

Uniform Code of Military Justice: Time for Change

by

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The Uniform Code of Military Justice (UCMJ) needs to be changed and modified in several areas. The sexual assault crisis has caused Congress to review the court-martial process and as a result several pieces of legislation have been proposed. The legislation is focused primary on sexual assault cases. This paper proposes sweeping changes that do not rely on the type of offense to be prosecuted. All victims should be treated equally and fairly regardless of the nature of the offense. The time has come to eliminate commanders and the convening authority from the court-martial process. The decision to send an accused to a court-martial should rest with the Staff Judge Advocate. The Staff Judge Advocate has the legal skills, training, and experience to determine what cases should result in trial by courts-martial. The guilty plea process should be completely overhauled. The Staff Judge Advocate and the accused with his defense counsel can negotiate a fair and just sentence. The military judge should have no role in the sentencing process. These changes and the others will restore faith in the military justice system. Most importantly commanders will not lose their ability to instill good order and discipline.

Uniform Code of Military Justice: Time for Change

Now is the time for a major overhaul of the Uniform Code of Military Justice (UCMJ), not just minor tinkering based on sexual assault cases. This paper will outline changes that will make the system more streamlined, ensure continued fairness to the accused, and place the military justice system more in line with civilian criminal practice while maintaining its military character. My proposed changes and modifications will protect the rights all victims and ensure due process for the accused.

The UCMJ has come under fire recently as a result of the explosion of military sexual assault cases and the resulting publicity generated from those cases. The documentary *The Invisible War* and cases such as *United States versus Wilkerson* and *U.S. versus Herrera* have caused Congress to take a hard look at removing commanders from the decision making process and removing the ability of convening authorities to set aside convictions in accordance with UCMJ Article 60.¹

Throughout the history there have been changes to the military justice system. These changes were the result of some major event that caused Congress, the military, legal scholars and U.S. citizens to closely examine the military justice system and make needed changes. Congress, the media, and victims of sexual assault are questioning the fairness of the system and questioning why commanders have such an influential role. Now is the time to make much needed changes in the UCMJ.

Military Justice History

On June 30, 1775, the Continental Congress agreed to the *Articles of War*.² The original *Articles of War* contained 69 articles. The *Articles of War* agreed to were the same as the British articles as they stood in 1765. Article 1, section 8 of the U.S. Constitution authorized Congress to make rules for the government and regulation of

the land and naval forces.³ This is the authority Congress uses to pass legislation regulating the United States military justice system.

The *Articles of War* did not change much until after World War (WW) II. After WWI, the acting Judge Advocate General of the Army, Brigadier General S.T. Ansell, led the call for military justice reform. General Ansell was reviewing court-martial cases when he discovered that there were serious inequities. The Houston Mutiny cases were especially problematic for General Ansell.

In the summer of 1917, black soldiers were assigned to guard facilities under construction at Fort Sam Houston. The black soldiers were segregated from the white civilians and there were allegations that the black soldiers were being mistreated by the white civilians to include white police officers. The black soldiers tired of the mistreatment armed themselves and made their way to the white section of town. There they were met by white civilians and the police. A fight ensued and a number of people were killed to include black soldiers. Sixty-three Negro soldiers were court-martialed, 55 were convicted, and 13 were sentenced to death. The commanding general approved the convictions and ordered the death sentences executed.⁴ Thirteen black soldiers were executed one day after the trial before anyone had a chance to review the proceedings.

Sentences were extremely long for minor offenses and those sentenced to death were executed within days after the court-martial ended without any legal review. General Ansell wrote to the Secretary of War, Newton T. Baker explaining the issues he had with the court-martial process. On December 30, 1918, Senator George E. Chamberlain of Oregon made a speech in the Senate alleging inequality within the

military justice system, excessive sentences, command and control, and calling for the establishment of an appellate tribunal to formulate rules and equalize sentences.⁵

Senator Chamberlain held hearings and drafted a bill to fix the problems with the *Articles of War*. The War Department also studied the issue. The American Bar Association and many prominent lawyers lined up on both sides of the debate. General Ansell proposed a sweeping reform of military justice. In testifying before the Senate Committee on Military Affairs in February 1919, he spoke as bluntly and critically as any American military man has dared to speak about military justice:

Army officers, acting on a mistaken sense of loyalty and zeal, are accustomed to say, somewhat invidiously, that courts-martial are the fairest courts in the world. The public has never shared that view . . .

