studies and that system has weathered well. The United States Supreme Court has agreed in that assessment, recently stating in *Ortiz*

[14] *See* Schlueter *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1 (2013), available at https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW.NSF/20a66345129fe3d885256e5b00571830/17ecb457e9eff74285257bf0005a5903/$FILE/By%20David%20A.%20Schlueter.pdf.
[15] 595 F.2d 873, 878 (D.C. Cir. 1979).

v. United States[16] that "[t]he procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal."[17]

Notwithstanding all of the reforms that have taken place since the founding of the nation, the American military justice system remains a system designed to enforce discipline and good order.

The proposed changes would be a severe and unnecessary blow to the military. These proposed changes would undermine military good order and discipline and would, as we note *infra*, result in fewer prosecutions of perpetrators of serious crimes including sexual assaults.

B. Comparison to Civilian Prosecutorial Decisions

The proposed amendments to Article 30, UCMJ, which would remove the commander as the decision maker in the military justice process would undermine the commander's broad prosecutorial discretion and would transfer the local commander's decision to some unspecified command structure, outside the commander's chain of command, and require the recommendations of a senior armed forces lawyer, disconnected in time and space from the command. Such a modification would be tantamount to informing a district attorney that the decision to prosecute or not prosecute serious cases would be made in the state capital, or in Washington D. C. — and that the decision would be binding on local authorities. Not only would that system undermine the effectiveness of the district attorney's offices, it would undermine the populace's confidence in the ability of local authorities to take care of local crime. So too in the military, with commanders. Once members of a command discover that a person with no connection to the command is making the decision regarding court-martial charges, they will view the commander as powerless to deal with serious offenses in a quick and efficient manner.

C. An Academic or Ivory Tower Decision

Because a high-ranking lawyer outside the command would be routinely making decisions concerning court-martial charges, some may view that exercise as primarily "academic," which is disconnected from the real-world problems of the command. Or worse yet, an "ivory tower" decision.

The decision to prosecute almost always involves an armed forces prosecutor personally interviewing potential witnesses, reviewing the law enforcement reports, speaking personally to the commanders in the chain of command, and providing an informed "on the ground" assessment of the strengths and weaknesses of the case against an accused.

Most of those critical elements in the decision-making process would be missing, if the primary decision authority rests in a high ranking officer, separated from the real world problems of that particular command. Memos, e-mails, and electronic evidence are not an adequate substitute for a decision made by the local commander, after a careful assessment by the commander's local legal advisor.

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[16] 138 S.Ct. 2165 (2018).
[17] 138 S.C. at 174 (2018) (citing1 D. Schlueter, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1–7, p. 50 (9th ed. 2015).

D. Undermining the Chain of Command

Under the current system, it is the unit, or company commander, who usually initiates the charging process by asking the prosecutor assigned to his unit to prepare a charge sheet, i.e., "preferring charges." Usually, that decision is made after consulting the prosecutor assigned to that unit. Each commander in the chain of command is charged with considering the possible charges and providing another level of assessment before it reaches the desk of the commander, who would be the convening authority on the case. The amendments are clearly intended to disrupt the normal chain of command. The decision to prosecute or not prosecute is made completely out of the chain of command, and not by the very people who are in the best position to make decisions that directly affect good order and discipline in that command.

E. For Purposes of Good Order and Discipline there is No Distinction Between Common Law Offenses and Military Offenses

In stripping the commander of the discretion to dispose of serious offenses, the amendment appears to distinguish what some refer to as "common-law" crimes from military crimes. For purposes of the military justice system, that distinction is meaningless. In *Solorio v. United States*,[18] the Supreme Court concluded that a court-martial had jurisdiction to try a Coast Guard person who committed sexual misconduct offenses that occurred in the civilian community. Among other sources, the Supreme Court quoted General George Washington's General Order dated February 24, 1779: "All improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other."[19]

Service members who commit common law crimes such as larceny (Art. 121), sexual assault (Art. 120), and murder (Art. 118), pose as significant a threat to good order and discipline as do the crimes of desertion (Art. 85), disobedience of an order (Art. 90), and conduct unbecoming an officer and a gentleman (Art. 133).

F. The Problem of Mixed Offenses

The proposed amendments create another issue when the accused has committed multiple offenses — some of which are in the excluded list of offenses (military offenses) and some which are on the included list (common-law offenses). Who will make the ultimate decision to proceed with court-martial charges? For example, an accused may be charged with sexual assault, conduct unbecoming an officer and a gentleman, and disobedience of an order of a superior officer to avoid contact with the sexual assault victim. Is that a decision for the commander? Or the senior legal officer, unconnected with the command? Under the current system, that decision is made efficiently by the local command without regard to whether the offense is military in nature or a civilian-type offense. Additionally, if the commander proceeds with offering the accused a summary court-martial or nonjudicial punishment for the "purely" military offenses, but the accused decides to demand trial by court-martial, who will refer that case? (*See* Section VI, *infra*.)

[18] 483 U.S. 435 (1987).
[19] *Id*. at 445 n.10 (citing 14 Writings of George Washington 140-141 (J. Fitzpatrick ed. 1936).

The proposed system creates a needless and complicated bifurcated system and additional level of bureaucracy that in all likelihood will present unintended consequences.

G. The Proposed Amendments Threaten the Ability to Hold the Commander Responsible for the Offenses of Members of the Command

There is still another reason for not stripping prosecutorial authority from the commander. If commanders no longer have the necessary disciplinary role in preferring charges or referring them to trial for service members' misconduct, it could be difficult to hold them personally responsible for the delicts of the service members under their command.

For example, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia overturned the conviction of General Markač, a commander of a Special Police unit during the Croatian War of Independence in the 1990s.[20] The appellate court noted that although General Markač had some control over his subordinate commanders, his authority to discipline them for their misdeeds was not within his power because any crimes committed by members of his command fell under the jurisdiction of civilian prosecutors. Thus, the court said, there was a question about whether he could be held liable for crimes committed by his subordinates. Although the court did not decide whether the commander could be held responsible, it is interesting to note that the court recognized the problem. The same result could occur under the proposed amendments, where someone outside the chain of command is making a binding decision to prosecute or not prosecute crimes occurring within the commander's command.

CEO's for large organizations know that responsibility for the organization must be accompanied by the authority to manage the organization. The same holds true, to an even greater extent, in the military because commanders make life and death decisions on the battlefield.

H. The Amendments Apparently Reinstitute Procedures Long-Since Abandoned for Appointing the Participants to a Court-Martial

Under the current system, the convening authority appoints the panel members who will serve as the finder of fact at the court-martial. They are the military's counterpart to jurors for a state or federal criminal case. The military judge is assigned to the case by the independent Service's trial judiciary command. The defense counsel is assigned to represent an accused by an independent chain of command for defense counsel. The trial counsel (prosecutor) is selected by the Staff Judge Advocate.

The proposed amendments appear to reinstate a system that has not existed in many years. It would apparently require the Service Chiefs of Staff located in the Pentagon to create an office to select not only the court-martial members but also the military judge, prosecutor, and defense counsel. That leaves a clear impression with the accused, and members of the public, that the system has reverted to the day when it appeared that the court-martial was stacked against the accused. No U.S. Attorney or district attorney has authority to select these trial participants for cases being tried by their offices.

[20] Prosecutor v. Gotovina & Markač Case No. IT-06-90-A, Appeal Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

This scheme would be particularly problematic insofar as it would be perceived as impacting on the impartiality and independence of the military judge. It would certainly be attacked in the courts as depriving an accused of due process.[21]

V. The Proposed Changes Would Create Unintended Consequences

A. Inability to Impose Nonjudicial Punishment or Convene Summary Court-Martial

Under the proposed amendments to Article 30, a decision by the lawyer not connected to the command, would undermine the commander's ability to deal with the alleged offenses in some other forum. For example, the amendment indicates that a decision not to proceed with court-martial charges would not limit the ability of the commander to proceed with a summary court-martial (Art. 24) or nonjudicial punishment (Art. 15). But that creates potential problems with actual implementation. Article 15 provides that unless a service member is attached to a vessel, the service member can turn down the commander's proposed Article 15 procedures and demand a court-martial. The same is true for a summary court-martial; the accused must consent, whether or not the accused is assigned or attached to a vessel. If the centralized legal authority decides not to prosecute and the commander offers the accused an Article 15, or prefers summary court-martial charges, the accused can refuse to proceed, and thus put the commander in the "check-mate" position of not being able to conduct a summary court-martial or impose nonjudicial punishment under Article 15.

B. Deciding Whether to Impose Pretrial Confinement

Under the current system, a commander may place an accused in pretrial confinement pending disposition of the charges. The system provides for both command review and judicial review of that decision by a military magistrate or judge. The current system is an integrated and coordinated decision by the chain of command, which in large part depends on the probable disposition of the charges. The proposed scheme—which takes the decision to refer a case to trial out of the chain of command—creates uncertainty as to whether that current system of dealing with pretrial confinement issues can be maintained.

C. The Proposed Scheme Will Present Speedy Trial Problems

The military justice system currently recognizes several speedy trial protections—constitutional, statutory, and regulatory. Those protections are triggered by preferral of court-martial charges and/or pretrial confinement of the accused. Under the current system commanders and legal advisors work together to ensure that the case moves in a timely and efficient manner. Vesting the decision to refer charges to a court-martial in a legal office, separated by time and distance, poses speedy trial concerns, and could eventually make it impossible or impractical for a local commander to impose pretrial confinement.

D. Plea Bargaining Adversely Affected

Another example—as in the civilian community, the military justice system depends heavily on the ability of a convening authority and an accused to enter into a pretrial agreement. Those agreements

[21] United States v. Weiss, 510 U. S. 163 (1994) (holding that current system of appointing judges does not violate due process).

typically require the accused to enter a plea of guilty in return for reduction of charges, dismissal of some of the charges, or a sentence limitation. The proposed amendments fail to address that critical feature of the system. If the centralized legal authority decides to proceed with court-martial charges, that decision is binding on any convening authority. Does that mean that a convening authority could not subsequently enter into plea bargaining with the accused, which resulted in the dismissal of a serious charge?

The answer to that question does not lie in drafting additional statutory language nor in directing the President to solve the problem through myriad amendments to the Manual for Courts-Martial or existing Service regulations. That would simply add a level of bureaucracy to a system that currently operates efficiently and fairly.

E. The Proposed Amendments May Adversely Affect Agreements with Local Civilian Prosecutors

At many installations there are agreements with local prosecutors (state and federal) as to which office—military or civilian—will prosecute an accused. Those agreements are very beneficial in promoting good community relations between the local command and the surrounding civilian community. The proposed amendments make no provision for such agreements. Is it intended that after the O-6 legal advisor decides to prosecute a case, the local agreements are no longer operative? Would the O-6 be bound by such agreements? Is the O-6 required to contact the local civilian prosecutor and decide on the next best steps? In either event, the local command has no say in resolving the issues, even though the decision could have an impact on local military-civilian relations.

For example, in the current system if a commander elects not to refer sexual offenses to courts-martial, a superior convening authority may refer the offense to courts-martial. If the offense occurred on a military installation with exclusive federal jurisdiction, the U.S. Attorney may prosecute the case in U.S. District Court. If the offense occurred elsewhere in the United States, a district attorney could prosecute the case. Thus, the commander's decision not to prosecute may lead to prosecution in other venues.

VI. Congress Should Not Look to Other Countries' Systems as Models for American Military Justice Unless There is Clear Evidence that the Other System is More Effective

A. In General

The proposed amendments seem to rest on the view that first, military commanders are not to be trusted in exercising prosecutorial discretion and second, Congress should follow the lead of other countries and adopt procedures used in countries such as Canada, Australia, and the United Kingdom. That argument is reminiscent of the debate over whether other countries' laws should serve as a model for American legal systems. In hearings on earlier similar legislative proposals, some commentators have urged Congress to go further and apply this approach to the prosecution of all cases by civilian prosecutors. The argument is that the United States' military justice system is an "outlier" and that it is somehow deficient.

The American military justice system is exceptional. There is no need to look to other countries for guidance. Commanders are well trained and highly educated. Those who fail to perform are usually removed from command or denied valued promotions. Lawyers who advise them also are well trained and

highly educated. And there are consequences if they fail to perform. Before Congress gives any serious consideration to adopting the procedures used in other countries, it should compare those systems in terms of size of the military force, the world-wide and geographical disbursement of military personnel, purpose of those military justice systems, history and experience of those systems, and the country's expectations for its commanders in enforcing good order and discipline.

B. Statistical Comparisons Between The United States and Three Countries Where Attorneys Refer Cases to Courts-Martial

On April 20, 2020, a Shadow Advisory Group (SAG) issued a report to the Senate Armed Services Committee and the House Armed Services Committee. The report addressed Section 540F of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (Dec. 19, 2019) (FY20 NDAA), and noted (as mentioned previously) that Section 540F(b)(a)(3) of the National Defense Authorization Act directs a report containing among other elements:

> (3) A comparative analysis of the military justice systems of relevant foreign allies with the current military justice system of the United States and the alternative military justice system, including whether or not approaches of the military justice systems of such allies to determinations described in subsection (a) are appropriate for the military justice system of the United States.[22]

The SAG indicates that about 8 of 15 relevant allies do not prosecute non-military offenses such as sexual assault by courts-martial during peace time.[23] The remaining 7 allies utilize lawyers to charge offenses and refer them to trial.[24] The military forces of two allies (Ireland and New Zealand) have fewer than 10,000 personnel in their militaries.[25] Five allied countries—Australia, Canada, Israel, Italy, and the United Kingdom—have militaries with personnel strengths between about 60,000 and 150,000,[26] and the effectiveness of their prosecution systems could be compared to that of the United States. Any assessment should consider the rates of sexual assault prosecutions and convictions (because those statistics seemed to be reported and available) and compare those rates with the rates of United States sexual assault courts-martial prosecutions and convictions. It may not be possible to assess the statistics of some of the allies because some of these countries might not maintain statistics. Others might be unwilling to disclose statistics on prosecutions.

The SAG Report states, "The experience of other democratic countries that rely on courts-martial for the trial of serious offenses by military personnel with the charging power vested in a lawyer rather than a lay commander demonstrates that such a system can be put in place without compromising the

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[22] Shadow Advisory Report Group of Experts, "Alternative Authority for Determining Whether to Prefer or Refer Charges for Felony Offenses Under the Uniform Code of Military Justice," Apr. 20, 2020 (addressing Section 540F of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (Dec. 19, 2019) (FY20 NDAA) [hereinafter SAG Report].
[23] *Id*. at App. 16-17.
[24] *Id*.
[25] Global Firepower Nations Index (2020), Active Military Manpower (2020), available at https://www.globalfirepower.com/active-military-manpower.asp.
[26] *Id*.

effectiveness of the nation's defense capability."[27] Actually, the SAG Report provides no demonstration of the effect on defense capability of transferring authority from the commander to lawyers. The SAG Report does not give any examples where prosecutions of serious crimes were more effective than the current United States system where the convening authority refers cases to trial. The United States is clearly the most effective and powerful military, and it is the model that our allies emulate in many ways. None of our allies has presented an argument that dilution of the authority of the commander to enforce good order and discipline improved the effectiveness of their military.

A 2013 study compared the number of sexual assault felony-level prosecutions in the Canadian, Australia, United Kingdom, and Israel Armed Forces with those in the United States Armed Forces. (*See* Appendix) The study concluded that more than twice as many United States personnel were tried by courts-martial for sex offenses per capita than for Canadian Forces, even though the U.S. reported rate per thousand of sexual abuse by military suspects was 27% lower than the Canadian rate per thousand. In Fiscal Year 2012, a single United States military installation, Fort Hood, alone tried 3.7 times (26 Fort Hood versus 7 Canada)—as many sex offenses by courts-martial as the entire Canadian military—and obtained ten times (21 Fort Hood versus 2 Canada) as many sex offense courts-martial convictions.

In 2013, the Israeli active duty population was 176,500 or four times as large as the active duty population of Fort Hood. Yet in 2012, Fort Hood completed about the same number of military sex offense prosecutions as the entire Israeli Defense Force (Fort Hood tried 26 sex offense courts-martial in FY 2012; Israel averaged 23 indictments from 2008 to 2012). The 2013 study reported that "[t]he entire Australian military justice system prosecuted an average of three felony-level prosecutions the last two years; as compared to the U.S. military justice system that prosecutes approximately 400 times as many felony-level cases."[28] The prosecution rate in the United Kingdom was roughly the same as for the United States Department of Defense.