This is not a pleasant duty for me to perform. I realize, if I may be permitted to say it, that I am arraigning the institution to which I belong--not the institution, but the system and practices under it--an institution which I love and want to serve honestly and faithfully always. Yet an institution has got to be based on justice, and it has to do justice if it is going to survive, and if it is going to merit the confidence and approval of the American people. Indeed if our Army is going to be efficient, justice has to be done within it, whether in war or in peace.⁶

The Chamberlain bill had as one of its many changes a limitation on the ability of commanders to convene courts-martial. The bill required a senior officer to convene a court-martial with the hope that the higher level commander would have a judge advocate as an advisor and with a trained lawyer advising the commander some of the problems might be avoided. Chamberlain's proposal's limiting the commanders' role was rejected.⁷

The 1920 Articles can hardly be considered an important reform of military justice, and the Chamberlain bill, despite its rejection, continued to provide the principal guidelines for the reform movement.⁸ One area that was reformed was the accused's

right to counsel. Prior to passage of the bill, an accused did not have the right to a defense attorney. It seems strange to contemplate finding a soldier guilty of a defense where death is a possible sentence yet he had no right to legal representation.

World War II was the next catalyst for changing the military justice system. Over sixteen million men and women served in WW II--nearly one in eight Americans. There were over two million courts-martial. Many people from all walks of life were exposed to the military justice system and many did not like what they saw.⁹

The calls for reform were numerous so in the summer of 1948, Secretary of Defense Robert Forrester appointed a committee to draft a proposed uniform code of military justice.¹⁰ Interestingly, Harvard Law School Professor Edmund Morgan was selected as a member of the committee. Major Morgan, a member of the Army Judge Advocate General's Corps, worked for General Ansell during World War I. The committee worked in near secrecy. The final package was presented to Congress in early 1949. The House of Representatives held three weeks of hearings in the spring of 1949. These included an article by article review of the proposed code. The Senate held a more perfunctory three days of hearings a few weeks later.¹¹ Congress passed the proposal with few changes and President Truman signed it into law on May 5, 1950. The UCMJ took effect on May 31, 1951.

The new system retained many features of the old, including considerable authority for the commander, but attempted to limit the commander's authority and to balance it with a system of somewhat independent courts and expanded rights for service members.¹²

Since 1950, the UCMJ has seen minor revisions. However, the sexual assault problem is the next major catalyst for changing and modifying the UCMJ. The level of interest in the UCMJ by politicians, lawyers, civilians, the media, victims, and senior military leadership is unprecedented. The time has come to make wide-spread sweeping changes in the UCMJ. It is time for the UCMJ to reflect modern society and the advances technology has afforded in the prosecution of military justice.

Senator Kirsten Gillibrand (Democrat-NY) has led the charge for reform, and continues to push for legislation. She is the proponent for *The Military Justice Improvement Act*.¹³ The most controversial portion of her legislation is removing commanders from the process in cases involving sexual assault. Instead a Colonel or higher judge advocate would make the determination whether to take the case to trial. At the time of this paper, Senator Gillibrand has not been able to muster the 60 votes needed to pass the legislation in the Senate. The latest vote was taken on March 6, 2014, and only 55 senators voted in favor of the measure.

Senator Claire McCaskill (Democrat-MO) has offered up her own bill.¹⁴ Senator McCaskill's bill keeps the chain of command involved in the process. Her bill removes the ability of an accused to use the "Good Soldier Defense" in sexual assault cases¹⁵ The "Good Soldier Defense" allows the accused to place his good military character into evidence. The theory behind the defense is that because the accused is a good soldier he could not have committed the charged offense(s). The bill allows the victim to choose between the civilian court system and the military justice system. This would only be applicable if the offenses occurred off the installation and the victim and

perpetrator were both in the military. The *Victims Protection Act of 2014* passed the Senate vote 97-0 on March 10, 2014.¹⁶

Section 538 of the *National Defense Authorization Act* (NDAA) 2014 directed the Secretary of Defense to conduct an assessment of the current role and authorities of commanders in the administration of military justice and the investigation, prosecution, and adjudication of offenses under the UCMJ; and a recommendation by the Secretary of Defense regarding whether the role and authorities of commanders should be further modified or repealed.¹⁷ The purpose of this panel was to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses. On September 23, 2013 the Secretary of Defense established Response Systems Panel (RSP) subcommittees. One of the subcommittees was the Role of the Commander Subcommittee. On January 29, 2014 the RSP Role of the Commander Subcommittee published their findings.¹⁸ Not surprisingly, the subcommittee recommended commanders retain the authority to refer sex assault cases.

The *National Defense Authorization Act* mandated several changes to the UCMJ. The NDAA changed the name of the Article 32 from Pre-trial Investigation to Preliminary Hearing.¹⁹ The change requires judge advocates perform the duties of the Article 32 preliminary Hearing Officer.²⁰ Prior to this change, the duties of the Article 32 investigating officer were performed predominately by commissioned officers who were not judge advocates. Another change to the Article 32 procedure is victims of sexual assault offenses are no longer required to testify at the Article 32 hearing.²¹ This is a

significant change because it prevents defense lawyers from cross examining the sex assault victim at the Article 32 hearing.

Article 60 was also modified to prevent the convening authority from adjusting the findings of guilt for felony offenses where the sentence is six months or longer or includes a punitive discharge (dishonorable discharge or bad conduct discharge).²² The modification also prevents the convening authority from changing the findings of any sex crime. The changes to Article 60 are directly related to Lieutenant General Franklin's decision to set aside the finding of guilty and the one year prison sentence in the case of *U.S v. Wilkerson*.

Article 120 and 125 were modified to require a mandatory minimum sentence of a dishonorable discharge for enlisted soldiers and a dismissal for officers. The change mandates that all sexual assault and forcible sodomy cases have to be tried at general courts-martial.²³ The change also eliminated the offense of consensual sodomy.

Removal of Article 60 from the UCMJ

In *United States v. Wilkerson*, the convening authority, Lieutenant General Craig Franklin set aside the findings and sentence. Lieutenant General Franklin was exercising the authority he was granted as a convening authority in accordance with UCMJ Article 60. Article 60 permits a convening authority to set aside a finding of guilt, dismiss charges, change the offense to a lesser included offense, or reduce the sentence. Lieutenant Colonel Wilkerson was found guilty of sexually assaulting a female who was sleeping in a spare bedroom in the Wilkerson's on post house. The panel sentenced him to a dismissal and a year confinement.

Lieutenant General Franklin did not violate any provision of the UCMJ when he took the action that he did. Article 60 does not require or set a standard for taking the

actions that he did. Article 60 is purely subjective and it illustrates the power a convening authority has over courts-martial. However, this case was a sexual assault case and since sexual assault cases in the military have been viewed by some outsiders as failing to adequately protect victims this case hit the front page. The NDAA FY 2014 changed Article 60 as previously discussed. However, Congress did not go far enough. Article 60 should be deleted from the UCMJ. Article 60 confers too much power in the convening authority after the trial has concluded. It was clear from reading Lieutenant General Franklin's reasons for setting aside the findings and sentence that he did not understand the courts-martial process.²⁴ He completely disregarded the importance of sitting through a trial, listening to all of the witnesses and judging their credibility.

During the sentencing phase of the contested case the accused has the opportunity to present evidence that could mitigate the possible sentence. Family members, friends, and fellow service members may testify on the accused's behalf. The awards and decorations earned by the accused can be admitted for sentencing purposes. The accused has the opportunity to take the stand and tell the panel or judge why he or she should receive a particular sentence or not be punished at all. Finally, the lawyer for the accused has the opportunity to address the panel or judge and argue for a particular sentence. The panel or judge has the responsibility to ensure justice is done for the victim, the military, and the accused. The convening authority has no need to be involved in today's court-martial sentencing process of which clemency is a part.

The courts-martial process should be left in the hands of the Staff Judge Advocate (SJA), trial counsel, defense counsel, and military judge. If defense counsel

believes that the government has not proven the case beyond a reasonable doubt he or she can make a Rule for Court-martial 917 motion for a finding of not guilty. The military judge can raise this motion *sua sponte* or defense counsel can raise the motion when they believe the evidence is insufficient to sustain a conviction. Even the panel has the ability to reconsider their findings before they are announced in accordance with Rule for Courts-martial 924. Finally, if the accused is sentenced to a dishonorable or bad conduct discharge or a sentence of confinement for more than a year his case is automatically appealed. Defense appellate lawyers will review the verbatim record of trial and look for any issue that might allow for a retrial.

Clemency has outlived its usefulness. Military members have sufficient protections in place to ensure justice has been fair.

Guilty Plea Process – The Dreaded Providence Inquiry

The guilty plea process needs a major overhaul. It is solely the accused's decision to plead guilty. The government cannot force an accused to plead guilty. The accused can be represented by a military defense attorney, civilian defense attorney (at his own expense) or both. Trial Defense attorneys have the same qualifications as trial counsels. They have an experienced senior defense counsel to assist them and a regional defense counsel who is similar in experience to the SJA.

The current process is time consuming and offers no additional safeguards to the accused. The defense counsel and the trial counsel are currently permitted to negotiate a sentence if the accused desires to plead guilty. That would not change under this proposal. Once the SJA has agreed with the terms of the sentence he, the accused, and defense counsel would sign the sentencing agreement and the case would be set for the guilty plea hearing. The accused could change his mind up to the time the judge

accepts his or her plea. The convening authority would play no role in the guilty plea process. The accused could plead guilty in two ways. He could admit he is guilty of the offenses listed on the charge sheet or he could enter an Alford plea.²⁵ An Alford plea does not force the accused to admit his guilt. All that is required he or she acknowledge it is his or her best interest to accept the government's deal. Under current military law an accused is not permitted to enter into an Alford plea. However, Alford pleas are allowed in Federal courts.