Recent statistical comparisons of United States military prosecutions with the Canada, Australia, and the United Kingdom yield results that are similar to the study in 2013. (*See* Appendix) On April 30, 2020, the active duty personnel strength of the United States Armed Forces was 1,329,972.[29] The Department of Defense "uses the term 'sexual assault' to refer to a range of crimes, including rape, sexual assault, forcible sodomy, aggravated sexual contact, abusive sexual contact, and attempts to commit these offenses, as defined by the [UCMJ]."[30]

In FY 2018, convening authorities referred 66% (378) cases (penetrative and contact sexual assaults) to trial by general, special, and summary court-martial, and in FY 2017, 64% (441) were referred to court-martial.[31] In FY 2018, convening authorities dismissed or resolved through alternate administrative

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[27] SAG Report *supra* n.22, at 13.
[28] Schenck, L., Fact Sheet on Australia Military Justice (Sept. 13, 2013) at 11 (App.).
[29] Defense Manpower Data Center, Armed Forces Strength Figures for April 30, 2020, https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp.
[30] Department of Defense (DOD) Sexual Assault Prevention and Response (SAPR) Report, DOD Fiscal Year 2019 Annual Report on Sexual Assault in the Military, Appendix B Statistical Data on Sexual Assault at 4, available at https://www.sapr.mil/sites/default/files/3_Appendix_B_Statistical_Data_on_Sexual_Assault.pdf [hereinafter 2019 SAPR Report].
[31] The source for the information in this paragraph is Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) Court-Martial Adjudication Data Report (Nov. 2019)

means 34% (196) of preferred cases. Overall, 82% of referred cases in FY18 were referred to general court-martial, and in FY 2017, 77% were referred to general courts-martial. The more serious the sexual assault offense, the higher the level of court-martial. General courts-martial (GCM) have authority to sentence the accused to multiple years of confinement whereas special courts-martial sentences to confinement are limited to one year and summary courts-martial sentences are limited to 30 days. The following table shows referral levels for penetrative and contact sexual offense cases completed in Fiscal Years 2015 through 2018.[32]

Referral Level of Penetrative Offenses	**FY 2015**	**FY 2016**	**FY 2017**	**FY 2018**
General Court-Martial	94% (376)	93% (350)	92% (300)	95% (272)
Lower Levels of Court-Martial	6% (23)	7% (27)	8% (25)	5% (15)
Referral Level of Contact Offenses	**FY 2015**	**FY 2016**	**FY 2017**	**FY 2018**
General Court-Martial	40% (64)	44% (51)	35% (40)	43% (39)
Lower Levels of Court-Martial	60% (96)	56% (66)	65% (76)	57% (52)

at 19, available at https://dacipad.whs.mil/images/Public/08-Reports/05_DACIPAD_Data_Report_20191125_Final_Web.pdf.

[32] *Id*. at 17.

The number of substantiated reports of sexual assault courts-martial cases tried to verdict, convictions of any offense, and confinement adjudged are depicted in the following table.

Fiscal Year	2015[33]	2016[34]	2017[35]	2018[36]	2019[37]
Unrestricted Reports[38]	4,584	4,591	5,110	5,805	5,699
Cases Tried	543	389	406	307	363
Convictions	413	261	284	203	264
Confinement Adjudged	Not Indicated	196	227	157	227

The Canadian Armed Forces currently have 71,500 regular force members.[39] The United States Armed Forces have approximately 20 times more personnel than the Canadian Armed Forces. The number of Canadian courts-martial prosecutions with at least one sexual misconduct charge and the number of convictions by reporting year are depicted in the following table.

Year	2013/2014	2014/2015	2015/2016	2016/2017	2017/2018	2018/2019
Cases Tried	6	10	7	12	20	20
Convictions	4	5	7	10	15	14

During the 2018/2019 reporting period, Canada completed 20 courts-martial involving sexual misconduct charges and 14 resulted in a finding of guilt on at least one charge.[40] Of the 20 personnel charged with

[33] FY 2015 Department of Defense (DOD) Annual Report on Sexual Assault in the Military (May 2, 2016) at 49, available at https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/03_DoD_Reports_Regs_Surveys/DoD_Annual_SexAsslt_Reports/2015_Annual_Report_SexAsslt.pdf.

[34] DOD Sexual Assault Prevention and Response (SAPR) Report, DOD Fiscal Year 2016 Annual Report on Sexual Assault in the Military, Appendix B Statistical Data on Sexual Assault at 24, available at https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/03_DoD_Reports_Regs_Surveys/DoD_Annual_SexAsslt_Reports/Appendix_B_Statistical_Section.pdf.

[35] DOD SAPR Report, DOD Fiscal Year 2017 Annual Report on Sexual Assault in the Military, Appendix B Statistical Data on Sexual Assault at 15, 25, available at https://www.sapr.mil/public/docs/reports/FY17_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf.

[36] DOD SAPR Report, DOD Fiscal Year 2018 Annual Report on Sexual Assault in the Military, Appendix B Statistical Data on Sexual Assault at 11, 24, available at https://www.sapr.mil/sites/default/files/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf.

[37] *See* 2019 SAPR Report, *supra* n.30.

[38] Restricted Reports are confidential, protected communications and unrestricted reports of sexual assault are referred for investigation to a military criminal investigative organization, and the command is notified of the alleged incident. DOD SAPR Report, DOD Fiscal Year 2019 Annual Report on Sexual Assault in the Military, Appendix B Statistical Data on Sexual Assault at 5, 11, 29, available at https://www.sapr.mil/sites/default/files/3_Appendix_B_Statistical_Data_on_Sexual_Assault.pdf.

[39] National Defence and the Canadian Armed Forces, available at http://www.forces.gc.ca/en/about-us.page.

[40] Information in this paragraph is from Government of Canada, Judge Advocate General Annual Report 2018-2019, *The Canadian Military Justice System: Structure and Statistics*, Annex B — Summary of Charges Disposed of at Court Martial, available at https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2018-2019/chapter-two-service-tribunals-statistics.html#toc9; *Director of Military Prosecutions Annual Report 2018-2019*, Annex A, available at

sexual misconduct in 2018/2019, 6 were charged with sexual assault, and the other charges related to prostitution, child pornography, voyeurism, etc. None of the sexual assault charges resulted in a finding of guilty.[41]

In the 2017/18 reporting period Canada also completed 20 courts-martial involving sexual misconduct with 15 of those resulting in a guilty finding for at least one charge. However, there were only 9 charges involving sexual assault, and the other charges were for non-assault sexual crimes. Three were convicted of sexual assault and received sentences including imprisonment ranging from 9 to 22 months. In the entire Canadian military justice system, during the 2018/19 reporting period, 43 sentences were pronounced by courts-martial; however, only three cases resulted in sentences to any imprisonment (5 days, 5 months, and 10 months respectively). In sum, during the last two years the Canadian prosecutor tried an average of 7.5 sexual assault cases each year and obtained an average of 1.5 convictions each year, which is a much lower rate per thousand than in the United States military justice system.

The Australian Defense Force (ADF) has 58,680 active duty personnel, and the United States Armed Forces is 23 times as large as the ADF.[42] In the Australian military, the Director of Military Prosecutions (DMP), chooses the level of trial for each accused.[43] Trial by a Defense Force Magistrate (DFM) or Restricted Court-Martial (RCM) have the power to impose a maximum sentence of six months' imprisonment. A general court-martial (GCM) may adjudge a sentence based on a particular offense of up to confinement for life. The 2019 DMP report notes that on December 3, 2018, a captain was convicted of one count of sexual intercourse without consent by a GCM and his sentence included 3 months imprisonment. The 2017 DMP report states there was one GCM during 2017 for a trial of an accused on a charge of sexual intercourse without consent, and that accused was acquitted.[44] The 2016 DMP report states, "The majority of offences dealt with under the [Defence Force Discipline Act] are acts of indecency. The more serious offences are generally dealt with by the civilian authorities unless such offending occurs overseas, where the Australian courts have no jurisdiction."[45] The following table depicts the DMP referral decisions for all cases and provides the number of sexual offenses sent to the DMP for a referral decision.

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https://www.canada.ca/content/dam/dnd-mdn/documents/legal-juridique/reports-rapports/dmp-dpm/dmp-ar-2018-19-en.pdf; *Director of Military Prosecutions Annual Report 2017-2018*, available at https://www.canada.ca/content/dam/dnd-mdn/documents/legal-juridique/reports-rapports/dmp-dpm/dmp-annual-report-2017-18-en.pdf.

[41] *Id.*

[42] Australian Government Department of Defense 2017-2018 Annual Report, Chapter 7 Strategic Workforce Management, available at https://www.defence.gov.au/AnnualReports/17-18/Chapter7.asp.

[43] The 2019 Report of the Director of Military Prosecutions (DMP) to the Australian Minister of Defence (Apr. 3, 2020) at 21-24 is the source for the information in this paragraph unless stated otherwise. The 2019 DMP Report is available at https://www.defence.gov.au/mjs/docs/2019-DMP-Annual-Report.pdf

[44] The 2017 Report of the DMP to the Australian Minister of Defence (Apr. 30, 2018) at 19, 22, available at https://www.defence.gov.au/mjs/docs/2017-DMP-Annual-Report.pdf.

[45] The 2016 Report of the DMP to the Australian Minister of Defence (Apr. 18, 2017) at 24, available at https://www.defence.gov.au/mjs/docs/2016-DMP-Annual-Report.pdf.

Calendar Year	2016[46]	2017[47]	2018[48]	2019[49]
No Adverse Action	49	38	Not Available	54
Referred to unit for Summary Disposal	22	9	Not Available	37
Defense Force Magistrate	36	32	33	42
Restricted Court-Martial	3	0	4	1
General Court-Martial	0	1	1	0
Sexual Offenses Including Sexual Assaults Referred to DMP for Referral Decision	15	14	Not Available	46

The Australian Inspector General Report states, "Superior trials (courts martial and Defence Force magistrate trials) decreased by a further six per cent, a trend that has been observed over the past five financial years. In 2018-19 there were 30 superior trials recorded, compared to 32 trials recorded in 2017-18."[50]

In sum, only two cases were tried at the general court-martial level from 2016 to 2019, and one of them was acquitted; both general courts-martial were for penetrative sexual assaults.[51] Australia should not be used for comparison with the United States as there were only two felony-level sexual assault prosecutions (trial by general court-martial) in the previous four years, and only one general court-martial sexual assault conviction.[52]

The United Kingdom's full-time trained strength as of October 1, 2017 is 137,280.[53] The United States Armed Forces has about 10 times more active duty personnel than the United Kingdom. Statistics from the United Kingdom Ministry of Defence indicate the following numbers for military personnel prosecuted and convicted of sexual offenses and the most serious sexual offenses, rape or sexual assault, as depicted in the following table. According to United Kingdom statistics, if a defendant is charged with both rape and sexual assault, the defendant is counted as one person in each category. Thus the number of persons prosecuted and convicted is somewhat lower than the numbers shown on the following table.

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[46] *Id*. at 22-23, 25, Annex B.
[47] 2017 DMP Report, *supra* n.44, at 17, Annex B.
[48] The DMP webpage does not include the 2018 DMP Report. The statistics provided are from Judge Advocate General Defence Force Discipline Act 1982 Report for the period 1 January to 31 December 2018 (June 28, 2019) at Annex N, available at https://www.defence.gov.au/JAG/JAG_Report2018.pdf.
[49] 2019 DMP Report, *supra* n.43, at 21-22, Annex A.
[50] Inspector-General of the Australian Defence Force Annual Report from July 1, 2018 to June 30, 2019 (Nov. 25, 2019), available at 22 https://www.defence.gov.au/mjs/_Master/docs/IGADF-Annual-Report-2018-19.pdf.
[51] 2019 DMP Report, *supra* n.43, at 21-24 (stating one penetrative sexual assault was tried by general court-martial in December 2019 and resulted in a finding of guilty); 2017 DMP Report, *supra* n.44, at 17, 22 (stating one allegation of sexual intercourse without consent was tried by general court-martial and resulted in an acquittal); 2016 DMP Report, supra n. 45, at 46 (did not describe any general courts-martial in 2017).
[52] *Id*.; 2017 DMP Report, *supra* n.44, at 17, 22; 2019 DMP Report, *supra* n.43, at 21-24.
[53] UK Ministry of Defence, UK Armed Forces Monthly Service Personnel Statistics (Oct. 1, 2017), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/659404/20171001_-_SPS.pdf. BBC News, Strength of British military falls for ninth year (Aug. 16, 2019) indicates the strength of the UK military was 133,460, available at https://www.bbc.com/news/uk-49365599.

Year	2015[54]	2016[55]	2017[56]	2018[57]
Rape and Sexual Assault Investigations[58]	69	86	93	109
Prosecutions for Rape or Sexual Assault Offenses	44	38	56	43
Convictions for Rape or Sexual Assault	19	14	17	13

From 2015 to 2018, 53 personnel were prosecuted for rape, and only 8 were convicted of rape, a conviction rate of 15%.[59] The rate of United Kingdom rape and sexual assault prosecutions for 2018 is 43% higher than the rate of U.S. prosecutions of sexual assault for 2018; however, the United Kingdom conviction rate for sexual assault prosecutions is 36% lower than for the United States.

Comparisons of the rates of felony-level sexual assault prosecutions with Canada, Australia, and the United Kingdom do not support removing commanders from the process for prosecuting military sexual offenses because they do not provide evidence of increased convictions for sexual assaults.

C. The Shadow Advisory Report Group of Experts Arguments to Adopt Foreign Models.

As stated previously, the Shadow Advisory Report Group of Experts suggests that Congress emulate the practices used in other countries for determining which cases should be referred to trial or alternatively, that a pilot program could be used to test the viability of ending the commander's responsibility for ensuring prosecution of serious common law offenses.[60] As that Group notes in its report to the Senate and House Armed Services Committees, several allies of the United States including United Kingdom, Australia, and Canada have transferred responsibility for prosecution of sexual offenses from commanders to attorneys.[61] Their rate of prosecution per thousand of active duty personnel in one of the countries, the United Kingdom, is about the same as in the United States Department of Defense; however, their conviction rate for sexual assault is substantially lower. Canada and Australia have much lower rates of prosecution of felony-level sexual assaults. For example, Canadian military prosecutors did not obtain any courts-martial convictions of military personnel for sexual assault in the most recent year in which statistics are available.[62] In 2019, Australia did not complete *any* general courts-martial for *any* offense.[63] In the Australian Armed Forces, all offenses were disposed of at military proceedings where the maximum confinement was limited to six months, and the military personnel who committed serious criminal offenses were tried in civilian courts.

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[54] UK Ministry of Defence, Sexual Offences in the Service Justice System 2016, Excel Spreadsheet, Tables, 1, 6 (Mar. 30, 2017), available at https://www.gov.uk/government/statistics/sexual-offences-in-the-service-justice-system-2016.
[55] *Id.*
[56] UK Ministry of Defence, Sexual Offences in the Service Justice System 2017, Excel Spreadsheet, Tables 1, 6 (Revised Mar. 20, 2019), available at https://www.gov.uk/government/statistics/sexual-offences-in-the-service-justice-system-2017.
[57] UK Ministry of Defence, Sexual Offences in the Service Justice System 2018, Excel Spreadsheet, Tables 1, 6 (Mar. 28, 2019), available at https://www.gov.uk/government/statistics/sexual-offences-in-the-service-justice-system-2018.
[58] Investigations do not include command referrals for prosecution.
[59] UK Sexual Offences in the Service Justice System 2016, *supra* n.54, at Table 6; Sexual Offences in the Service Justice System 2018, supra n. 57, at Table 6.
[60] *See* SAG Report supra n.22, at 12-15.
[61] *Id*. at App. 16-17.
[62] *Director of Military Prosecutions Annual Report 2018-2019*, supra n. 40, at Annex A.
[63] 2019 DMP Report, *supra* n.43, at 21-22, Annex A.

As the Appendix to the Shadow Advisory Report reflects, the majority of allied forces also have transferred responsibility for criminal cases from the armed forces to civilian authorities. It is important to note, however, that relinquishing jurisdiction to the civilian courts for criminal trials of service members was tried for almost twenty years and failed. Specifically, from 1969 with the Supreme Court's decision in *O'Callahan v. Parker*,[64] until 1987 when the Court overturned *O'Callahan* in *Solorio v. United States*,[65] service members could be tried by courts-martial only for service-related crimes.

VII. The Proposed Amendments Will Adversely Affect the Delicate Balance Between Justice and Discipline

There is a danger that in rushing to "fix" what some consider to be problems in the military justice system, the delicate balance between discipline and justice will be thrown off—to the detriment of the command structure, those accused of committing offenses, and victims of the alleged offenses.

The UCMJ was enacted in 1950 as a response to complaints and concerns about the operation of the existing Articles of War during World War II. In enacting the UCMJ, Congress struggled with the issue of balancing the need for command control and discipline against the view that the military justice system could be made fairer. The final product was considered a compromise. On the one hand, there was concern about the ability of the commander to maintain discipline within the ranks. On the other hand, there was concern about protecting the rights of service members against the arbitrary actions of commanders. Although the commander remained an integral part of the military justice structure, the statute expanded due process protections to service members and created a civilian court to review courts-martial convictions. Since its enactment, the UCMJ has been amended numerous times, sometimes favoring the prosecution of offenses and at other times expanding the protections of the accused.

The proposed amendments clearly undermine the commander's authority. Thus, whether intended or not, the balance tips in favor of the accused, even though the apparent intent is to ensure that more cases go to trial. In doing so, it affects the very core of the military justice system—the role of the commander. And it adversely affects anyone associated with the alleged offenses in the command—witnesses, counsel, and even victims. Currently, the commander and his or her legal advisor carefully consider all of those interests in deciding whether to prosecute a case or choose some other route for dealing with the issue.

Placing that decision in some distant office creates the possibility that those diverse interests are not adequately considered or balanced.

[64] 395 U.S. 258 (1969).
[65] 483 U.S. 435 (1987).

VIII. Recent Studies of Command Decisions to Prosecute Sexual Assaults Demonstrate that the Current System is Working

On March 30, 2020, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) issued its Fourth Report.[66] In November 2019, the DAC-IPAD issued a report (Nov. 2019 DAC-IPAD Report) that included assessment of courts-martial dispositions of "charge sheets, Article 32 reports, and Results of Trial forms for disposition and adjudication outcomes."[67] The DAC-IPAD data base includes records of filed sexual offense charges from 4,454 cases from FY 2012 to 2018.

In 2017, the DAC-IPAD formed a Case Review Working Group (CRWG), consisting of seven Committee members, to review individual cases involving sexual offenses.[68] The CRWG reviewed 2055 investigative case files for probable cause to believe the subject committed the sexual offense. "In about half of the cases reviewed by members that resulted in no action against the subject for the penetrative sexual offense, the reviewer determined that the victim's statements to law enforcement authorities were insufficient to establish probable cause to believe that the subject committed the offense."[69] "The CRWG found the commander's initial disposition decision to be reasonable in 155 of 164 cases (95%). In 42 of the 164 cases (26%), the command preferred charges for a penetrative sexual offense; in the remaining 122 cases (74%), the command did not prefer charges against the subject for the penetrative sexual offense."[70] The committee concluded that the command reasonably decided to prefer charges in 40 of 42 cases (95%) and not to prefer charges in 115 of 122 cases (94%).[71]

The 2020 DAC-IPAD annual report assessed the disposition of cases in which Article 32 Preliminary Hearing Officers concluded there was not probable cause to believe the accused committed the charged offense, and the convening authority nevertheless referred the charge to court-martial:

> In FY17, 32 cases were referred to court-martial after an Article 32 [P]reliminary [H]earing [O]fficer determined that there was no probable cause to believe a penetrative sexual offense occurred. Fifteen of the 32 referred cases (47%) resulted in dismissal of the penetrative sexual offense(s). In 17 of the 32 cases (53%), the penetrative sexual offenses were tried by court-martial. Of those penetrative sexual offense cases that were tried by court-martial, more than three-fourths (76%) resulted in verdicts of not guilty. Notably, one of the guilty verdicts was overturned on appeal due to lack of evidence.

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[66] March 30, 2020, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) Fourth Report (Mar. 30, 2020), available at https://dacipad.whs.mil/images/Public/08-Reports/06_DACIPAD_Report_20200331_Final_Web.pdf.
[67] 2019 DAC-IPAD Report, *supra* n.31, at 1.
[68] The source for the information in this paragraph is the 2020 DAC-IPAD Report, *supra* n.66, at 19-22.
[69] *Id*. at 22.
[70] *Id*. at 20.
[71] *Id*. at 20 n.33.

> In FY18, 18 cases were referred to court-martial after an Article 32 [P]reliminary [H]earing [O]fficer determined that there was no probable cause to believe a penetrative sex offense occurred. Seven of the 18 referred cases (39%) resulted in dismissal of the penetrative sexual offense(s). In 11 of the 18 cases (61%), the penetrative sexual offenses were tried by court-martial. Of those penetrative sexual offense cases that were tried by court-martial, nearly three-fourths (73%) resulted in verdicts of not guilty.[72]

The Article 32 Preliminary Hearing Officer is a legal officer and these dispositions show convening authorities are more willing at least in some instances to refer sexual assault cases to trial than lawyers.

The CRWG plans to recommend additional efforts to improve the quality and efficiency of criminal investigations which should result in additional prosecutions.[73] In 2020, the Policy Working Group plans to analyze Article 32 preliminary hearings, including a comparison with federal pretrial processes and a review of the purposes and effectiveness of the Article 32 preliminary hearing.[74] The Policy Working Group will examine disposition guidance for judge advocates and convening authorities and the effectiveness of the Staff Judge Advocate's pretrial advice.[75]

IX. Congress Should Await Implementation of the Reforms Included in the Military Justice Act of 2016 Which Provide for Oversight and Statistical Analysis

The genesis of the proposed change to the Uniform Code of Military Justice is apparently a concern that commanders abuse their authority to decide who is prosecuted. Some observers allege that commanders are unwilling to send cases of sexual assault to courts-martial notwithstanding strong evidence of guilt because of their close relationships with members of their command who may be accused of crimes or friends of the accused. The Department of Defense reduced the risk of this possibility by elevating any decision not to prosecute a sexual assault offense to the O-6 special court-martial convening authority level.

In the 2014 National Defense Authorization Act,[76] Congress required an additional review of convening authorities' decisions not to refer charges of certain sex-related offenses for trial by court-martial. This provision states:

> In any case where a [S]taff [J]udge [A]dvocate, pursuant to section 834 of title 10, United States Code (article 34 of the Uniform Code of Military Justice), recommends that charges of a sex-related offense be referred for trial by court-martial and the convening authority decides not to refer any charges to a court-martial, the convening authority shall forward the case file to the Secretary of the military department concerned for review as a superior authorized to exercise general court-martial convening authority. . . .

[72] *Id*. at 52, 54.
[73] *Id*. at 22-26.
[74] *Id*. at 56.
[75] *Id*.
[76] Act Dec. 26, 2013, P. L. 113-66, Div A, Title XVII, Subtitle E, § 1744, 127 Stat. 980; Dec. 19, 2014, P. L. 113-291, Div A, Title V, Subtitle D, § 541, 128 Stat. 3371.

> In any case where a convening authority decides not to refer a charge of a sex-related offense to trial by court-martial, the Secretary of the military department concerned shall review the decision as a superior authority authorized to exercise general court-martial convening authority if the chief prosecutor of the Armed Force concerned, in response to a request by the detailed counsel for the Government, requests review of the decision by the Secretary. . . .
>
> In any case where a [S]taff [J]udge [A]dvocate, pursuant to section 834 of title 10, United States Code (article 34 of the Uniform Code of Military Justice), recommends that charges of a sex-related offense should not be referred for trial by court-martial and the convening authority decides not to refer any charges to a court-martial, the convening authority shall forward the case file for review to the next superior commander authorized to exercise general court-martial convening authority. . . .

This provision ensures that any decision not to refer a sexual assault to trial receives an additional review whenever the original convening authority decides not to refer the case to trial by court-martial. The reviewing convening authority has the authority to refer the case to court-martial. It is implicit that the higher level convening authorities that review a case have authority to hold any lower level convening authority accountable for showing poor judgment in referral decisions.

In the Military Justice Act of 2016,[77] Congress also amended Article 146, UCMJ, and created a "Military Justice Review Panel." That panel will conduct an in-depth review of the military justice system every eight years, after its initial review in 2020. This is an important step in ensuring that a designated body, apart from Congress, will conduct thorough reviews of the system and offer proposed changes to the Department of Defense.

In addition, in the Military Justice Act of 2016, Congress added provisions to create more transparency for assessing the American military justice system. The new Article 140a addresses the critical subject of determining trends and issues across all of the Services.[78] The new article was based on an observation by the Response Systems to Adult Sexual Assault Crimes Panel that there is lack of uniform, offense-specific sentencing data from military courts and that it makes meaningful comparison and analysis of military and civilian courts "difficult, if not impossible."[79] Additionally, Article 140 requires the government to facilitate the public's access to all courts-martial filings and records.[80]

These additions to the UCMJ can be invaluable tools for reviewing and if necessary, reframing military justice procedures. Congress should await those reports before making dramatic changes to the military justice landscape that will radically change a system that currently operates fairly and efficiently.

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[77] Military Justice Act of 2016, Pub. L. No. 114-328, 130 Stat. 2000. *See generally*, Schlueter, *Reforming Military Justice: An Analysis of the 2106 Military Justice Act*, 49 ST. MARY'S L.J. 1 (2017).
[78] Art. 140, UCMJ.
[79] Response Systems to Adult Sexual Assault Crimes Panel Report *supra* n.5, at 136–37.
[80] That means that courts-martial filings will be available to the public in a manner similar to what exists in the PACER system, which is used in the federal civilian court system.

X. Conclusion: Reaffirming the Critical Role of Commanders

The problem of sexual assaults allegations over the last decade within the Department of Defense is cause for concern and requires additional action by the chain of command including more training of personnel and prosecution of all cases whenever warranted. But the answer to the problem does not rest in removing or reducing the commander's role. One feature of the military is that it does respond and adapt and can issue orders to correct the problems. It is very clear that the American military justice system has improved since its founding and will continue to make adjustments to ensure both discipline and justice.

We recommend that commanders continue to be responsible for discipline in their commands and that the proposed amendments to the UCMJ be rejected.

If Congress is to make any changes to the Uniform Code of Military Justice, it should be to first, reaffirm the view that the primary purpose of the military justice system is to enforce good order and discipline and second, retain the commander's critical role in that system, without limitation.

The Supreme Court of the United States has stated that the purpose of the military is to fight and win wars.[81] To that end, it is absolutely essential that commanders—who are ultimately responsible for accomplishing that mission—be vested with the authority and responsibility for maintaining good order and discipline within their command. Accordingly, we recommend that the UCMJ be amended by adding the following section, 10 U.S.C. § 801a:

> §801a. Art. 1a. Purpose of Military Law:
>
> The purpose of military law is to assist in maintaining good order and discipline in the armed forces, to provide due process of law, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

That proposed language, which is a variation on similar language in the preamble to the Manual for Courts-Martial,[82] reflects the long-standing and tested view that the military justice system is designed primarily to promote good order and discipline.

XI. Contact Information

If we can provide any additional assistance, please feel free to contact us at the following addresses:

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[81] United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955).
[82] The Preamble to the Manual for Courts-Martial lists the due process language first, before the language concerning good order and discipline. In our view, the order of those purposes is critical. Listing the discipline purpose first more accurately reflects the function and purpose of the military justice system.

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APPENDIX

FACT SHEETS ON MILITARY JUSTICE IN FOUR ALLIED FORCES

Lisa M. Schenck, Fact Sheet on Canadian Military Justice (Sept. 18, 2013)

Michael W. Drapeau, Review of Fact Sheet on Canadian Military Justice (Sept. 19, 2013)

Lisa M. Schenck, Fact Sheet on Australia Military Justice (Sept. 13, 2013)

Lisa M. Schenck, Fact Sheet on United Kingdom Military Justice (Corrected Copy) (Sept. 22, 2013)

Lisa M. Schenck, Fact Sheet on Israeli Military Justice (Sept. 9, 2013)

LISA M. SCHENCK, FACT SHEET ON CANADIAN MILITARY JUSTICE
SEPT. 18, 2013

MICHAEL W. DRAPEAU, REVIEW OF FACT SHEET ON CANADIAN MILITARY JUSTICE
SEPT. 19, 2013

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September 18, 2013

Fact Sheet on Canadian Military Justice[1]

1. Introduction. During the Senate Armed Services Committee Hearing on June 4, 2013, some witnesses suggested that the Canadian military justice system might be a good model to mirror with a central prosecutor rather than command referred courts-martial. This fact sheet provides an overview of the Canadian military justice system and compares Canada's military prosecution statistics with those of the United States Department of Defense (DoD), with an emphasis on sexual assault prosecutions.

2. The Canadian System.

a. The Canadian Forces (CF) active duty strength is approximately 70,000.[2]

b. The Canadian military justice system is primarily based on the *Canadian Charter of Rights and Freedoms* and the *Code of Service Discipline* (CSD) at Part III of the *National Defence Act* (NDA).[3]

c. The Canadian military justice system underwent modifications based on a Supreme Court of Canada decision. Specifically, in 1992, the Supreme Court of

[1] This document reflects the personal opinion of the author and does not represent the views of George Washington University or the Law School.

[2] National Defence and the Canadian Forces website, July 19, 2013. This website was subsequently revamped. Public Sector Statistics, Financial Management System 2007/2008, Catalogue no. 68-213-X, shows National Defence regular forces: 64,884, and National Defence reserve forces: 25,716 for 2007. Id. at 104, http://publications.gc.ca/collections/collection_2008/statcan/68-213-X/68-213-XIE2008000.pdf.The Department of National Defence, Report on Plans and Priorities 2013-14, indicates a Canadian Government goal of "[m]aintaining an overall [Canadian Armed Force] strength of 68,000 (+/-500)." *Id*. at 34, http://publications.gc.ca/collections/collection_2013/dn-nd/D3-25-2013-eng.pdf.

[3] *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces, A Review from Apr. 1, 2009 to Mar. 31, 2010* (Mar. 2012) at 2. http://publications.gc.ca/pub?id=411031&sl=0 [hereinafter *2010 Canadian JAG Report*]; National Defence and Canadian Armed Forces website, *Military Justice Summary Trial Level* 2.2, B-GG-005-027/AF-011 (Updated, Jan. 12, 2011), http://www.forces.gc.ca/en/about-reports-pubs-military-law-summary-trial-level/index.page (providing a detailed description of Canadian military justice system) [hereinafter *Military Justice Summary Trial Level*]; Canada Consolidation National Defence Act (June 25, 2013) Part III, Code of Service Discipline, http://laws-lois.justice.gc.ca/PDF/N-5.pdf.

Canada ruled that the Canadian general court-martial structure violated judicial independence and impartiality standards mandated in Section 11(d) of the Canadian Charter of Rights and Freedoms.[4] Subsequent legislation dramatically reduced the role of the chain of command and convening authority in courts-martial to protect the accused's rights and eliminate the appearance of command influence.

d. The CSD is equivalent to the United States' Uniform Code of Military Justice (UCMJ) and the *Manual for Courts-Martial* (*MCM*). The CSD sets forth disciplinary jurisdiction, pretrial and trial procedures, offenses, punishments, and post-trial and appellate procedures. The Canadian military justice system provides for jurisdiction over offenses worldwide, and it applies to regular and reserve CF members as well as to civilians in limited circumstances. The CSD includes unique military offenses as well as violations of civil criminal statutes.[5]

e. The Canadian Forces National Investigative Service (NIS) "normally investigate[s] offences of a serious and sensitive nature."[6] A commanding officer, or delegee, or a Military Police officer or delegee, assigned to duties with the Canadian Forces NIS may charge a person, who is subject to Canadian military justice.[7] The charge then goes to an initial referral authority (an officer in the chain of command), who serves the charge on the accused, registers the charge, refers the charge to a summary proceeding or sends the charge to a higher level for disposition, disposes of the charge by deciding not to proceed, or defers final action on the charge.[8] The referral authority may, but is not required to, "forward the [charges and file] to the Director of Military Prosecutions together with any recommendation concerning the disposal of the charge

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[4] *R. v. Généreux*, [1992] 1 S.C.R. 259, http://www.law.yale.edu/Genereaux.pdf. *See also* Lindsy Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 Duke J. Comp. & Int'l L. 169, 175-177 (2006) (describing the events causing changes in the Canadian military justice system), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1110&context=djcil&sei-edir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Drole%2520of%2520commanders%2520in%2520canadian%2520military%2520justice%2520system%26source%3Dweb%26cd%3D1%26ved%3D0CCoQFjAA%26url%3Dhttp%253A%252F%252Fscholarship.law.duke.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1110%2526context%253Ddjcil%26ei%3DxkHtUdieJcv84AOvtoCQCA%26usg%3DAFQjCNH7BHX1FEJkut8J7LNbKopHnVEHkg%26bvm%3Dbv.49478099%2Cd.dmg#search=%22role%20commanders%20canadian%20military%20justice%20system%22.

[5] *2010 Canadian JAG Report*, *supra* note 3, at 13.

[6] *Military Justice Summary Trial Level*, *supra* note 3, at Ch. 3, Section 3, ¶¶ 48-50 (defining when the Canadian Forces National Investigative Service (NIS) investigates allegations).

[7] *Id*. at ¶¶ 44-46 (citing *Queen's Regulations and Orders* Sections 107.015, 107.02, and 107.02, Note).

[8] *Id*. at Ch. 8, Section 4.

that the referral authority considers appropriate."[9] Although a referral authority is not required "to obtain legal advice prior to considering an application for disposal of a charge, . . . legal advice is recommended."[10]

f. The Canadian Forces Provost Marshal reported sexual assault crime statistics, which include all incidents that came to the attention of the Military Police, whether the Military Police or a civilian law enforcement agency was the lead investigating agency as follows: 2007 – 176, 2008 – 166, 2009 – 166, and 2010 – 176.[11] For disposition information the Provost Marshal Report states, "[f]ive CF members were sentenced to imprisonment for more serious criminal charges of 'sexual interference,' 'sexual touching,'" and other non-sex offenses.[12]

g. The Canadian military justice system consists of two levels of service tribunals. The "service tribunal" or "summary trial" is presided over by military commanders and is an expeditious means of resolving minor offenses at the unit level. Jurisdiction and punishments are very limited. A commanding officer presiding over a summary trial may impose: detention (to a maximum of 30 days); reduction in rank, but for one substantive rank only; reprimand; fine (to a maximum of 60% of member's monthly basic pay); confinement to ship or barracks (to a maximum of 21 days); extra work and drill (to a maximum of 14 days); stoppage of leave (to a maximum of 30 days); and caution.[13] The unit legal advisor provides advice on disposition. "Should the presiding officer decide not to act on the advice of the unit legal advisor, then the presiding officer must state the decision and provide written reasons for that decision."[14] Findings of guilty and

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[9] *Id*. at Annex N, ¶¶ 25-26 ("The referral authority's letter is intended to assist the Director of Military Prosecutions in putting the alleged offence into the specific military context from which it originates. The Director of Military Prosecutions requires this contextual analysis to assist in making a decision on whether to prefer the charge to court martial, refer the matter back to the unit for disposal by summary trial or to not proceed with the charge at all. The letter represents the referral authority's best opportunity to set out why he or she believes that the matter ought or ought not to be preferred.").

[10] *Id*. at Annex N, ¶ 24.

[11] *2010 Annual Report of the Canadian Forces Provost Marshal*, Canadian Forces Provost Marshal 8, http://publications.gc.ca/collections/collection_2012/dn-nd/D3-13-2010-eng.pdf.

[12] *Id*. at 20.