Under the current system the military judge is required to explain every element of every offense. The accused must agree that he is guilty of every element that makes up the offense. The military judge also defines the words in the elements. For example in a rape case the judge would define what a vagina is. The military judge would define vulva. The military judge would define penetration as it relates to rape. The military judge would define penis. The accused has to acknowledge that he understands the definitions. This process is known as the providence inquiry. Under my proposal the military judge simply accepts the plea and ensures the accused signed it willingly.

There would be no sentencing phase in the modified guilty plea process. The accused is sentenced according to the sentencing agreement between him and the SJA. There would be no more attempts by the defense of trying to beat the deal. A guilty plea could take less than 30 minutes not the 4 to 6 hours it currently takes.

The key changes in my proposal are:

- the convening authority is not involved in the process;
- the sentence is that agreed to by the accused and SJA;
- there is no appeal;

- there is no need for clemency matters to be submitted because the “clemency” is the deal accepted by the accused, and
- the military judge does not question the accused concerning the elements of each offense.

The proposed system works in civilian criminal practice and it would work in the military. There would be no more pleading guilty without a negotiated sentence. An accused would no longer be permitted to “plead naked” without the benefit of a deal. An accused has two choices plead guilty with a negotiated deal or plead not guilty and have the case heard by either a panel or a military judge.

Commanders often complain that the time to get a soldier through the court-martial process is too long. Changing the guilty plea process would help speed up the process without endangering the fairness of the system.

Panel Selection Process

The panel selection process needs to be changed. Currently, the convening authority selects the members who sit on the panel based on the criteria in Article 25.²⁶

The convening authority selects members based on age, education, training, experience, length of service, and judicial temperament. Panel selection is an area that involves needless legal wrangling. Too much time is spent worrying about the convening order and the minutia associated with producing a convening order.²⁷

Defense attorneys constantly want to know how the panel was selected and why certain officers were selected to the exclusion of others. Defense attorneys have called the convening authority as a witness to explain how the panel was selected. You cannot fault a defense counsel who wants to ensure the deck was not stacked against his client.

All of this can be avoided by taking the convening authority out of the process. Every officer assigned to an installation is in a personnel computer data base. Since all officers and enlisted soldiers can serve on a panel there is no need to distinguish between Branch and Military Occupational Specialty. The only requirement is that the members selected be senior in rank to the accused. A computer query can be run requesting a certain number of officers with a date of rank senior to the accused. The computer randomly generates the requisite number and those individuals comprise the panel for that court-martial. There would be no need for the current practice of having a standing panel who will hear potential numerous cases. Would you want to be the accused in the sixth sexual assault trial a panel has heard? In the case of a minority accused, the panel selection criteria could be modified to include minority members.

A computer generated panel selection system takes out any hint of impropriety. It also removes the potential of Unlawful Command Influence (UCI) influence because the convening authority does not have a dog in the fight. Also, panel members may feel freer to vote their conscience without any reservation. The accused deserves to be tried by a panel that he or she believes is not already biased against him before the case even starts. This also benefits the accused. The accused's defense counsel can stop spending his time reviewing the selection process and focus on other aspects of the defense.

Civilian juries are picked from voting records or are those who possess a driver's license. The quality of a military panel when it comes to education is unsurpassed. Every officer has at least a bachelor's degree with many having master degrees. The current enlisted population is the most highly educated in history. It is the norm rather

than the exception that an enlisted soldier has a bachelor's degree. Education, plus the fact the panel member must be senior to the accused adds the age and in most cases the experience requirement of Article 25. There is no training to learn how to be a panel member nor is there training to teach one to be a better panel member. How does the convening authority determine judicial temperament? That is a difficult question to answer and one could doubt whether judicial temperament can be ascertained by looking at an Officer Record Brief or an Enlisted Record Brief.

There needs to be a set number of panel members required for both general courts-martial and special courts-martial. Article 25(a) requires at least 12 panel members in death penalty cases. A general court-martial should have at least eight primary members and two alternate members and a special court-martial should have at least six members with two alternate members. The alternate members would hear the entire case. Currently only five members are required for general courts-martial and only three are required for special courts-martial. Having a specific requirement that increases the number of panel members makes the system fairer. Civilian juries range from a six to ten jurors depending on the jurisdiction. Federal criminal juries are comprised of 12 individuals with six alternate jurors in the event a primary juror becomes ill or is disqualified. Courts-martial are Federal Courts so there should be some consistency which brings up the next proposal.

Military Verdicts

I asked numerous classmates at the Army War College (who shall remain nameless) if they knew how many votes it took to find a soldier guilty of an offense. The overwhelming majority said the verdict had to be unanimous. Several had sat on panels and they could not give me a definite answer because it makes no logical sense. The

number depends on the number of members sitting on the panel. In order to find a service member guilty of an offense two thirds of the panel must vote guilty. However, if the possible confinement for the offenses is more than ten years, three fourths of the panel must vote guilty. I do not believe the length of the sentence should be the determining factor when it comes down to voting on the guilt or innocence of a service member.

Military verdicts need to be unanimous. There is no logical reason why a military member who has served his or her country should have less judicial rights than other Americans in a criminal case. Requiring the government to prove the case beyond reasonable doubt and convince the jury of an accused's guilt is not only fair it is just. This proposal also puts the military justice system in line with the federal court system and state courts. It would also remove the gamesmanship of panel member numbers.

If the panel cannot not reach a unanimous verdict then the case is returned to the SJA and he or she will decide whether to retry the case with a different panel. Hung juries are a part of the civilian judicial system and either the case is retried or dismissed.

Post Trial Issues

A number of post trial issues can be alleviated with the change to the guilty plea process and no longer allowing clemency. Several other post-trial issues can be modified which will streamline the process and make military justice more efficient.

Article 57, effective date of sentence needs to be deleted.²⁸ The effective date of the sentence is the date and time the sentence is announced either by a judge or a panel. The sentence should be approved as a matter of law when it is announced. There is no need for a 14 day delay. All pay and allowances stop they day the findings are announced. A soldier should receive no pay or allowances after that time.

Article 66, Review by Court of Criminal Appeals would be modified to only allow criminal appeals for cases that were not disposed of via the guilty plea procedure. The accused would understand that if he pleads guilty there is no appeal.

Article 32 Reform

If the SJA determines that the offense merits trial by general court-martial then he or she would appoint an Article 32 investigation. That means the offense committed by the accused is serious enough to warrant confinement of over one year and a punitive discharge. The judgment and experience of the SJA plays a key role. Until recently, the Article 32 investigation was normally conducted by a field grade officer and his or her branch was immaterial. As a result of the NDAA FY 14, in sexual assault cases the investigating officer must be a judge advocate.²⁹ More importantly, the victim of a sexual assault is not required to testify. However, if he or she does agree to testify defense council cannot cross examine the victim witness. This change was not logically thought out. The change in the NDAA to Article 32 sets up two separate military justice systems; one for victims of sexual assault and one for victims of other offenses. If you are going to mandate that judge advocates are required to be the Article 32 preliminary hearing officer it should be mandated that judge advocates conduct all Article 32 hearings. Is a murder case less significant than a sexual assault case? Many cases are extremely complex and should warrant a judge advocate reviewing the case. Victims regardless of the offense should not have to testify at the Article 32 preliminary hearing.

The purpose of the Article 32 hearing is to provide the investigating officer the opportunity to hear some of the evidence in the case and to make a recommendation to the convening authority whether or not the case should go forward to trial. Article 32 hearings are only required in cases that warranted prosecution at a general court-

martial. Not all evidence at the disposal of the government is placed before the investigating officer. Currently the recommendation of the Article 32 officer is not binding on the convening authority. It is possible to have a situation where the Article 32 officer recommended the case go forward and the convening authority could opt to halt the proceedings or you could have a situation where the Article 32 officer recommended not going forward with the charges and the convening authority disregards the advice and refers the case to trial. Under my proposed change to the UCMJ the commander and convening authority would be taken out of the process completely.

The Article 32 investigation process could be streamlined and still ensure fairness to the accused. My proposal does not differentiate between sexual assault cases and other type cases. I propose the Article 32 investigation be conducted like an Army Regulation 15-6 formal hearing. Two officers and a senior enlisted soldier would comprise the hearing board. The trial counsel would present the evidence. The accused and defense counsel would not be allowed at the hearing. The victim of any offense would not have to fear being cross examined by defense counsel during the hearing and therefore could testify. The trial counsel could question the victim just as he or she would at the trial. The board by majority vote would make a recommendation to the SJA. If the board recommended going forward the case would return to the SJA and a trial date would be scheduled. There would be no need for the required Article 34, advice of the Staff Judge Advocate to the convening authority since the convening authority would no longer refer cases to courts-martial. Article 34 could be deleted from the UCMJ.³⁰

If the board decided there was not enough evidence the case would be dismissed. Documentary evidence submitted to the board would be provided to the defense. The military justice system operates under open discovery rules. This means that all evidence must be provided to the defense, especially evidence that might tend to prove the accused did not commit the offense.

The Article 32 investigation was not intended to be a mini trial. Defense counsels, both civilian and military use, the Article 32 as a practice trial. The intended purpose was to ensure an impartial third party (hearing officer) heard the evidence that the government had in its possession and to ensure the charges were supported by the evidence. Defense delay of the Article 32 hearing is common especially if a civilian defense counsel has been retained by the accused. Removing the defense counsel from the procedure will speed up the process and does not harm the accused. The defense counsel is free to interview all of the witnesses the government intends to call at the general court-martial. A competent defense counsel would ensure prior to trial that all witnesses had been interviewed so the defense of the accused is not compromised by the defense counsel not being present during the Article 32 hearing.