[13] Queen's Regulations and Orders for the Canadian Forces, Table to Art. 108.24, 34, http://www.admfincs-smafinsm.forces.gc.ca/qro-orf/vol-02/doc/chapter-chapitre-108.pdf. See also National Defence and the Canadian Forces, *Guide for Accused and Assisting Officers*, OPI: JAG/DLaw/MJP&R (updated Oct. 6, 2009), Annex A, http://www.forces.gc.ca/en/about-reports-pubs-military-law/guide-for-accused-and-assisting-officers.page (briefly summarizing the various levels of disciplinary proceedings, rights of accused, and maximum punishments).

[14] Military Justice Summary Trial Level, *supra* note 3, at Ch. 8, Section 4, ¶ 54 (citing *Queen's Regulations and Orders* Section 107.11(2)).

sentences awarded at a summary trial are subject to review by a superior officer independent of the command trying the case. Under some circumstances, the accused can elect trial by courts-martial in lieu of summary trial. (In 47.83% of cases involving the right to elect trial by courts-martial, only 2.35% of accused ultimately chose courts-martial.[15]) Summary trials are most similar to DoD's nonjudicial dispositions under Article 15, UCMJ.[16] Under the Canadian system, 84 charges of a sexual nature made against 51 accused were resolved utilizing summary trial.[17] Jurisdiction for the most serious sex crimes is limited to courts-martial.[18]

h. The second type of service tribunal is the court-martial. Military judges preside over courts-martial which function similar to Canadian civilian criminal courts. The accused is entitled to publicly-funded legal representation by Defence Counsel Services (DCS), or the accused may hire a civilian lawyer at his own expense. Legal officers from the Canadian Military Prosecution Service (CMPS) conduct the prosecutions. Rules of evidence apply to the proceedings, and courts-martial findings and sentences may be appealed to the Court Martial Appeal Court of Canada, and then to the Supreme Court of Canada (SCC).[19]

i. From Apr. 1, 2009 to Mar. 31, 2010, 1,998 Canadian service tribunals were held, of which 1,942 were summary trials and 56 were courts-martial. The total number of summary trials and courts-martial has been relatively constant over the last three years. Summary trials represented approximately 97% of all service tribunals.[20]

j. There are currently two types of courts-martial. In a standing court-martial, a military judge decides the findings and the sentence.[21] General courts-martial have a

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[15] *2010 Canadian JAG Report, supra* note 3, at 15.
[16] *Id*. at 13-14.

[17] *Id*. at 15 note 30.

[18] *Military Justice Summary Trial Level*, *supra* note 3, at Ch. 11, Sections 2 and 3, ¶¶ 31-63. "Offences of a 'sexual nature' heard at summary trial generally involve sexual harassment, inappropriate comments, inappropriate use of the internet and fraternization. Serious offences of a sexual nature such as sexual assault are dealt with at courts martial." Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces, A Review from A Review from April 1, 2007 to March 31, 2008 at 21 note 9, http://publications.gc.ca/pub?id=411031&sl=0.

[19] *2010 Canadian JAG Report, supra* note 3, at 14.

[20] *Id*. at 14.

[21] Global Legal Research Center, *Military Justice: Adjudication of Sexual Offenses: Australia, Canada, Germany, Israel, United Kingdom*, The Law Library of Congress, July 2013, at 23 (citation omitted).

military judge and a panel or jury of five military members.[22] The accused has the right to choose trial forum, either general court-martial or standing court-martial.[23]

k. The Director of Military Prosecutions (DMP) has authority to determine which charges, if any, should be tried by courts-martial, or sent back for disposition at summary trial. The DMP has two deputies, eight prosecutors work at four regional offices for the DMP, and several reservists work in individual offices.[24] The current DMP is a Navy Captain who was appointed to a four-year term on September 19, 2009. He is under the general supervision of the Judge Advocate General, and he is expected to exercise his duties and functions independently.

l. From Apr. 1, 2009 to Mar. 31, 2010, referral authorities submitted 78 referral applications for disposal of a charge or charges to the DMP. Charges were referred to courts-martial in 49 cases. In 8 of those cases, the DMP withdrew charges after they had been referred to trial, but before trial. In 17 cases, the DMP elected not to refer any charges to trial by court-martial. During the reporting period, a total of 181 charges were tried before 56 courts-martial.[25]

m. From Apr. 1, 2009 to Mar. 31, 2010, there were 48 judge-alone courts-martial and 8 jury trials, resulting in 45 convictions and 11 acquittals. 37 cases were guilty pleas and 19 cases were not guilty pleas. Of those who pleaded not guilty, 59% were found guilty. Only 10 courts-martial cases resulted in any confinement and in 3 cases all confinement was suspended, in 4 cases the accused received 6 months or less confinement, and in the last 3 cases the accused received 9 months, 20 months, and 4 years of confinement.[26]

n. The following table depicts the annual Canadian courts-martial for the last five years:[27]

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[22] *Id*.

[23] *R v MacLellan,* 2011 CM 3005 (May 20, 2011), http://www.jmc-cmj.forces.gc.ca/assets/CMJ_Internet/docs/en/2011cm3005.pdf.

[24] *Id*. at 39-42.

[25] *Id*. at 45-46.

[26] *Id*. at 46-48, 56-76.

[27] *Id*. at 46-48 (data for 2010); *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces, A Review from April 1, 2008 to March 31, 2009* at 93, 94, 97, 137, http://publications.gc.ca/collections/collection_2010/forces/D1-16-2009-eng.pdf [hereinafter *2009 Canadian JAG Report*]; Canadian Chief Military Judge, *2012 Results and Decisions*, http://www.jmc-cmj.forces.gc.ca/en/2012/res.page? [hereinafter *2012 Canadian Results and Decisions*]; Canadian Chief Military Judge, *2011 Results and Decisions*, http://www.jmc-cmj.forces.gc.ca/en/2011/res.page? [hereinafter *2011 Canadian Results and Decisions*].

Canadian Courts-Martial						
	2008	2009	2010	2011	2012	Average
Standing Court-Martial	63	51	48	55	59	55.2
Disciplinary Court-Martial	15	10	0[28]	0	0	5.0
General Court-Martial	0	6	8	4	5	4.6
Total	78	67	56	59	64	64.8

o. As for sex offenses, from Apr. 1, 2009 to Mar. 31, 2010, nine Canadian military personnel were referred to courts-martial with sexual assault charges; five were found not guilty; two were withdrawn; two were found guilty; and both of those who were convicted received confinement. One received 20 months confinement for sexual assault, and one received 3 months for sexual interference and other offenses.[29]

p. The following table depicts the Canadian sexual abuse investigations and courts-martial for 2009 to 2012:[30]

[28] On July 18, 2008, the Canadian government reduced the number of types of courts-martial from four to two, and eliminated disciplinary and special courts-martial. *2009 Canadian JAG Report, supra* note 27, at 135.

[29] *2010 Canadian JAG Report, supra* note 3, at 46-48, 56-76. *See also* Global Legal Research Center, *Military Justice: Adjudication of Sexual Offenses: Australia, Canada, Germany, Israel, United Kingdom*, The Law Library of Congress, July 2013, at 27-28 (noting that on September 1, 2009, service tribunals received jurisdiction to dispose of sexual assault offenses because of the adverse impact on morale, discipline and military efficiency).

[30] The Canadian Provost Marshal report did not include information about investigations in 2011 and 2012. *See* paragraph 2.f, *supra* (sex offenses investigated). The court-martial information is from four sources: (1) *2010 Canadian JAG Report*, *supra* note 3, 46-48, 56-76, 89, 107; (2) 2009 *Canadian JAG Report*, *supra* note 27, at 93, 94, 97, 137; (3) *2012 Canadian Results and Decisions, supra* note 27; (4) *2011 Canadian Results and Decisions, supra* note 27. *See also* Global Legal Research Center, *Military Justice: Adjudication of Sexual Offenses: Australia, Canada, Germany, Israel, United Kingdom*, The Law Library of Congress, July 2013, at 27-28 (noting that on September 1, 2009, service tribunals received jurisdiction to dispose of sexual assault offenses because of the adverse impact on morale, discipline and military efficiency).

Canadian Sexual Abuse Investigations and Courts-Martial					
	2009	**2010**	**2011**	**2012**	**Average**
Investigated Sexual Offenses	166	176	Unk	Unk	171
Rate Per Thousand Investigated	2.37	2.51	Unk	Unk	2.44
Referred to Courts-Martial	3	9	6	5	6
Tried by Courts-Martial	3	7	5	4	5
Percent Investigated Tried by Court-Martial	1.8%	4.0%	Unk	Unk	2.9%
Convictions	1	2	5	3	3
Percent Convicted	33%	29%	100%	75%	31%
Incarceration	1 (7 days)	2 (20 months; 3 months)	3 (34 months; 9 months; 9 months)	2 (6 months; 12 months)	2 (12 months)

3. **Analysis.**

a. In FY 2012, the active duty strength of the U.S. Department of Defense (DoD) was 1,388,028 or 20 times as large as the Canadian active duty forces.[31] The DoD completed 2,510 courts-martial, including 1,183 general courts-martial and 1,327 special courts-martial. Without including the 1,346 summary courts-martial tried in FY 2012, the DoD had 39 times as many courts-martial as Canada (2,510/65), and twice as many per capita as Canada.

b. In FY 2012, DoD investigated 2,661 instances of sexual abuse by military suspects for a rate per thousand of 1.92, and the Canadian rate of investigation of 2.44 is 27% higher than the U.S. rate per thousand of 1.92.[32] In FY 2012, 302 DoD military personnel were tried by courts-martial, and 238 were convicted of sexual assault offenses for a conviction rate of 79% (238/302), as compared to an average of 3 Canadian sexual assault courts-martial convictions for 5 courts-martial tried over the previous four years for a conviction rate of 60% (3/5).[33] The rate per thousand of DoD

[31] On September 30, 2012, the total population on active duty was 1,388,028. DoD Personnel and Procurement Statistics, *Military Personnel Statistics*, http://siadapp.dmdc.osd.mil/personnel/MILITARY/miltop.htm (click "Total DoD - December 31, 2012 (DMDC data)).

[32] Department of Defense, *1 Annual Sexual Assault Report* 58 (2012), http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf [hereinafter *2012 DoD Report*].

[33] *Id*. at 73.

personnel tried by courts-martial for sexual assault offenses was .22 (302/1,388,000) and the rate per thousand of Canadian personnel was .07 (5/70,000). More than three times as many DoD personnel were tried by court-martial for sex offenses per capita as for Canadian Forces, even though Canadian active duty personnel were investigated at a 27% higher rate.

c. As indicated previously, in Canada over the last two years only 3.5% (6/171) of those investigated faced the possibility of more than 30 days confinement for sexual abuse or assault. In the last two years, only two Canadian military personnel were sentenced to more than 10 days of confinement.[34] Numerous DoD military personnel received over five years confinement for sex crimes, and six DoD military personnel received 20 years confinement for sex crimes.[35]

d. Some U.S. military installations have tried more courts-martial, obtained more convictions, tried more sexual assault cases, obtained more sexual assault convictions, and sent more sexual assault perpetrators to confinement than the entire Canadian Forces, even though they have substantially fewer assigned personnel than Canada.

e. As an example, the Army installation of Fort Hood, Texas has 45,414 active duty military personnel,[36] compared to Canada's 70,000. In FY 2011, Fort Hood prosecuted 115 courts-martial (including 18 sex offenses), resulting in 112 convictions (including 13 sex offense convictions—the number of convictions would be higher, if cases were included where the accused was acquitted of a sex offense and convicted of a non-sex offense).[37]

f. In FY 2012, Fort Hood prosecuted 121 courts-martial (including 26 sex offenses), resulting in 114 convictions (including 21 sex offense convictions). More importantly, in FY 2011, 10 Fort Hood military personnel were sentenced to more than one year of confinement for committing a sex offense; in FY 2012, 17 military personnel were sentenced to more than one year of confinement. Whereas, in the entire Canadian active duty forces, only one person received over one year of imprisonment for a sex offense (one accused received 20 months in jail-and that sentence is under appeal).[38] In sum, Fort Hood by itself in FY 2012, tried 3.7 times (26/7) as many sex

[34] *2010 Canadian JAG Report, supra* note 3, at 46-48, 56-76.

[35] *2012 DoD Report*, *supra* note 29, at 232, 245, 245, 246, 533, and 657 (Case Numbers 291, 486, 487, 532, 533 and 1).

[36] Fort Hood Fact Sheet No. 0703, http://www.hood.army.mil/facts/FS%200703%20-%20Fort%20Hood%20Overview.pdf.

[37] Fort Hood prosecution statistics provided from Clerk of Court's Office, Army Court of Criminal Appeals on July 15, 2013.

[38] *2010 Canadian JAG Report, supra* note 3, at 89.

offenses by courts-martial as the entire Canadian military and obtained ten times (21/2) as many sex offense courts-martial convictions.

g. If the goal is to establish a military justice system for the U.S. Armed Forces that: treats allegations of sexual assault as serious offenses; ensures efficient adjudication of allegations and convictions; and, provides deterrence through significant punishment of convicted offenders, then mirroring the Canadian system would not be an improvement. Using Fort Hood as an example, even though its active duty population is 35% lower than the Canadian armed forces, Fort Hood obtains ten times as many courts-martial convictions for serious sex offenses. Furthermore, numerous DoD military personnel were sentenced to over five years confinement for sex offenses.

Université d'Ottawa University of Ottawa

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Section de common law Common Law Section

September 19, 2013

FROM : Professor Michel W. Drapeau

RE: Review of a fact sheet on Canadian Military Justice

I have been provided with a "*Fact Sheet on Canadian Military Justice*" prepared by the Associate Dean for Academic Affairs, The George Washington University Law School, dated September 18, 2013. I wish to congratulate the author of this document as it provides a very useful overview of the Canadian Military Justice System. However, I need to bring the following to the attention of the Armed Services Committee.

> At paragraph 2 c., the author writes: "The Canadian military justice system underwent modifications based on a Supreme Court of Canada decision . . . subsequent legislation dramatically reduced the role of the chain of command and convening authority in courts-martial to protect the accused rights and eliminate the appearance of command influence."

I disagree.

Without wishing to minimize the importance of the *R v. Genereux* [1992] 1 S.C.R. 259 decision in changing the national defence legislation in Canada, it is a fact that the overarching factor in bringing significant and wide scale reforms was, first and foremost, the 1997 report submitted by the Honorable Gilles Létourneau in the wake of his 2 ½ year Royal Public Commission of Inquiry into the actions of the then Canadian Airborne Regiment during its deployment to Somalia in 1993. Next, equally important was a 2003 review of the legislation conducted by retired Chief Justice of the Supreme Court of Canada, the Right Honorable Antonio Lamer, which led to no less than 88 recommendations to change and improve the Canadian military justice system. Then there were the repeated interventions by both the Supreme Court of Canada and the Court Martial Appeal Court of Canada which brought pressure for reform the Canadian military justice system. Pressures for additional reforms to the Canadian military justice system continue.

The role played by these actors is discussed in a paper authored by me titled "*Canadian Military Justice: At a Crossroads*" . This paper which is dated September 19, 2013 will be forwarded to you under separate cover later on today for dissemination.

LISA M. SCHENCK, FACT SHEET ON AUSTRALIA MILITARY JUSTICE
SEPT. 13, 2013

Lisa M. Schenck, J.S.D.
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September 13, 2013

Fact Sheet on Australia Military Justice[1]

1. Introduction. Some commentaries have suggested that the Australian military justice system may be a good model for the United States because of its centralization of military tribunal prosecutions under the authority of a military prosecutor, rather than military commanders. This fact sheet traces the recent changes in the Australian military justice system, describes the Australian rationale for centralizing the referral decision in the Director of Military Prosecutions (DMP), notes the problems resulting from the 2006 structural changes, describes the magnitude of Australian military justice prosecutions, briefly discusses the findings of the 1,567 page 2011 DLA Piper Review, and compares the disposition of U.S. courts-martial and Australian courts-martial with an emphasis throughout on disposition of sex offenses.

2. The Australian System.

a. **Australian Armed Forces Strength.** In May 2012, the Australian active duty strength was 56,856 including 7,903 (13.9%) women.[2]

b. **Authority for Australian Military Justice System**. In addition to the Australian Constitution, the Defence Force Discipline Act 1982 (Cth) (DFDA) provides specific legal authority for the Australian military justice system along with implementing rules and regulations.[3] The DFDA provides for "the investigation of disciplinary offences, types of offences, available punishments, the creation of Service tribunals, trial procedures before those Service tribunals, and rights of review and appeal."[4] The Discipline Law Manual instructs Australian Defense Forces (ADF) members on the law.[5]

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[1] This document reflects the personal opinion of the author and does not represent the views of George Washington University or the Law School.

[2] Australian Government, Department of Defense, *Roles of Women in the ADF*, Fairness and Resolution, http://www.defence.gov.au/fr/RR/Womenindefence/Roles.html.

[3] Report for Congress, *Military Justice: Adjudication of Sexual Offenses: Australia, Canada, Germany, Israel, United Kingdom* (Law Library of Congress File No. 2013-009638, July 2013) at 2 [hereinafter 2013 Report for Congress] (citing Defence Force Discipline Act 1982 (Cth), http://www.comlaw.gov.au/Details/C2012C00181 [hereinafter DFDA]; Defence Force Discipline Regulations 1985 (Cth), http://www.comlaw.gov.au/Details/F2011C00695).

[4] *Id*. at 2-3 (citing Senate Foreign Affairs, Defence and Trade References Committee, *The Effectiveness of Australia's Military Justice System* [hereinafter Senate Report] (June 2005) at ¶ 2.7, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/miljustice/report/index.htm).