The proposed Article 32 change brings the military justice system in line with the civilian grand jury model while ensuring an impartial body has reviewed the evidence thus ensuring the rights of the accused are protected.

Removing Commanders and Convening Authorities from the Courts-martial Process

Senator Gillibrand's bill removes commanders from the decision making process in sexual assault cases. Commanders could not fairly decide whether a sex assault case should go forward through the court-martial process because of what was perceived as the inherent bias of the commander. If a commander is perceived to be

biased in sexual assault cases why would he or she not be biased in other type cases?
Is a commander less biased in an aggravated assault case where the female victim is severely beaten than the case of a male trainee grabbing the breast or buttocks of a female trainee as she walks down the barracks hallway?

The main argument for keeping the commander in the process is that he or she is responsible for the good order and discipline of his or her unit and by taking the commander out of the UCMJ decision making process his or her ability to command is diminished or compromised. This argument is without merit. The commander is rarely involved in the court-martial process. UCMJ Article 30, allows anyone subject to the code to prefer charge(s) if they have knowledge of the offenses. Knowledge can be obtained by reading investigative reports or reading sworn statements rendered by the victim or witnesses. There is no requirement that the commander sign the charge sheet and most often he or she does not. The charge sheet is normally signed by the trial counsel (prosecutor) assigned to that jurisdiction.

Under the current system the commander reviews the investigation file and with advice from his trial counsel determines whether charges should be signed and at what level of court-martial. A O6 level commander is authorized to convene a Special Court-martial. However, the service member cannot receive a bad conduct discharge.³¹ The convening authority is the only officer that can refer a case to a General Court-martial or a Special Court-martial empowered to adjudge a bad conduct discharge.³² The commander's role is limited to convening a Special Court-martial with no possibility of a discharge, recommending that the convening authority refer the case to a higher level court and appointing the Article 32 Preliminary Hearing officer. The area that has

caused concern is when the commander does not recommend refer a case to a court-martial.

Removing the commander from the courts-martial process does not hinder his or her ability to instill good order and discipline in his or her formations. The ability of the commander to be involved in the court-martial process and good order and discipline are not mutually exclusive. Commanders can still instill good order and discipline in their units. Good order and discipline is a component of command leadership. The ability of the commander to hold soldiers to a standard, hold soldiers accountable for their actions, and uphold the law is not diminished by removing commanders from the court-martial process.

Secretary of Defense Leon Panetta withheld initial disposition of certain sexual assault cases to the Colonel (O6) level command.³³ A company commander loses the ability to ensure there is good order and discipline in his company for sexual assault cases. A higher level commander always has the authority to withhold a lower level commander's ability to adjudicate offenses if he sees fit to do so. The idea that a commander somehow has the ability to instill good order and discipline in his or her unit by utilizing the UCMJ is no longer viable. The case is titled on the charge sheet The United States of America versus the Accused. It is not the Commander versus the Accused.

Under my proposal the UCMJ process would be overseen by the SJA for all cases. The SJA would assume the role of the convening authority and commanders would no longer have a role in deciding which cases get prosecuted.

The SJA is the senior lawyer on the installation. He or she has a law degree and has passed a state bar exam. The SJA is normally a Colonel with over 18 years of experience. SJAs have a wide variety of legal experiences and most if not all have been involved in the military justice system as either a trial counsel or defense counsel.

Under my proposal the SJA would assume the role of the commander and the convening authority. The SJA would run the process from investigation to post-trial. The SJA in conjunction with the Chief of the Criminal Law section would review the evidence and determine at what level the case belongs (General Courts-Martial, Special Courts-martial or Summary Courts-martial). If the offense was minor but the evidence was sufficient to court-martial the accused, the offense could be returned to the commander for non judicial punishment in accordance with Article 15. This process would not be detrimental to the readiness of the unit involved.

The SJA is a Special Staff Officer who by virtue of a law degree has acquired specialized knowledge and a skill set not possessed by the commander. The law is ever changing and is nuanced making commanders ill-suited for making legal decisions. All Army Judge Advocates are required to have a *Juris* Doctorate (law degree) degree from an American Bar Association accredited law school and have been admitted to the bar of the highest court in the state.³⁴ Once accepted into the Army Judge Advocate program, a First Lieutenant attends the basic course and then is assigned to an Office of the Staff Judge Advocate at an installation. Once a judge advocate has completed the basic course the Judge Advocate General certifies that he or she is possess the knowledge and skills required to practice law in the Army.³⁵ Trial Counsels attend

additional advocacy courses and are supervised by an experienced senior judge advocate. Other service judge advocates have the same requirements.

My proposed model is very similar to the model used in most cities in the U.S. The district attorney reviews police investigations and determines based on the evidence and the law whether a criminal offense has been committed and whether there is sufficient evidence to prove the criminal act was committed. An assistant district attorney files the charges and prosecutes the case. The only difference would be in a situation where the military offense was minor and the case could be returned to the commander for non judicial punishment in accordance with Article 15. In the event a service member elected trial by court-martial and turned down the Article 15, the SJA would have already have reviewed the case and decided there was sufficient evidence to prove the individual guilty beyond a reasonable doubt. The case would be scheduled for trial.

One needs to look no further than the fiasco that *United States v. Brigadier General Jeffrey Sinclair* has become to see the drastic need to eliminate commanders and convening authorities from the court-martial process. Brigadier General Sinclair was charged with numerous violations of the UCMJ but the most severe charge he is facing is that he forced the female officer to perform oral sex on him in violation of UCMJ Article 125. The defense argued that Sinclair cannot get a fair trial before a panel of five fellow generals because the Army and the Obama administration have demonized anyone accused of sexual offenses. Scheff cited comments made by President Obama that anyone “engaging in this stuff” should be fired, stripped of rank and court-martialed.³⁶ In another defense motion, defense requested that the military judge

dismiss the forcible sodomy charge alleging that top brass at the pentagon unlawfully interfered with the prosecution.³⁷ The military judge denied the motion. On March 4, 2014, the defense submitted a motion citing Undue Command Influence (UCI) after they received emails from the government defense had requested. The emails between lawyers involved in the case and general officers concerned the original offer to plead guilty which was rejected by the convening authority. The military judge ruled in favor of the defense and suggested the government and the defense work out a new offer to plead guilty.³⁸ UCI issues would be avoided if commanders and convening authorities were not in the court-martial process.

UCI is defined in Article 37(a), UCMJ.³⁹ Article 37(a) prevents convening authorities and other officers from interfering with the judicial proceedings. No person subject to this chapter may attempt to coerce or, by unauthorized means, influence the action of a court-martial or any other military tribunal.⁴⁰ In *United States v. Thomas*, the Court of Military Appeals considered Unlawful Command Influence to be the mortal enemy of military justice.⁴¹ Military judges take an allegation of UCI seriously. A Navy Judge ruled in June of 2013, that two defendants in sexual assault cases cannot be punitively discharged, if found guilty because of “undue command influence” derived from comments made by President Barack Obama.⁴² Taking the convening authority and commanders out of the court-martial process would go a long way in eliminating UCI. It would not have eliminated the UCI raised in the navy case but no one could have predicted that President Obama in his role as Commander in Chief would have made comments of a nature to cause military judges to have to make rulings concerning his UCI.

Conclusion

The military justice system is an evolving system. The time is right for Congress to make my proposed changes. The current military justice system was designed for a different time. It has evolved from strictly military offenses to jurisdiction over every possible offense. It only makes sense to have a complicated system such as is the military justice system run and overseen by the subject matter experts; lawyers. Commanders have a role in the system but they should not be the ones overseeing and running the system.

The military lawyers who participate in the court-martial process are college graduates, law school graduates, have passed a state bar exam, and have been certified by the services Judge Advocate Generals as certified to practice in the military. Staff Judge Advocates have years of military justice experience. Both the government and defense have specialized organizations that conduct training and education on the latest information in the legal world. With all of this training and experience why would you not want the experts running and overseeing the system? A commander would not think of entering the operating room so why do we think a commander should enter the court room?

From the history of the military justice system you have read how changes we take for granted now (accused represented by a defense counsel, military judges, appellate review) were fought by commanders who wanted to retain their power. It took major incidents to cause change and even then change was fought every step of the way.

The military justice system has a very important role in both the military and society. In the military it provides fair justice for those service members that have

violated the UCMJ. Service members understand that their criminal misconduct has very real ramifications and that the military has rules which they are required to follow. But service members should also expect that if they are victimized by another service member they will be treated fairly. Society also has an interest in military justice. The military draws the men and women who wear the uniforms of the various services from society. Fathers and mothers expect that if their child enters the military that they will be treated fairly. The argument that is now raging across America from both service members and family members is that the military justice system is not fair. It will only take the proposed changes to be put in place to restore both the service members and families faith in the military justice system.

Organizational change is very difficult. The military culture is difficult to change. That culture has fostered the idea that this notion of good order and discipline actually means something when in reality it is a concept without meaning. The proposed changes still allow commanders to set and enforce standards within their formations. But once a service member commits a criminal offense that warrants the court-martial process the commander is no longer involved.

Commanders are very busy individuals. By taking the court-martial process out of their control they are freed to train and lead their formations which one could argue is their most important role.

Our senior military leadership needs to really reflect on why they are fighting change so hard. Senior military leaders thought for sure the military would face untold problems if Don't Ask Don't Tell was repealed. In fact, the repeal has not caused any

problems. The military is currently studying placing females in combat roles and have even opened up previously closed military occupational specialties.

The most important things our senior military leadership needs to be concerned with is having manned, trained, and equipped forces that are ready to fight. Making these proposed changes to the UCMJ does not affect manning, training, equipping or readiness. Failure to make the changes will however impact readiness and unit cohesion.