[5] *Id*. at 3. (citing Discipline Law Manual, http://www.defence.gov.au/adfwc/ADFP.html). *See also, e.g.*, DI(G) ADMIN 45-2, *The Reporting and Management of Notifiable Incidents* (26 March 2010), http://www.defence.gov.au/oscdf/afc/pdf/GA45_02.pdf (outlining the primary requirements and common procedures for the reporting, recording, and investigation of alleged offences).

c. **Rationale for Changing the Australian Military Justice System**. In June 2005, the Foreign Affairs, Defence and Trade References Committee of the Senate delivered a report recommending change in the Australian military justice system.[6] In 2006, the Australian Parliament changed the Australian military justice system to make it more like the systems in the United Kingdom and Canada.[7] Those changes were based on decisions in 1997 and 2003 by the European Court of Human Rights (ECHR). The ECHR required structural changes in the role of the convening officer in United Kingdom cases because the convening officer had a role in the prosecution of cases.

> The [convening] officer . . . appointed the members of the court martial, who were subordinate in rank to him and fell within his chain of command. He also had the power to dissolve the court martial before or during the trial and acted as "confirming officer", with the result that the court martial's decision as to verdict and sentence was not effective until ratified by him.[8]

The ECHR found United Kingdom courts-martial lacked independence and impartiality because of the convening officer's roles in the process. In response, the United Kingdom eliminated the "convening officer" requirement and divided his main roles between "the higher authority, the prosecuting authority and the Court-Martial Administration Officer."[9] The goal was to increase the "appearance of fairness" for the accused and not to enhance justice for victims or to increase prosecutions.[10]

d. **Changes to the Australian Military Justice System**. In 2005, the *Defence Legislation Amendment Act (No. 2) 2005 (Cth)* provided for the offices of Director of Military Prosecutions (DMP), who decide which accused and offenses will be referred to trial, and the Registrar of Military Justice, who received some of the other powers of a

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[6] *Lane v Morrison* (2009) 239 CLR 230, [2009] HCA 29 at ¶ 15 (citing Foreign Affairs, Defence and Trade References Committee, *The Effectiveness of Australia's military justice system*, (June 2005), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/miljustice/report/index.htm.).

[7] *Id*. at ¶¶ 13, 16, 62 (citing *Findlay v. the United Kingdom*, (1997) 24 EHRR 221, [1997] ECHR 22107/93 and *Grieves v. the United Kingdom,* (2003) 39 EHRR 52, [2003] ECHR 57067/00).

[8] *Morris v. the United Kingdom*, (2002) 34 EHRR 1253, [2002] ECHR 38784/97.
at ¶ 60 (citing *Findlay v. the United Kingdom* (judgment of Feb. 25, 1997, *Reports of Judgments and Decisions* 1997-I)), http://www.bailii.org/eu/cases/ECHR/2002/162.html.

[9] *Morris, supra* note 8, at ¶ 50.

[10] *See also* Michael D. Conway, *Thirty-Ninth Kenneth J. Hodson Lecture in Criminal Law*, 213 Mil. L. Rev. 212, 224 (Fall 2012), https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW.NSF/20a66345129fe3d885256e5b00571830/256fb1f93504c34785257b0c006b99d4/$FILE/By%20Major%20General%20Michael%20D.%20Conway.pdf.

convening authority.[11] On October 1, 2007, the Australian Government replaced general and restricted courts-martial and trial by a Defense Force Magistrate (DFM) with trial by a military tribunal called the Australian Military Court (AMC).[12] The Australian Parliament created the AMC to "satisfy the principles of impartiality, judicial independence and independence from the chain of command."[13] Key features to meet these goals are tenure for trial judges (10-year fixed term appointments), security of salary, and appointment and termination by the Governor-General.[14] On August 26, 2009, the High Court of Australia invalidated the provisions establishing the AMC because the legislation creating the AMC was unconstitutional.[15] The Parliament responded by enacting the *Military Justice (Interim Measures) Act (No. 1) 2009* and *Military Justice (Interim Measures) Act (No. 2) 2009*, re-establishing the pre-2007 regime of Defence Force magistrates (DFM), restricted courts-martial, and general courts-martial.[16]

e. **Levels of Australian military tribunals**. The DFM and restricted courts-martial have the same jurisdiction and powers.[17] They do not have authority to impose more than six months of imprisonment or restriction.[18] A general court-martial may

[11] *Morrison*, *supra* note 3, at ¶ 91; *2011 Annual Report of the Director of Military Prosecutions to Parliament*, Ch. 1, ¶ 1.2, http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=fadt_ctte/annual/2012/report2/c01.htm#c01f1 [hereinafter 2011 DMP Report] (citing Defence Force Discipline Act 1982 (DFDA), Section 188G).

[12] Chief Military Judge, Australian Military Court (AMC), *Report for the period 1 January to 31 December 2008*, Annex A-1, http://www.defence.gov.au/publications/AMC_AnnualReport_08.pdf [hereinafter 2008 AMC Report].

[13] Australian Government, Department of Defense, *Frequently Asked Questions on the Australian Military Court*, Military Justice Inquiry FAQ, 1-2, http://www.defence.gov.au/mjs/resources/AMCFAQs.pdf.

[14] *Id*. at 2.

[15] 2011 DMP Report, *supra* note 11, at Ch. 1, ¶ 1.10(d) (citing *Lane v Morrison* (2009) 239 CLR 230, [2009] HCA 29 (invalidating Division 3, Part VII of the DFDA)), http://www.clrg.info/2011/02/lane-v-morrison-2009-hca-29-26-august-2009/.

[16] *Id*. at Ch. 1, ¶ 1.10(d) (citing *Haskins v the Commonwealth* [2011] HCA 28 and *Nicholas v the Commonwealth* [2011] HCA 29). *See also* Australian Department of Defense Director of Military Prosecutions, *Report for the period 1 January to 31 December 2012*, Annex A-1, http://www.defence.gov.au/publications/DMP_Annual_Report_2012.pdf [hereinafter 2012 DMP Report].

[17] Peter Heerey, *The Role of the Commander in Military Criminal Procedure*, Presentation to the 6th Budapest International Military Law Conference, June 14-17, 2003, http://www.defenceappeals.gov.au/papersheerey.html.

[18] *Id*.; DFDA, *supra* note 3, Schedule 2, § 67.

impose up to the maximum punishment for the offence as prescribed by statute.[19] Generally, the accused has the right to make a forum election, either trial by DFM (judge alone trial) or court martial (jury trial).[20] The president of a general court martial is a colonel or higher and has at least four additional members; the president of a restricted court martial is a lieutenant colonel or higher and has at least two other members.[21]

f. **Offense Report Statistics**.

Two Australian Defence databases include records of sex offense complaints in the ADF as shown in the following table:[22]

	2008	2009	2010	2011
Australian Defence Force Investigative Service (ADFIS)[23]	58	82	86	84
Broderick Report[24]	87	74	50	42
Average	72	78	68	63

On June 20, 2013, the Australian Minister of Defense indicated:

> Of particular concern is research which indicates that approximately 80 percent of victims do not report their experience. The number of unacceptable behaviour complaints is also higher than one would want to see, increasing since 2009 in the ADF and Defence more generally. Complaints in the ADF increased from 624 in 2009 to 631 in 2012 and in the Australian Public Service in Defence

[19] International Society for Military Law and the Law of War, *Conference on Military Jurisdiction*, Doc. No. ISMLLW 468 E 4 (Sept. 28, 2011 - Oct. 2, 2011) at 2, 20, http://www.ismllw.org/conferences/QUESTIONNAIRE%20RHODES/Australian.pdf.

[20] DFDA, *supra* note 3, §§ 111B, 111C.

[21] *Id*. at §§ 114, 116.

[22] 2013 Report for Congress, *supra* note 3, at 18 (citations omitted).

[23] *Id*. (citing Australian Human Rights Commission, *Review into the Treatment of Women in the Australian Defense Force: Phase 2 Report*, 254 (2012), http://defencereview.humanrights.gov.au/sites/default/files/adf-complete.pdf.

[24] *Id*. (citing Australian Human Rights Commission, *Review into the Treatment of Women in the Australian Defence Force Academy and Australian Defence Force*, http://defencereview.humanrights.gov.au/).

> increased from 124 in 2009 to 180 in 2012. Pathway to Change encourages a reporting culture; one in which people are not afraid to come forward and report unacceptable behaviour in the confidence that it will be dealt with.[25]

g. **Absence of Military Prosecution of Serious Sex Crimes**. The 1994 Report of the Senate Standing Committee on Foreign Affairs, Defence and Trade on Sexual Harassment in the Australian Defense Force recommended that sex offenses be removed from the jurisdiction of Defence Forces and instead be referred to the civil police for investigation and civilian authorities for prosecution.[26] The Committee concluded the Defence handling of the investigation and prosecution of sex offenses was inadequate, and civil authorities were better equipped to carry out such investigations and prosecutions.[27]

Currently, the only sex offenses likely to be prosecuted under the DFDA are indecency offenses in the second and third degree and indecency without consent.[28] Sexual assault offenses are more serious and are referred to civil police and resolved in civilian courts. The 2012 Australian Human Rights Commission, Review into the Treatment of Women in the Australian Defence Force, Phase 2 explains:

> In relation to offences that may also constitute a criminal offence under the ordinary criminal law of the Commonwealth, States and Territories, jurisdiction under the DFDA in Australia may be exercised only where proceedings under the DFDA can reasonably

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[25] Press Release, Stephen Smith MP, *Paper Presented on the Defence Abuse Response Taskforce* (June 20, 2013), http://www.minister.defence.gov.au/2013/06/20/minister-for-defence-stephen-smith-paper-presented-on-the-defence-abuse-response-taskforce/ [hereinafter 2013 Smith Press Release].

[26] Senate Foreign Affairs, Defence and Trade References Committee, *Sexual Harassment in the Australian Defense Force* 320 (August 2004), http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=fadt_ctte/completed_inquiries/pre1996/harassment/index.htm [hereinafter 1994 Senate Report].

[27] *Id.*; Gary A Rumble et al., *Report of the review of allegations of sexual and other abuse in Defence facing the problems of the past, Vol. 1, General findings and recommendations* 136 (Oct. 2011), http://www.defence.gov.au/pathwaytochange/Docs/DLAPiper/Volume1.pdf [2011 DLA Piper Review]. The entire version of the 1,567 page 2011 DLA Piper review can be found at the National Library of Australia's online website Trove at http://trove.nla.gov.au/version/178785904. *See also* Australian Government, Department of Defence, *Pathway to Change – Evolving Defence Culture*, Pathway to Change, http://www.defence.gov.au/pathwaytochange/index.htm.

[28] Australian Human Rights Commission, *Review into the Treatment of Women in the Australian Defence Force, Phase 2 Report* 451 (2012), http://defencereview.humanrights.gov.au/sites/default/files/adf-complete.pdf (citing Crimes Act 1900 (ACT), sections 58-60).

> be regarded as substantially serving the purpose of maintaining or enforcing service discipline. It is a matter for the Director of Military [P]rosecutions to decide whether the maintenance of discipline requires that DFDA charges be laid in a particular case.
>
> In addition, the DFDA specifically excludes military jurisdiction for dealing with a number of serious offences unless consent is provided by the Commonwealth Director of Public Prosecutions (DPP). These offences include murder and manslaughter and certain sexual offences, namely, sexual assault in the first, second and third degree, sexual intercourse without consent and sexual assault with a young person. [A] Defence Instruction . . . notes, however, that "due to the seriousness of these offences, it is unlikely the DPP would give the ADF consent to deal with these offences" and that, as a matter of policy, these sexual offences should be referred to civilian authorities in the first instance.
>
> Since 1985, the Commonwealth DPP has consented on only two occasions to the DFDA prosecution of sexual assault offences which were alleged to have occurred in Australia. A number of other sexual offences contained in section 3 of the Crimes Act 1900 (ACT) are also "imported" into the DFDA. Whilst prosecution under the DFDA for these offences does not require the consent of the Commonwealth DPP, the Defence Instruction . . . recommends the immediate referral of some of these offences to civilian authorities, where the offence occurs in Australia, because of their seriousness.[29]

h. **Director of Military Prosecutions (DMP)**. The Australian Parliament created the Office of the DMP effective June 12, 2006.[30] The Director is a Brigadier and DMP is has 14 positions for prosecutors.[31] The DMP has three pertinent functions:

> (a) to carry on prosecutions for service offences in proceedings before a court martial or a Defence Force magistrate, whether or not instituted by the Director of Military Prosecutions;

[29] *Id*. at 452 (internal footnotes omitted; emphasis added).

[30] 2011 DMP Report, *supra* note 11, at Ch. 1, ¶ 1.2 (citing Defence Force Discipline Act 1982, Section 188G).

[31] *Id*. at Ch. 1, ¶ 1.5.

> (b) to seek the consent of the Directors of Public Prosecutions as required by section 63; . . . and
>
> (e) to do anything incidental or conducive to the performance of any of the preceding functions.[32]

i. **Australian Military Prosecution Statistics**.

(1) In 2008, the Director of Military Prosecutions referred 114 matters for trial, and 92 trials were conducted, including 64 guilty pleas and 28 contested cases.[33] There were 15 jury trials—two with 12-person juries and 13 with 6-person juries. No trials were conducted outside of Australia.[34] Although two felony-level trials (Class 1 trials) were held, both cases resulted in acquittals.[35]

(2) From January 1, 2009 to August 26, 2009, there were 5 jury trials, 9 judge alone trials, and 19 sentencing hearings, and after *Lane v Morrison* invalidated the AMC system, there were 10 Defence Force Magistrate (DFM) hearings, 1 Restricted Courts-Martial (RCM) and 5 General Courts-Martial (GCM) hearings.[36] The DMP did not prosecute 69 matters because they believed there "was no reasonable prospect of success or that to prosecute would not have enhanced or enforced discipline."[37] Forty-five matters were referred back for summary disposal; 11 matters were referred to civilian Directors of Public Prosecution; and ODMP had 90 open matters at the end of the calendar year.[38]

(3) In 2011, the DMP listed five general courts martial and three involved sex offense cases: (1) The DMP obtained a conviction involving "an act of indecency."; (2) a GCM of a lieutenant commander resulted in guilty findings for seven counts of "indecent conduct upon an Able Seaman without her consent" and one count of "attempting to destroy service property." The lieutenant commander-accused was sentenced to among

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[32] *Id*. at Ch. 1, ¶ 1.3 (citing Defence Force Discipline Act 1982, Section 188GA (1)).

[33] 2008 AMC Report, *supra* note 12, at 6.

[34] *Id*.

[35] *Id*. at Annex A-F.

[36] *2010 Annual Report of the Director of Military Prosecutions to Parliament*, Ch. 1, ¶ 1.18, http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=fadt_ctte/annual/2010/report2/c01.pdf [2010 DMP Report].

[37] *Id*. at Ch. 1, ¶ 1.18.

[38] *Id.*

other punishments 18 months imprisonment with 6 months suspended; and (3) Sailor W was acquitted at a GCM of one charge of sexual intercourse without consent.[39] In the offense category table, DMP listed 13 counts of sexual assault and related offenses (7 pertained to the lieutenant commander) out of a total of 130 charged offenses.[40]

(4) In 2012, the DMP prosecuted 13 charges of sexual assault and related offenses out of a total of 125 charges.[41] The only GCM in 2012 was not related to a sex crime; the case involved larceny of housing allowance by fraud and resulted in a fine.[42]

(5) The following table depicts the DMP prosecution actions in 2011 and 2012:

	2011[43]	**2012**[44]
Defense Force Magistrate Hearings	38	38
Restricted Courts Martial	14	11
General Courts Martial	5	1
Total Misdemeanor and Felony-Level Trials	57	50
Matters Not Proceeded	36	32[45]
Referred to Command for Summary Disposal	42	35
Referred to Directors of Public Prosecution	7	62
Total Cases Not Prosecuted	85	9
Open Matters	47	51

h. **Perceptions Resulting from Lack of Military Justice Prosecution of Sex Crimes.** In April 2011, after an Australian military sexual abuse scandal, Australian Minister for Defence Stephen Smith announced two important reviews of sexual abuse in the Australian military by the Australian Human Rights Commission, and the 2011 DLA Piper Review.[46] The 2011 DLA Piper Review at 144 states:

[39] 2011 DMP Report, *supra* note 11, at Ch. 1, ¶¶ 1.10-1.13 (citing *Low v Chief of Navy* [2011] ADFDAT 3, General Court Martial Trial of Lieutenant Commander Alan John Jones (Dec. 2011) and General Court Martial Trial of Sailor W (Oct. 31, 2011)). *See also* 2012 DMP Report, *supra* note 16, at ¶¶ 25-27 (appeals dismissed).

[40] *Id*. at Ch. 1, ¶ 1.17.

[41] 2012 DMP Report, *supra* note 16, at Annex B.

[42] 2012 DMP Report, *supra* note 16, at ¶¶ 36-38.

[43] 2011 DMP Report, *supra* note 11, at Ch. 1, ¶ 1.9.

[44] 2012 DMP Report, *supra* note 16, at ¶¶ 20, 21.

[45] The DMP did not refer 32 matters to trial "due to the determination that there was no reasonable prospect of success, or that to prosecute would not have enhanced or enforced service discipline." *Id*. at ¶ 20.