Endnotes

¹ Uniform Code of Military Justice, Article 60, 10 U.S.C. Section 860.

² Journals of the Continental Congress 1774-1779, Vol. II, 111-123, Library of Congress, Washington DC.

³ U.S. Constitution, art. 1, sec 8.

⁴ Sherman, Edward F., "The Civilianization of Military Law," *The University of Maine Law Review*, 22 (1970): 15.

⁵ Congressional Record 878 (1918), quoted in 35 *Military Law Review* (9) (1967) (DA Pam 27-100-35, January 1, 1967).

⁶ General Answell Testimony, *Hearings on S. 5320 Before the Senate Committee on Military Affairs*, 65th Cong., 3d Sess. 48-52 (1919).

⁷ 35 *Military Law Review*, (9) (1967) (DA Pam 27-100-35, January 1, 1967).

⁸ "The Civilianization of Military Law," 27.

⁹ *Military Law Review*, 165, Mil L. Rev. (pg. 6) (2000).

¹⁰ *Ibid.*, 7.

¹¹ *Ibid.*, 8.

¹² *Ibid.*, 9.

¹³ Military Justice Improvement Act of 2013, S. 1752.

¹⁴ Victims protection Act of 2014, S. 1917, 2d Session, 113th Cong, March 10, 2014.

¹⁵ Military Rules of Evidence, Rule 404(a).

¹⁶ Ed O’Keefe, Senate easily passes McCaskill’s military sexual assault bill, *The Washington Post*, March 10, 2014, <http://www.washingtonpost.com/blogs/post-politics/wp/2014/03/10>.

¹⁷ National Defense Authorization Act for Fiscal year 2014, Public Law 66, 1st session 113th Cong, July 8, 2013.

¹⁸ Barbara S. Jones, Chair, Role of the Commander Subcommittee, “Initial Assessment of Whether Commanders Should Retain Authority to Refer Cases of Sexual Assault to Courts-Martial,” Arlington, VA., January 29, 2014.

¹⁹ NDAA FY 2014, 1702(a).

²⁰ NDAA FY 2014, section 1702, (b).

²¹ NDAA FY 2014, section 1702, (d) (3).

²² NDAA FY 2014, section 1702(b).

²³ NDAA FY 2014, section 1705.

²⁴ LAG Craig Franklin, no subject, memorandum for Secretary of the Air Force Donley, A March 2013.

²⁵ *U.S. v Alford*, 400 U.S. 25 (1970). An Alford plea allows the defendant to maintain his innocence. The defendant agrees to plead guilty because he or she realizes that there is little chance for an acquittal based because of the strong evidence of guilt. Only three states and the US military don’t allow the Alford plea.

²⁶ UCMJ, Article 25, 10 U.S.C. Section 825.

²⁷ A convening order is the document that lists the names of the individuals selected to sit on a particular court case. Panels are normally selected for a period of time. The times can vary from six months to 12 months. In the military it is rare for a panel to only hear one case before it is replaced. What sounds like a very simple document is made very complicated by the military justice system.

²⁸ UCMJ, Article 57, 10 U.S.C. Section 857.

²⁹ NDAA FY 2014, section 1702.

³⁰ UCMJ, Article 34, 10 U.S.C. Section 834.

³¹ Rules for Courts-martial, Rule 201.

³² Rules for Courts-martial, Rule 601.

³³ U.S. Secretary of Defense Leon Panetta, ““Withholding Initial Disposition Authority Under Uniform Code of Military Justice in Certain Sexual Assault Cases,”” memorandum for Secretaries of the Military Departments, Washington DC, April 20, 2012.

³⁴ Army Judge Advocate Recruiting Office, <http://www.jagcnet2.army.mil/sites/jaro.nfs>.

³⁵ UCMJ Article 27(a).

³⁶ David Zucchini, Defense in Sex Crimes Case Plan to Put Army on Trial, *Los Angeles Times*, March 6, 2014.

³⁷ Drew Brooks, "Military Judge Rejects Two trials in Sinclair Case," *Fayetteville Observer*, March 26, 2013, <http://www.military.com/daily-news/2013/03/26/military-judge-rejects-two-trials-in-sinclair-case>

³⁸ "Judge Won't Dismiss Sex Charges," *Fox News*, March 10, 2014, <http://www.foxnews.com/us/2014/03/10/judge-weighs-evidence-possible-pentagon-meddling>

³⁹ UCMJ, Article 379(a), 10 U.S.C. Section 837.

⁴⁰ Article 37(a).

⁴¹ *United States v. Thomas*, 22 M.J. 388, 393(C.M.A. 1986).

⁴² Erik Slavin, "Judge: Obama Sex Assault Comments Unlawful Command Influence," *Stars and Stripes*, June 14, 2013.