> The removal of the role of Defence in the investigation and prosecution of sex offences as recommended by that Committee was based on the Committee's perception that sex offences were being badly handled by Defence. Defence met this criticism by requiring the immediate referral of complaints of sexual assault to the civil police. This "complied" with the Committee's recommendation. . . . Further, not only does it seem that Defence hands over the management of the investigation of sex offences to the civil police, Defence also seems to withdraw from taking any part in the process.[47]

At page 106, the 2011 DLA Piper Review states:

> What the Review can say (based on the information before it) is that when considering past abuse in the ADF, the Review has found:
>
> - high levels of under-reporting
> - a substantial number of people who have been dissatisfied and disillusioned with the ADF's application of military justice processes and approach to complaint handling
> - inconsistent (and in many cases, flawed) applications of the military justice procedures (see Chapter 7) in place at particular points in time
> - low levels of prosecutions and/or inaction by civilian police or the ADF (including failure to take administrative or DFDA action) in failing to call perpetrators to account for unacceptable behavior (including serious instances of assault).[48]

The 2011 DLA Piper Review further states at 136, "The combined effect of unwillingness to report, ADF's reliance upon civilian prosecutors to commence actions and the notoriously low rate of prosecutions or convictions for sex offences results in a

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[46] 2013 Smith Press Release, *supra* note 25.

[47] 2011 DLA Piper Review, *supra* note 27, at 144. *See also* Appendix 34 for the Memorandum of Understanding between the Australian Directors of Public Prosecutions and Director of Military Prosecutions dated 22 May 2007 in relation to prosecution of sex offenses.

[48] 2011 DLA Piper Review, *supra* note 27, at 106.

very low number of convictions of members of the ADF who have committed a sexual assault."[49]

Australian Minister for Defence Stephen Smith noted that the "DLA Piper Review identified a range of allegations from 775 people which fell within the Review's Terms of Reference, the overwhelming majority of which were said to be plausible allegations of abuse."[50] A task force was commissioned to address the DLA Piper Review, and as as of May 31, 2013, there were 2,410 complaints of sexual abuse or harassment, which included 1,535 new complaints.[51]

4. **Analysis.**

a. In FY 2012, the active duty strength of the U.S. Department of Defense (DoD) was 1,388,028 or 24 times as large as the Australian active duty forces total of 56,856.[52] In 2009, 2011, and 2012, Australia averaged 47 military trials for all offenses; however, most of them were Defence Force Magistrate hearings with a maximum punishment of six months confinement or detention. In 2011 there were only 5 Australian general courts-martial (GCM), and in 2012, there was only 1 Australian GCM. In FY 2012, the DoD completed 2,510 courts-martial for all offenses, including 1,183 GCM and 1,327 special courts-martial. Without including the 1,346 summary courts-martial tried in FY 2012, the Australian military prosecution rate per thousand of .83 is less than half as high as the U.S. military prosecution rate per thousand of 1.81.

b. In FY 2012, 302 DoD military personnel were tried by courts-martial for sexual assault offenses, and 238 (79%) were convicted.[53] The rate per thousand of DoD personnel tried by courts-martial for sexual assault offenses was .22 (302/1,388,000). The Australian Government rarely tries serious sex offenses. In the last two years, there

[49] 2011 DLA Piper Review, *supra* note 27, at 136. *See also* Global Legal Research Center, Military Justice: Adjudication of Sexual Offenses: Australia, Canada, Germany, Israel, United Kingdom, The Law Library of Congress, July 2013, at 18 (citations omitted) (noting the Values, Behavior and Resolution Branch of the Defence Report listed "sexual offence complaints" from 2008 to 2011 ranged from 42 to 87, and the initial reports of "sexual assaults and related offenses" from the Service Police Central Records Office of the Australian Defence Force Investigative Service from 2008 to 2011 ranged from 58 to 84).

[50] 2013 Smith Press Release, *supra* note 25.

[51] *Id*.

[52] On September 30, 2012, the total U.S. Defense Department population on active duty was 1,388,028. DoD Personnel and Procurement Statistics, *Military Personnel Statistics*, http://siadapp.dmdc.osd.mil/personnel/MILITARY/miltop.htm (click "Total DoD - December 31, 2012 (DMDC data)).

[53] Department of Defense, *1 Annual Sexual Assault Report* 73 (2012), http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.

were only three Australian general courts martial for sex crimes with two convictions. A U.S. soldier who commits a serious sex crime is far more likely to receive a GCM and substantial confinement from a U.S. court-martial than an Australian soldier who commits the same offense. The entire Australian military justice system prosecuted an average of three felony-level prosecutions the last two years; as compared to the U.S. military justice system that prosecutes approximately 400 times as many felony-level cases.

c. The Australians followed the United Kingdom's lead and changed to a system of centralized prosecutions handled by military lawyers in the aftermath of decisions by the European Court of Human Rights and a 2005 legislative committee review. Those appellate court decisions addressed protecting the rights of the accused. The 2011 DLA Piper Review found that once the military passed the investigation and prosecution of serious sex offenses to the civilian sector, the military often washed their hands of the matter and withdrew from the process. The 2011 DLA Piper Review collected 775 complaints; a 2012 follow-up review collected 1,535 new complaints of sexual abuse or harassment. With several thousand sex offense allegations currently under assessment and very rare prosecutions of serious sex offenses in Australian military tribunals, the Australian model does not seem to be a framework that the United States Armed Forces should adopt.

LISA M. SCHENCK, FACT SHEET ON UNITED KINGDOM MILITARY JUSTICE
(CORRECTED COPY)
SEPT. 22, 2013

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September 22, 2013

Fact Sheet on United Kingdom (UK) Military Justice[1] (Corrected Copy)

1. Introduction. During the Senate Armed Services Committee Hearing on June 4, 2013, some witnesses suggested that the UK military justice system may be a good model for centralization of courts-martial referrals under the authority of a central prosecutor, rather than military commanders.[2] This fact sheet traces the recent changes in the UK military justice system, describes the rationale for withdrawing the convening authority's ability to refer criminal cases to trial and transferring that authority to a central prosecution office, describes the magnitude of UK military justice prosecutions, and compares the disposition of US courts-martial and UK courts-martial with an emphasis throughout on disposition of sex offenses.

2. The United Kingdom System.

a. **UK Armed Forces Strength.** On October 1, 2012, the UK active duty strength was 175,940 including 17,060 (9.7%) women.[3]

b. **European Court of Human Rights Calls for Systemic Changes.** On February 25, 1997, the European Court of Human Rights (ECHR) required structural changes in the role of the convening officer in UK cases because the convening officer had a role in the prosecution of cases The ECHR required structural changes in the role of the convening officer in United Kingdom cases because the convening officer had a role in the prosecution of cases.

> The [convening] officer . . . appointed the members of the court martial, who were subordinate in rank to him and fell within his chain of command. He also had the power to dissolve the court martial before or during the trial and acted as "confirming officer", with the result that the court martial's decision as to verdict and sentence was not effective until ratified by him.[4]

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[1] This document reflects the personal opinion of the author and does not represent the views of George Washington University or the Law School.

[2] Senate Armed Services Committee *Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military*, (June 4, 2013) (statement of Senator Gillibrand at 49-50), http://www.armed-services.senate.gov/Transcripts/2013/06%20June/13-44%20-%206-4-13.pdf.

[3] Gavin Berman & Tom Rutherford, Social and General Statistics, *Defence Personnel Statistics*, House of Commons Library, Standard Note: SN/SG/02183 (Nov. 30, 2012) at 9, www.parliament.uk/briefing-papers/sn02183.pdf.

[4] *Morris v. the United Kingdom*, (2002) 34 EHRR 1253, [2002] ECHR 38784/97 at ¶ 60 (citing *Findlay v. the United Kingdom* (judgment of Feb. 25, 1997, *Reports of Judgments and Decisions* 1997-I)), http://www.legislationline.org/documents/id/8251. *See Grieves v. the United Kingdom,* (2003) 39 EHRR 52, [2003] ECHR 57067/00).

The ECHR found UK courts martial lacked independence and impartiality because of the convening officer's roles in the process. In response, the UK eliminated the "convening officer" role in the process and divided his main roles between "the higher authority, the prosecuting authority and the Court Martial Administration Officer."[5] The UK Government's goal was to increase the "appearance of fairness" for the accused and not to enhance justice for victims or to increase prosecutions.[6]

c. **Commanding Officer's Authority**. UK commanding officers retain authority to dispose of minor offenses using minor administrative awards.[7] Minor administrative awards are similar to nonjudicial punishment under Article 15, Uniform Code of Military Justice. Minor administrative awards permit imposition of extra work, muster parades, and extra duties. Procedures are simple and expeditious. In addition, minor criminal and military offenses may be investigated by the suspect's commanding officer, and punishment imposed, in a process known as Summary Dealing which is most similar to a summary court-martial in the US Armed Forces under the Uniform Code of Military Justice (UCMJ). The maximum punishment includes up to 90 days of detention; however, imposition of this punishment is limited to lower ranking personnel and specified offenses. The accused may elect to be tried by "court martial." When an election for court martial has been made, the punishment is limited to the maximum available to the commanding officer.[8] When a commanding officer learns of a possible serious offense, the commanding officer is required to ensure Service Police are aware of the allegation and circumstances "as soon as is reasonably practicable."[9]

d. **Higher Authority**. The UK term, "higher authority" means "any officer in the commanding officer's disciplinary chain of command who is superior in that chain of command to the commanding officer."[10] The commanding officer of the accused refers the allegation to the higher authority for "the initial decision whether or not to bring a prosecution. . . . who must decide whether [the] case . . . should be dealt with summarily,

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[5] *Morris, supra* note 4, at ¶ 50.

[6] *See also* Michael D. Conway, *Thirty-Ninth Kenneth J. Hodson Lecture in Criminal Law*, 213 Mil. L. Rev. 212, 224 (Fall 2012), https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW.NSF/20a66345129fe3d885256e5b00571830/256fb1f93504c34785257b0c006b99d4/$FILE/By%20Major%20General%20Michael%20D.%20Conway.pdf

[7] *Id*., at 223-224.

[8] Armed Forces Act 2006 within the United Kingdom, from the UK Statute Law Database, http://www.legislation.gov.uk/ukpga/2006/52/pdfs/ukpga_20060052_en.pdf [Armed Forces Act of 2006]. *See also* Explanatory Notes to the Act and the Manual of Service Law (MSL), Ministry of Defence, Joint Service Publication (JSP) 830, Vol. 1. and 2 Edition 1.0 2009, Sections 164 to 165. https://www.gov.uk/government/publications/joint-services-publication-jsp-830-manual-of-service-law-msl [hereinafter MSL, JSP 830].

[9] Armed Forces Act of 2006, at 3 & 4 Eliz. II, *supra* note 8, at c. 52, pt. 5, § 113.

[10] *Id*. at c. 2, pt. 18, § 361 (defining the term "higher authority").

referred to the prosecuting authority, or dropped. Once the higher authority has taken this decision, he has no further involvement in the case."[11]

e. **Prosecuting Authorities**. A military prosecuting authority receives the case from the higher authority or the Service Police (who informs the commanding officer after the referral),[12] and "the prosecuting authority has absolute discretion, applying similar criteria as those applied in civilian cases by the Crown Prosecution Service, to decide whether or not to prosecute, what type of court martial would be appropriate and precisely what charges should be brought. . . The prosecution is brought on behalf of the [UK] Attorney-General."[13] Prosecuting authorities prosecute traditional military offenses, such as desertion, and civil offenses, such as sexual assault and robbery, at courts martial. In October 2009, the Service Prosecuting Authority (SPA) was formed through the merger of the Army, Air Force and Navy Prosecuting Authorities. The current head of the SPA is a Senior Civil Servant who is also the Director of Service Prosecutions. The Deputy Director of Service Prosecutions is a Brigadier General.[14]

f. **Service Civilian Court**. Under limited circumstances, civilians who commit offenses outside the UK,[15] may be tried by the service civilian court, which consists of a judge advocate sitting alone. If the offense is sufficiently serious, it can be referred to a court martial, or the defendant can elect trial by court martial in lieu of trial by the service civilian court. The maximum punishment includes imprisonment for up to 12 months (or 65 weeks for two or more offences). The findings or sentence of the service civilian court may be

[11] *Morris, supra* note 4, at ¶ 20. *See also* Conway, *supra* note 6, at 220.

[12] Armed Forces Act of 2006, *supra* note 8, at Ch. 52, Part 5, Section 118.

[13] *Morris, supra* note 4, at ¶ 21. Major General Conway explained the current process as follows:

> The most serious kinds of cases do not go to commanding officers for them to decide how they should be dealt with. They used to [go to the commanding officers] under the old system, but they go now to the police and then to the service prosecutors; and it's impossible under this system for a commanding officer to dismiss a charge of, say, murder, as he could and in at least one case did before this Act came into force. Judge advocates sit in all trials, including at the Summary Appeal Court. The Court Martial Appeal Court that hears appeals from courts-martial is made up of civilian judges, and it can be seen, therefore, that there has been a massive change in our system since the days of convening officers and confirming officers and the like.

Conway, *supra* note 6, at 222.

[14] Ministry of Defence, *Service Prosecuting Authority*, Gov.UK, https://www.gov.uk/service-prosecuting-authority.

[15] The circumstances and requirements for jurisdiction over civilians are complex and beyond the scope of this fact sheet. *See* MSL, JSP 830, *supra* note 8, at Vol. 1, ¶¶ 17-35, pages 1-3-8 to 1-3-16.

appealed to a court martial, which makes a de novo determination of the findings and any sentence. The court martial jury for a civilian is composed of civilians.[16]

g. **Court Martial**. Beginning November 1, 2009, the court martial was established as a permanent standing court. The distinction between levels of courts martial was abolished. The court martial may try any offense against service law. A judge advocate[17] presides over the court martial, and the jury or board is composed of officers and warrant officers. For sentencing, the judge advocate is included in the board. The maximum sentence includes imprisonment for life and dismissal, depending on the offense.

h. **Sexual Assault**. Jurisdiction over certain serious sexual assault offenses in Schedule 2 is limited to court martial—such offenses may not be summarily resolved and must be referred to Service Police for investigation.[18] The Service Police are required to refer investigations that substantiate Schedule 2 offenses to the Service Prosecuting Authority for disposition.[19] Schedule 2 includes most non-consensual sex offenses.[20]

i. **Victim Reports of Offenses**. The House of Commons Defence Committee expressed frustration about the failure of victims to report sex offenses based on surveys showing sexual abuse "offences [were] a lot higher than the number of complaints would indicate."[21] The UK Service Complaints Commissioner for the Armed Forces' press release for her annual report states, "After 5 years the Armed Forces complaints system is still inefficient and undermines confidence in the chain of command."[22]

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[16] The information in this paragraph is from the Armed Forces Act of 2006, *supra* note 8, at Explanatory Notes, §§ 278-80, 285-86, sch. 3 (punishments), http://www.legislation.gov.uk/ukpga/2006/52/pdfs/ukpgaen_20060052_en.pdf.

[17] Because of a decision of the European Court of Human Rights all judge advocates sitting on Service Civilian Courts and Courts Martial are civilian attorneys. Conway, *supra* note 6, at 221.

[18] MSL, JSP 830, *supra* note 8, at Vol. 1, ¶ 23d, page 1-6-11.

[19] Armed Forces Act of 2006, *supra* note 8, at c. 52, pt. 5, § 116.

[20] MSL, JSP 830, *supra* note 8, at Vol. 1, § 6, ¶ 234l(2), 234l(5), page 1-6-60 ("(2) An offence under the Sexual Offences Act 1956, sections 1 to 7, 9 to 11, 16, 17, 19 to 24, 26 to 29 or 32; . . . (5) An offence under the Sexual Offences Act 1967, section 4 or 5;"); *Id*. at Vol. 1, Ch. 6, Annex D, ¶ 1(12)(at), page 1-6-D-4 ("(at) Any offence under Part 1 of the Sexual Offences Act 2003 (c. 42) except one under section 3, 66, 67 or 71").

[21] Global Legal Research Center, *Military Justice: Adjudication of Sexual Offenses: Australia, Canada, Germany, Israel, United Kingdom*, The Law Library of Congress, July 2013, at 66 (citing *Service Complaints Commissioner of the Armed Forces*, Annual Report 2012, at 22, http://armedforcescomplaints.independent.gov.uk/linkedfiles/afcindependent/426354_ssc_ar_2012.pdf and *Defence Committee-Eighth Report: The Work of the Service Complaints Commissioner for the Armed Forces, 2012–13*, ¶ 30, http://www.publications.parliament.uk/pa/cm201213/cmselect/cmdfence/720/72002.htm) [hereinafter 2013 Library of Congress]).

[22] *Id*. at 67 (citing Press Release, Service Complaints Commissioner (SCC) for the Armed Forces, SCC No. 3/2013 (Mar. 21, 2013), http://armedforcescomplaints.independent.gov.uk/linkedfiles/afcindependent/scc-

3. Statistics.

a. **Complaints**. In 2012, the UK Service Complaints Commissioner (SCC) received 572 "potential Service complaints" of bullying, harassment, and discrimination.[23] In 2012, the number of reports to the SCC increased by one third from 2011 and by nearly two thirds from 2010. The UK SCC did not explain why complaints increased so significantly. The SCC report notes, "there were still 582 Service complaints awaiting decision at Commanding Officer level..... At the end of 2012 the Army had 430 cases which had been in the system for over 6 months."

b. **Military Sex Offense Investigations**. The following complaints or allegations of rapes, sexual assaults, and other sex offenses "within" the UK military services were investigated in the years 2005 to 2012:[24]

UK Investigations of Military Sex Crimes									
	2005	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**Average**
Rape	19	28	32	19	26	25	14	13	22
Sexual Assault	95	94	78	60	79	50	40	40	67
Other Sex Offenses	47	34	30	25	31	22			32
Total	161	156	140	104	136	97			132

c. Allegations reported by service personnel against service personnel were as follows: 2009 (2 rapes and 11 sexual assaults); 2010 (8 rapes and 44 sexual assaults); 2011 (14 rapes and 39 sexual assaults); and 2012 (13 rapes and 35 sexual assaults).[25]

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annualreport2012.pdf [SCC Press Release]). The Service Commissioner Press Release also states, "For the fifth year running, I find that the Armed Forces have failed to give Servicemen and Servicewomen an efficient, effective and fair system through which they can raise a complaint." *Id*. at 2.

[23] *Id*. at 3 is the source for the remainder of this paragraph. *See also* 2012 SCC Report at 8 ("Fear of adverse impact at work or on one's career is given by over half as the reason for not making a complaint, as is a view that the chain of command would do nothing.") http://armedforcescomplaints.independent.gov.uk/linkedfiles/afcindependent/426354_ssc_ar_2012.pdf.

[24] The Ministry of Defence, Deputy Chief of Defence Staff (Personnel) Secretariat, Reference to FOI 14-09-2010-164757-003 (Oct. 12, 2010), Appendix, provided the statistics from 2005 to October 2010, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/16793/FOI14092010164757005 Kerbaj.pdf. The source for the statistics for 2011 and 2012 is the 2013 Library of Congress, *supra* note 21, at 65 (citing April 25, 2013, Parl. Deb. H.C. (6th sir.) 1250W, http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130425/text/130425w0009.htm [hereinafter 2013 Parliament Report]. The 2013 Library of Congress article indicates in 2009, there were 12 sexual assaults and 2 rapes; in 2010, there were 54 sexual assaults and 8 rapes. *Id*.

[25] 2013 Parliament Report, *supra* note 24, at 1254W.

d. UK action on 135 sexual assault cases received by service police from November 1, 2009, the date of the implementation of the Armed Forces Act 2006, to December 31, 2012, are as follows:[26]

(1) 29 cases were not referred to the prosecuting authority; (a) 14 cases were not investigated because the complaint was not pursued; and (b) 15 cases were investigated, but not referred after the investigation.

(2) 106 cases were referred to the prosecuting authority: (a) 15 cases resulted in no action; (b) 49 cases resulted in a referral for a court martial or other disciplinary action, and of those 49 cases, 24 cases resulted in a court martial conviction or other disciplinary action, 10 cases did not result in a conviction or other adverse action, 15 cases resulted in a court martial or other disciplinary proceeding and conviction of a lesser offense, and (c) 23 cases are ongoing.

e. **UK Courts Martial Results**. The UK courts martial findings results for 2009-2011 are as follows:[27]

UK Courts Martial Findings				
	2009	**2010**	**2011**	**Average**
Total Courts Martial Completed	627	592	592	604
Guilty Pleas	546	469	456	490
Not Guilty Pleas—Conviction	27	48	72	49
Not Guilty Pleas—Acquittal	47	71	61	60

f. **Military Serious Sex Offense Cases Referred to the SPA**. The serious sex offense cases referred to the SPA are as follows: 2007—33 cases; 2008—35 cases; 2009—47 cases; 2010—69 cases; 2011—81 cases, and 2012—40 cases.[28] The average number of serious sex offenses cases referred from 2007 to 2011 is 53.

[26] 2013 Library of Congress, *supra* note 21, at 65 (citing 2013 Parliament Report, *supra* note 24, at 1250W). Please note, differences may exist between the UK and US military justice systems' required threshold for evidentiary sufficiency in order for investigators or military police to forward a sex crime case to the SPA and/or for the SPA to refer a case to trial.

[27] Service Prosecuting Authority, *Annual Report for 2011* at 19, http://spa.independent.gov.uk/linkedfiles/spa/test/about_us/publication_scheme/annualreport2011.pdf [hereinafter 2011 SPA Annual Report].

[28] *Id*. at 17. *See also* 2013 Parliament Report, *supra* note 24, at 1254W (indicating in 2010, there were 9 sex offence cases directed for trial and 12 not directed for trial; in 2011, there were 7 sex offense cases directed for trial and 11 not directed for trial; in 2012, 14 cases were directed for trial and 8 were not directed for trial).

g. **UK Courts Martial**. The number of UK courts martial for all offenses for the last five years is as follows:[29]

UK Courts Martial								
	2005	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**
Courts Martial	714	687	706	741	705	633	290	
Discharges	154	122	94	100	unk[30]	79	29	
Unsuspended Custodial Detention (confinement) Adjudged	39	50	38	42	unk	302	151	
Sex Offense Trials[31]	40	23	42	41	39	34 (9)	40 (7)	38 (14)
Sex Offense Convictions[32]						28	34	15

The SPA defines the term "sex offense" more broadly than the DoD Report. Using statistical data of the UK Military Court Centres available for November 1, 2011 to August 31, 2013, the trials involving pornography offenses, lewd language, sexual exposure without touching, and sexual abuse and rape of child victims have been subtracted from the totals to conform with the DoD Report's definition of sex offense. The following table reflects an analysis of the Military Court Centres' data, which makes available all charges, convictions, and

[29] Ministry of Defence, Deputy Chief of Defence Staff (Personnel) Secretariat, Reference to FOI 06-06-2011-151146-007 (July 7, 2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/16889/Response_to_06062011151146007_CourtMartial_Figures.pdf [hereinafter 2011 MOD FOI]. In 2009, there were 1,227 cases referred to the SPA and 622 courts-martial; in 2010, there were 1,198 cases referred to the SPA and 579 courts-martial; and in 2011, there were 1,163 cases referred to the SPA and 585 courts-martial. 2011 SPA Annual Report, *supra* note 27, at 16-17.

[30] 2011 MOD FOI, *supra* note 29 (stating that statistics were not available due to a change in databases).

[31] *Id*. (providing Air Force courts-martial for 2008-2010; and Army and Navy courts-martial for 2005-2011). The Air Force courts-martial were estimated to be 4 in 2005-2007 and 2011 based on the average of 6 in 2008, 5 in 2009, and 2 in 2010. *Id*. *See* 2013 Parliament Report, *supra* note 24, at 1254W (listing sex offenses referred to trial in parenthesis for 2010 (9 cases), 2011 (7 cases), and 2012 (14 cases). *See also* September 19, 2013 email from UK Brigadier (Ret.) Anthony Paphiti (He received the UK prosecution statistics for 2010 to August 2012 from the Service Prosecuting Authority, indicating 25 prosecutions and 10 convictions for January to August 2012. I have assumed the same rate of prosecutions and convictions for the remaining four months and extrapolated 38 prosecutions and 15 convictions for 2012). I am grateful for UK Brigadier (Ret.) Paphiti's comments regarding a previous version of this fact sheet. I have asked for additional UK data regarding confinement imposed for sex crimes and for an explanation for the inconsistency between the courts-martial statistics referred to Parliament and the numbers from the Service Prosecuting Authority.

[32] September 19, 2013 email from UK Brigadier (Ret.) Paphiti (indicating the conviction statistics for 2010 to 2012 were provided by the Service Prosecuting Authority).

imprisonment adjudged for courts-martial for November 1, 2011 to August 1, 2013, to provide a pertinent comparison of US and UK sex crime courts-martial:

Sexual Assault and Rape Courts-Martial (Military Court Centres)				
	2011 (2 months)[33]	**2012**[34]	**2013 (7 months)**[35]	**Annual Average**
Rape	2	6	6	8.0
Sexual Assault	3	15	14	18.3
Total	5	21	20	26.3
Convictions	5	15	6	14.9
Imprisonment Adjudged	3	3	1	4.0

4. Analysis.[36]

[33] Statistical data of the UK Military Court Centres is available for November 1, 2011 to August 31, 2013, https://www.gov.uk/government/publications/court-martial-results-from-the-military-court-centres. From November 1, 2011 to December 30, 2011, all cases involving adult sexual assault victims resulted in convictions. *Id*. The two rape convictions are listed at 17 and 77; and the three sexual assault convictions are listed at 5, 19, and 59. Of these five cases, two were not sentenced to imprisonment listed at 5 and 19. *Id.*

[34] From January 1, 2012 to December 31, 2012, the six rape cases with adult victims are listed at: 218, 265, 266, 277, 370, and 568; and the 15 sexual assault cases with adult victims are listed at: 141, 172,175,183, 190, 213, 223, 278, 315, 316, 337, 366, 385, 441, and 475. Id. Of the 21 sex crimes trials, six were found not guilty of the sex crime, listed at: 141, 223, 265, 266, 277, and 370 and three were sentenced to imprisonment, listed at: 218, 366, and 568. Id.

[35] From January 1, 2013 to August 1, 2013, the six rape cases with adult victims are listed at: 692, 711, 716, 786, 823, and 827; and the 14 sexual assault cases with adult victims are listed at: 641, 654, 674, 677, 701, 714, 755, 771, 782, 830, 833, 838, 875, and 880. Id. The six January 1, 2013 to August 1, 2013 cases with adult sex offense victims resulting in convictions are listed at: 674, 677, 823, 830, 838, and 875; and the single case with a sentence to imprisonment is listed at 823. Id.

[36] Precise statistical comparisons of the courts-martial trial and conviction rates between the UK and US militaries is impossible because of differences between the UK and US militaries. The UK sex crimes statistics may not include a crime that might meet DoD's criteria for an attempted sexual assault. The timing of case counting may be different. A case may be counted when it is investigated, referred to trial, tried, or sentence adjudged. Care must be exercised to avoid double counting or overlooking cases. The percentages of males and females in each military are different: 9.7% of the UK active duty population are women, see note 3 supra and accompanying text, and 14.7% of the US active duty population are women, DoD Personnel and Procurement Statistics, https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&subCat =milActDutReg. The UK 2013 Parliament Report reflects cases referred to trial, while the DoD FY 2012 number reflects 302 cases tried to verdict and does not include all the cases referred to trial. The low number of sex crimes tried in the UK military should not be construed as criticism of their decision making because a variety of factors including a low number of sex crimes reported to the police may be the primary cause of the low levels of prosecution.

a. In FY 2012, the active duty strength of the US Department of Defense (DoD) was 1,388,028 or eight times as large as the UK active duty forces total of 175,940.37 From 2005 to 2010, the UK averaged 698 courts martial. In FY 2012, the DoD completed 2,510 courts- martial, including 1,183 general courts-martial and 1,327 special courts-martial. Without including the 1,346 summary courts-martial tried in FY 2012, the DoD had 3.6 times as many courts-martial as the UK, but the UK rate per thousand of 3.94 was more than twice as high as the US rate per thousand of 1.81.

b. In FY 2012, 1,714 investigations were referred by investigators to DoD commanders for consideration of disciplinary action against military subjects.38 302 DoD military personnel were tried by courts-martial for sexual assault offenses, resulting in a prosecution rate of 18% (302 cases tried divided by 1,714 cases referred by investigators) and 79% (238 convicted divided by 302 tried) were convicted.39 The rate per thousand of DoD personnel tried by courts-martial for sexual assault offenses was .22 (302/1,388,000). The UK report with the highest number of courts martial indicates from 2005 to 2012, the UK tried an average of 37 sex offenses per year by courts-martial, and the UK annual prosecution rate per thousand is .21 (37/175,940). The DoD rate per thousand of prosecution of sex offenses is 3% higher than the UK rate per thousand. The 2013 Parliament Report (see supra note 31), however, indicates the number of sex offenses referred to trial as follows: 2010—9 cases; 2011—7 cases; and 2012—14 cases, or an average of 10 cases each year, resulting in a .057 (10/175,940) rate per thousand, whereas the DoD rate per thousand is at least 3.8 times higher than the UK rate per thousand. (The UK 2013 Parliament Report accounts for cases referred to trial, while the DoD number (302 cases) only includes cases tried to verdict and does not include all cases referred to trial.)

c. The most comparable UK metric to the DoD report is the UK's annual average of 26 sexual assault and rape trials completed, as reported by the UK judiciary, because sex crimes not included in the DoD report are deducted, such as child sexual assaults, child rapes, and pornography offenses. Under this measure, the UK prosecution rate per thousand is .15 (26/175,940). The DoD rate per thousand of sex offense prosecutions of .22 (302/1,388,000) is 47% higher than the UK rate per thousand.

d. The average number of UK military sexual assaults investigated by the police each year from 2005 to 2012 was 67 and the average number of UK rapes investigated by the police from 2005 to 2012 was 22.[40] An average of 89 UK sexual assaults and rapes were

[37] On September 30, 2012, the total population on active duty was 1,388,028. DoD Personnel and Procurement Statistics, *Military Personnel Statistics*, https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&subCat=milActDutReg.

[38] Department of Defense, *1 Annual Sexual Assault Report* 68 (2012), http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.

[39] *Id*. at 73 (indicating 302 sex offenses were tried by court-martial resulting in 238 convictions).

[40] *See* Table UK Investigations of Military Sex Crimes on page 5, *supra*.

investigated by the police each year from 2005 to 2012, and an average of 53 serious sex offenses cases (60% of investigated cases) were referred to the SPA from 2007 to 2010. The UK court martial prosecution rate is 70% (see supra note 31) (37 cases prosecuted by courts-martial divided by 53 cases referred by investigators to the SPA), or if determined based on the 2013 Parliament Report, possibly 19% (10 cases on average tried from 2010 to 2012 divided by 53 cases referred by investigators to the SPA). The US Department of Defense prosecution rate for sex offenses is 18%.

e. The UK changed to a system of centralized prosecutions handled by military lawyers in the aftermath of decisions by the European Court of Human Rights. Those appellate court decisions addressed protecting the rights of the accused. The modifications to the UK system were designed to protect the rights of the accused from any perception of an overbearing chain of command intent on achieving unjust convictions. The UK change in charging and referral authorities had nothing to do with increasing prosecution rates for crime in general or sex offenses in particular.

f. As an example, the Army installation of Fort Hood, Texas has 45,414 active duty military personnel,41 compared to UK's 175,940. In FY 2011, Fort Hood prosecuted 18 sex offenses at general and special courts-martial, resulting in 13 sex offense convictions—the number of convictions would be higher, if cases were included where the accused was acquitted of a sex offense and convicted of a non-sex offense).42 In FY 2012, Fort Hood prosecuted 26 sex offenses at general and special courts-martial, resulting in 21 sex offense convictions. More importantly, in FY 2011, ten Fort Hood military personnel were sentenced to more than one year of confinement; in FY 2012, 17 military personnel were sentenced to more than one year of confinement. However, UK's annual average of four military personnel sentenced to imprisonment for sexual assault and rape of adult victims, as reported by the UK judiciary, is strikingly lower than Fort Hood's confinement adjudged. In sum, assuming the report to Parliament is correct, Fort Hood by itself in FY 2012 tried more sex offenses by courts-martial than the entire UK military—with an active duty population 3.9 times larger than Fort Hood's—and obtained more sex offense convictions. However, if 26 is the accurate UK courts-martial number, Fort Hood has a higher prosecution rate per thousand than the UK, but about the same number of courts-martial per year. If the goal is to prosecute more sex crimes—the UK model may not work well for the US Armed Forces.

[41] Fort Hood Fact Sheet No. 0703, http://www.hood.army.mil/facts/FS%200703%20-%20Fort%20Hood%20Overview.pdf.

[42] Fort Hood prosecution statistics provided from Clerk of Court's Office, Army Court of Criminal Appeals on July 15, 2013.

LISA M. SCHENCK, FACT SHEET ON ISRAELI MILITARY JUSTICE (SEPT. 9, 2013)

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Fact Sheet on Israeli Military Justice[1]

1. Introduction. During the Senate Armed Services Committee Hearing on June 4, 2013, witnesses suggested that the United States military mirror the Israeli military justice system and eliminate military commanders' jurisdiction over serious crimes such as sexual assault.[2] One senator noted that in the last 5 years the Israeli Military Advocate General (MAG) officers have prosecuted several high profile cases, and that concurrently, reports of sexual assault and harassment offenses have increased by 80%.[3] In the Israeli Military Justice System, MAGs have always prosecuted courts-martial and oversee disciplinary hearings conducted by commanders.[4]

2. The Israeli System.

a. The Israeli Defense Forces (IDF) active duty strength is approximately 176,500 and reserve personnel is approximately 445,000.[5] Women comprise 33% of the IDF (approximately 58,833 service members), including 51% of IDF officers, 15% of technical personnel, and 3% of IDF combat soldiers.[6] By contrast, approximately 15% of active DoD personnel (214,098 service members) are women.[7]

b. Military service in Israel is compulsory, involves a large portion of the population, and the Military Justice Law (MJL), 5715-1955 provides the legal framework.[8]

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[1] This document reflects the personal opinion of the author and does not represent the views of George Washington University or the Law School. This fact sheet was written with the assistance of Julie Dickerson, a 2015 J.D. candidate.

[2] Senate Armed Services Committee, *Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military*, (June 4, 2013) (statement of Senator Gillibrand at 49), http://www.armed-services.senate.gov/Transcripts/2013/06%20June/13-44%20-%206-4-13.pdf.

[3] *Id. See also* Noam Barkan, *IDF: Rise in Sexual Harassment Complaints*, ynetnews.com (Aug. 5, 2012), http://www.ynetnews.com/articles/0,7340,L-4264554,00.html.

[4] Major General Menachem Finkelstein and Yifat Tomar, *The Israel Military Legal System – Overview of the Current Situation and a Glimpse into the Future*, 52 A.F. L. REV. 137, 146 (2002).

[5] *Israel*, The Institute for National Security at 11 (2012), http://www.inss.org.il.cdn.reblaze.com/upload/(FILE)1336472780.pdf.

[6] *More female officers in more positions in the IDF*, IDF Spokesperson (Nov. 30, 2011), http://www.idf.il/1086-14000-EN/Dover.aspx.

[7] *Statistics on Women in the Military*, Women in the Military Service For America Memorial Foundation. Inc. (Rev. Nov. 30, 2011), http://www.womensmemorial.org/PDFs/StatsonWIM.pdf.

[8] Finkelstein, *supra* note 4, at 137-38.

The MJL is a "separate and complete code, the need for which arises out of the uniqueness of military service."[9]

c. The MJL divides powers between the military judicial system and the MAG's office.[10] MAGs operate independently within the military. MAGs are legal advisors to IDF commanders and conduct courts-martial.[11] When acting in their advisory capacity, MAGs do not fall within that commander's chain of command. The commander cannot determine the MAG's salary or impact the MAG's promotion opportunities.

d. A MAG acts not only as legal counsel to the military commanders but also enforces penal laws; a MAG may file a charge sheet, order a preliminary investigation, and arraign soldiers for both military offenses and offenses committed under the penal laws of the State of Israel.[12] A MAG is, however, subordinate to the Attorney General in terms of arraignment.[13] MAGs also supervise disciplinary proceedings[14] in which the commander decides guilt or innocence and imposes a sentence.[15] MAGs review disciplinary hearing documentation and may "amend the judgment, quash it, or return it to the disciplinary officer."[16]

e. IDF commanders also have some legal powers. Each jurisdictional district (Northern Command, Central Command, Southern Command and Field Corps HQ, the Home Front Command, the Air Force, the Navy, and the General Staff) is headed by a district chief "who may intervene and influence legal processes in the military."[17] The

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[9] *Id.* at 139.

[10] *Id.* at 138.

[11] Professor Amos Guiora telephone call with Julie Dickerson on 16 July 2013, is the source for the information in the remainder of this paragraph [hereinafter Guiora Phone Call].

[12] *See* Finkelstein, *supra* note 4, at 140-41.

[13] HCJ 4723/96, *Avivit Atiyah v. Attorney General*, 51(3) P.D. 714 (holding the MAG must accept the Attorney General's interpretation of legal provisions and that the Attorney General may intervene in "special interest" matters that which exceed the realm of military law, acceptable norms, or general policy).

[14] Amendments to disciplinary law went into effect in January 2009 that broadened the power of non-commissioned and commissioned officers, enabling them to submit certain complaints. Additionally, "the degree of punishment for specific offenses and the ranks of officers entitled to preside over a variety of cases were revised." *Legal Supervision of Disciplinary Hearings*, IDF MAG Corps, http://www.law.idf.il/647-2351-en/Patzar.aspx.

[15] *See* Finkelstein, *supra* note 4, at 143.

[16] *Legal Supervision of Disciplinary Hearings*, *supra* note 14.

[17] *See* Finkelstein, *supra* note 4, at 145.

district chief may (1) order the Chief Military Prosecutor to file an appeal against a court-martial judgment, (2) with the consent of a military advocate, order the quashing of a charge sheet, and (3) confirm or mitigate any court-martial imposed sentence.[18]

f. Military Justice Law (MJL) provides for adjudication by military courts – which may impose long-term penalties – or disciplinary proceedings – which are conducted by commanders and serve to provide discipline in the field through lighter sentences.[19] The MJL establishes courts-martial (courts of first instance) and the Military Court of Appeals.[20] The Military Court system has five courts of first instance: a District Court Martial, a Naval Court Martial, a Special Court Martial, a Field Court Martial, and a Traffic Court Martial;[21] special courts exist for cases relating to officers with the rank of lieutenant colonel and above and death penalty cases.[22] Courts of first instance and disciplinary proceedings may be appealed to the Military Court of Appeals and next to the Supreme Court, though an appeal to the Supreme Court rarely occurs.[23] Similarly, a MAG's decision can be petitioned in the High Court of Justice.[24] An initial court-martial panel usually consists of three judges.[25] All judges have equal votes, but they serve different functions.[26] One judge is a lawyer who instructs the others in the law, and the remaining judges are field commanders who represent the voice of the "non-lawyer" or the soldiers on the ground.[27]

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[18] *Id.* at 148-49.

[19] Global Legal Research Center*, Military Justice: Adjudication of Sexual Offenses: Australia, Canada, Germany, Israel, United Kingdom*, The Law Library of Congress, July 2013, at 42-44 [hereinafter 2013 Congress Report].

[20] *Id*.

[21] *Id.* at 45.

[22] *Military Court System*, IDF MAG Corps, http://www.law.idf.il/647-2350-en/Patzar.aspx; 2013 Congress Report, *supra* note 19, at 42.

[23] Only 6 cases have been granted leave to appeal since 1986 when the MJL was amended to provide an option to appeal by leave. *See* Finkelstein, *supra* note 4, at 164.

[24] *Military Court System*, IDF MAG Corps, http://www.law.idf.il/647-2350-en/Patzar.aspx.

[25] *See* Finkelstein, *supra* note 4, at 164.

[26] Guiora Phone Call, *supra* note 11.

[27] *Id.*

g. The IDF Military Police comprise an independent unit not subordinate to military commands. They carry out criminal investigations and transfer evidence to the MAGs who then evaluate the evidence gathered and decide whether to submit an indictment.[28]

h. Victims of sexual assault or harassment can choose to report either within the unit or outside the unit.[29] If a victim reports within the unit, commanders must inform the MAG of the complainant's allegations.[30] The decision "whether to adjudicate sex offenses in disciplinary proceedings can only be made by the military advocate [MAG] and not by commanders [and] . . . complainants are also entitled to file a civil complaint against their alleged perpetrators."[31] "Lighter" sex offenses can be adjudicated in disciplinary proceedings by adjudication officers (AOs) who have "either a legal education or special training in handling sexual harassment cases at the IDF School of Military Justice."[32] The MAG selects the AOs from a comprehensive database for each proceeding.[33]

3. **Analysis of Increases in Reports of Sexual Harassment in Israel.**

a. There is not necessarily any reason to believe there is less sexual abuse in the Israeli Defense Force (IDF) than in the Department of Defense. "A 2003 study by the [IDF] itself found that 80 percent of women conscripts were exposed to sexual harassment in the course of their service."[34] In a different study, the "Advisor to the Chief of Staff on Women's Affairs for the IDF . . . found that one in seven female soldiers had been the victims of sexual harassment."[35] Without knowing the details of the surveys' methodologies, such as manner of questioning, content of questions, sample size, etc., it is impossible to assess the reliability of these extrapolations.

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[28] *Indictment Process,* IDFT MAG Corps, http://www.law.idf.il/647-2350-en/Patzar.aspx.

[29] IDF Spokesman, telephone call with Julie Dickerson, 8 July 2013.

[30] Guiora Phone Call, *supra* note 11. Complaints of sexual harassment and non-violent sex crimes are also sent to the military police and MAG officers. *Id.*

[31] 2013 Congress Report, *supra* note 19, at 50.

[32] *Id.* at 43.

[33] *Id.*

[34] Rela Mazali, *Israel's arms around sexualized, racialized clients,* Jewish Peace News Blog (Mar. 15, 2009), http://jewishpeacenews.blogspot.com/2009_03_01_archive.html (linking to a report in the Hebrew language).

[35] Yael Slater, *Enhancing Equality between men and women in the Euromed Region Situation Analysis 2009 Israel,* ADVA Center 28 (citing 5th Periodic Report *Concerning The Implementation of The International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, Ministry of Justice and Ministry of Foreign Affairs, State of Israel, 2009), http://www.adva.org/uploaded/EuroMed%20Report_Final%2004-11-09%20WEBSITE.pdf.

b. The IDF Women's Affairs Office reported that in 2007-2009 four categories of complaints were received in that office: 56% were physical harassment; 28% were verbal harassment; 13% were peeping; and 3% or 15 were rape.[36] In 2012, 3% of that year's 500 reports were, "instances of rape, attempted rape, or sodomy, and half of the cases were of a physical nature. This is a small decrease from 2011."[37] Reports of verbal abuse, peeping, and physical harassment, investigations of physical harassment (but not non-touching harassment), and indictments are depicted in the following table.[38]

Military Sex Offense Reports and Indictments in Israel							
	2007	2008	2009	2010	2011	2012	Average
Reports	318	363	445	483	583	500	442
Investigations	94	103	131	143	144		123
% of Reports Investigated	30%	28%	27%	29%	25%		28%
Indictments		28	26	20	14	27	23
% of Reports Resulting in Indictments		8%	6%	4%	2%	5%	5%
% of Investigations Resulting in Indictments		27%	20%	14%	10%		19%

c. At the Senate Armed Services Committee hearing, a senator accurately explained that Israel, the UK, Australia and Germany have taken the serious crimes out

[36] Dana Wiler Polak, *Few sexually harassed female IDF soldiers report abuse*, Haaretz (June 9, 2010, 1:43 AM) (received reports in 2007-2009), http://www.haaretz.com/print-edition/news/few-sexually-harassed-female-idf-soldiers-report-abuse-1.294998.

[37] Yoav Zitun, *IDF launches provocative campaign against sexual harassment*, ynetnews.com (Feb. 10, 2013), http://www.ynetnews.com/articles/0,7340,L-4343278,00.html.

[38] Polak, *supra* note 36; Noam Barkan, *supra* note 3 (providing the number of reports in 2011 and the number of investigations in 2007 and 2011); Gili Cohen, *Indictments for Sex Crimes in IDF Doubled in 2012*, Haaretz (June 15, 2013, 5:43 AM), http://www.haaretz.com/news/national/indictments-for-sex-crimes-in-idf-doubled-in-2012-1.529845 (listing indictments from 2008-2012). The number of sexual harassment complaints is of similar magnitude to the 390 reports in 1998, 436 in 1999, 373 in 2000, 372 in 2001, 217 in 2002, and 386 in 2003. United Nations Convention on the Elimination of All Forms of Discrimination against Women, June 2, 2005, *Fourth periodic report of States parties—Israel*, 48, U.N. Doc. CEDAW/C/ISR/4, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/373/19/PDF/N0537319.pdf?OpenElement; United Nations Convention on the Elimination of All Forms of Discrimination against Women, Mar. 24, 2010, *Fifth periodic report of States parties Israel*, 76-77, U.N. Doc. CEDAW/C/ISR/5, http://www.iwraw-ap.org/resources/pdf/48_official_documents/Israel5.pdf (providing the following sexual harassment reports for 2004 to 2007 as follows: 358 in 2004; 346 in 2005; 345 in 2006; and 318 in 2007, and sexual harassment rates from surveys showing a rise in rates from 14% in 2002 to 21% in 2006); 2013 Congress Report, *supra* note 19, at 53 (citing Noam Barkan, *Rise in Reporting of Sexual Harassment in IDF*, Yediot Acharonot, Aug. 5, 2012, at 8 (in Hebrew), http://www.meida.org.il/wpcontent/uploads/ 2012/09/sexual-harassment-IDF.pdf).

of the chain of command. However, the rationale for that change was inaccurately described as follows:

> [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. So my point to you is[,] this has been done before by our allies to great effect, and in fact, in Israel, in the last 5 years because they have prosecuted high-level cases, you know what has increased by 80 percent? Reporting.[39]

First, in the United Kingdom the transfer of authority from the convening authority to military lawyers was designed to protect the rights of the accused and ensure the structural independence of courts-martial.[40] The transfer was not made to enhance justice for victims, increase prosecutions of sex crimes, or done because convening authorities did not understand which crimes were serious offenses or practiced gender-based prejudice.[41] Second, Israel's recent increase in reports of physical harassment, verbal harassment, and peeping, was not due to reducing the authority of commanders or convening authorities. In Israel, the fundamentals of the current system establishing the authority of the MAG were created by the Military Justice Law (MJL), which came into force on January 1, 1956.[42]

The prosecution of some high profile, non-military sex crimes may have caused more victims to come forward and report offenses; however, the numbers of reported sex offenses has varied previously.[43] The year 2011 was the five-year-high for reporting sexual harassment with 583 reports, and that same year was the five-year-low for military sex offense indictments with only 14 military indictments. More importantly, the reported serious sex crimes that have the highest priority for deterrence and punishment have not increased over those same five years, as in 2008, there were 28 indictments of sex

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[39] Senate Armed Services Committee Oversight Hearing, *supra* note 2, at 49.

[40] *Morris v. the United Kingdom*, (2002) 34 EHRR 1253, [2002] ECHR 38784/97 at ¶ 60 (citing *Findlay v. the United Kingdom* (judgment of Feb. 25, 1997, *Reports of Judgments and Decisions* 1997-I), http://www.bailii.org/eu/cases/ECHR/2002/162.html. *See also Grieves v. the United Kingdom,* (2003) 39 EHRR 52, [2003] ECHR 57067/00; Michael D. Conway, *Thirty-Ninth Kenneth J. Hodson Lecture in Criminal Law*, 213 Mil. L. Rev. 212, 224 (Fall 2012), https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW.NSF/20a66345129fe3d885256e5b00571830/256fb1f93504c34785257b0c006b99d4/$FILE/By%20Major%20General%20Michael%20D.%20Conway.pdf.

[41] *Id.*

[42] *See* Finkelstein, *supra* note 4, at 138.

[43] *Id*.

crimes, and in 2012, there were 27 indictments of sex crimes. For 2011 and 2012, there were 15 reports of the most serious sex offenses of rape, attempted rape, or sodomy.

The IDF Manpower Directorate review, however, indicates that the rise in complaints could be a result of: (1) a rise in sexual harassment and assault incidents, (2) a rise in awareness about sexual harassment and assault after an IDF campaign focusing on the issue, or (3) IDF instructions to commanders and soldiers to immediately report sexual harassment and assault.[44] Amos Guiora, a University of Utah law professor and former IDF MAG, attributes some of the increased reporting to "recent high profile prosecutions" along with the balance of judicial power that Israel established between MAGs and commanders.[45]

4. **Analysis of U.S. and Israeli Prosecution of Serious Sex Offenses.**

a. In FY 2012, the active duty strength of the U.S. Department of Defense (DoD) was 1,388,028 or 7.86 times as large as the Israeli active duty forces.[46] In FY 2012, 302 DoD military personnel were tried by courts-martial for sexual assault offenses, and 238

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[44] Barkan, *supra* note 3. *See also* Alex Seitz-wald, *Answer to military's sexual assault problem may be oversees*, Salon (June 5, 2013, 2:31 PM), http://www.salon.com/2013/06/05/answer_to_militarys_sexual_assault_problem_may_be_overseas/ (noting the IDF has increased its attention on sexual assault).

[45] *Id. See also* Emily L. Hauser, *Opening Up About Sexual Assault in Israel*, The Daily Beast (June 29, 2013), http://www.thedailybeast.com/articles/2013/06/20/opening-up-about-sexual-assault-in-israel.html (noting that indictments for sex crimes in Israel's military doubled in 2012, potentially in relation to several high profile cases that brought attention to the issue); Emily L. Hauser, *Opening up About Sexual Assault in Israel,* The Daily Beast (June 20, 2013) (indicating a rise in reports of sex crimes in Israel attributed to high-profile civilian defendants and stating "Former President Moshe Katsav is currently serving a seven-year prison term for raping, sexually abusing and harassing three women; ex-Justice Minister Haim Ramon was convicted of sexual harassment; influential media figure Emmanuel Rosen was recently accused by 10 female colleagues of obsessive harassment and date rape"), http://www.thedailybeast.com/articles/2013/06/20/opening-up-about-sexual-assault-in-israel.html; Cohen, *supra* note 38 (describing a high profile military case publicized in September 2012 as follows, "[A]t the Israel Air Force's preparatory school ('Hatechni') in Be'er Sheva. . . . [t]hree instructors at the school were arrested on charges of rape, consensual but prohibited sexual relations with a minor and sexual abuse. The victims were all female cadets at the school. . . . In the end, two instructors were indicted on charges of having committed sexual offenses against female cadets during the time they served as instructors at the school. In a plea bargain, one of the instructors was sentenced to ten months in prison and the other was sentenced to six months of community service in a military context."). However, the case cited in Cohen's article was publicized too recently to cause the spike in reports of sexual harassment.

[46] On September 30, 2012, the total population on active duty was 1,388,028. DoD Personnel and Procurement Statistics, *Military Personnel Statistics*, http://siadapp.dmdc.osd.mil/personnel/MILITARY/miltop.htm (click "Total DoD - December 31, 2012 (DMDC data)).

(79%) were convicted.[47] Without data reflecting how many indictments in 2011 or 2012 led to Israeli convictions, it is difficult to make an accurate comparison. However, even if all of the Israeli indictments in 2012 were convictions, the rate per thousand of DoD personnel convicted by courts-martial for sexual assault offenses was .17 (238/1,388,000) compared to the .15 (27/176,500), who were indicted in Israel in 2012.

b. The Israeli active duty population is 176,500 or 4 times as large as the active duty population of Fort Hood. Yet Fort Hood completed about the same number of military sex offense prosecutions as the entire Israeli Defense Force (Fort Hood tried 26 sex offense courts-martial in FY 2012; Israel averaged 23 indictments from 2008 to 2012 with 27 indictments in FY 2012—statistics on completed trials in Israel are not available). If the goal is to prosecute more sex offenses, the Israeli system seems not to be the model for DoD to emulate.

[47] Department of Defense, *1 Annual Sexual Assault Report* 73 (2012), http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.