Recommendations to the Military Justice Review Group on Ways to Improve the Military Justice System

COMMITTEE ON MILITARY AFFAIRS & JUSTICE

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RECOMMENDATIONS TO THE MILITARY JUSTICE REVIEW GROUP ON WAYS TO IMPROVE THE MILITARY JUSTICE SYSTEM

The military justice system must modernize in a way that prevents the problems that have spurred the current review--especially those related to the handling of sexual assault cases. To accomplish this, the role of the Convening Authority ("CA"), while integral in many respects, must be appropriately cabined to prevent the exercising of that power in ways that hinder, rather than promote, justice. If the recent deterioration of public confidence in the military justice system is any indication, the military's standards of justice--while unique and separate for good reason in many respects--must become more aligned with civilian definitions of justice. Ultimately, the military is run by civilians and subject to legislation and administrative regulations created and enforced by civilians.

When civilians' discontent with the military justice system coincides with many military members' own discontent--as it has in the area of sexual assaults--then strong pressure to prevent further injustices is not only warranted, but appropriate as a fundamental check upon the insular nature of the military and its justice system. Undoubtedly, the need for a CA to exercise his/her full complement of powers may be at its zenith during forward-deployed combat operations, but outside of that sphere, when that need is much less acute, it is the demands of justice that approach their zenith. Certainly, if the President of the United States, the Commander-in-Chief of all the armed forces, has additional latitude to exercise his military power during wartime (and thus less power during peacetime),[1] it should not be any different for the President's subordinate officers.

We note that the mission of military lawyers is the creation and maintenance of "a military justice process that is, and is perceived to be, just."[2] That perception of justice is critical to the proper functioning of any justice system. For the military, there is a twofold scrutiny, with two different lenses through which its actions are judged: first, the system needs to be perceived as just by servicemen and servicewomen subject to that system; second, it must be perceived as just through the lens of the civilian justice system. Thus, the metric by which military justice is judged is not simply whether the adjudication of justice is or is not proper. The metric is also whether or not such adjudication appears improper, both in its results and in its procedures. This standard should come as no surprise to members of the military, whose core principles always have included the tenet that all servicemen's and servicewomen's behavior be "above reproach" and "beyond the appearance of impropriety." The military has fallen short of meeting this standard with respect to its military justice system. It is time to make changes to address those shortcomings.

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[1] For a discussion of this issue, *see e.g.,* http://www.law.umn.edu/uploads/wE/aa/wEaa1g7XB6j0QyoOhoFpYw/Presidential_Powers_exchange_Paulsen_Kitrosser_Carpenter.pdf (last accessed June 26, 2014) and http://www.utexas.edu/law/wp/wp-content/uploads/centers/clbe/howell_war_time_judgements.pdf (last accessed June 26, 2014).

[2] *See* JAGINST 1150.2C, *Military Justice Litigation Career Track*, dtd Sept. 16, 2013, at http://www.jag.navy.mil/library/instructions/11150.2C.pdf (last accessed June 18, 2014).

Although media and other public commentary on sexual assault cases have focused almost entirely on the rights of the alleged victim, the rights of the accused also deserve attention. Given the high profile of sexual assault claims and the official emphasis on responding to them, some CA's might convene courts martial in response to such claims, even when the evidence does not support such charges (and would likely not result in a prosecution if the charges were unrelated to sexual assault).[3] An independent and more professionalized process for responding to allegations of sexual assault might well protect the accused from inappropriate decisions to prosecute in response to public and higher level pressure.

The 2014 National Defense Authorization Act ("NDAA") made great strides towards righting the ship of military justice. Those efforts are to be commended. Recently, we expressed our support for the proposed Military Justice Improvement Act because it removed commanders' CA power for "serious crimes that are not uniquely military in nature."[4] Instead, we support placing that power in the hands of Staff Judge Advocate ("SJA") prosecutors that are independent of the chains of command of both the alleged perpetrator and the victim. This revision would place legal decisions in the hands of experienced legal practitioners--a practice that already has been successfully implemented in the militaries of our staunchest historical allies, with no evidence of any decline in unit readiness or cohesion.[5] Such a change would also bring increased legitimacy to--and confidence in--a system criticized internally and externally on both issues. As the Commandant of the Marine Corps recently stated, sexual assault victims "don't trust the chain of command," meaning they do not trust CAs to properly investigate and adjudicate their claims.[6] This change would not only bring the United States in line with other modern military justice systems in dealing with serious crimes,[7] but would still allow CAs to retain their power over non-serious crimes, as well as serious exclusively-military offenses.

Further to that endorsement, we make additional recommendations below. Some of these recommendations include specific limits on the power of CAs--these are recommended only in the event that CA power is not categorically removed for all serious crimes that are not uniquely military in nature. Other recommendations do not involve CA power and are recommended regardless of how the issue of CA power is ultimately resolved.

Recommendation 1: All unrestricted[8] reports of sexual assault should automatically be forwarded to, and investigated by, each military branch's independent investigation service.

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[3] For examples of commanders seeking to prosecute alleged sexual offenders despite a lack of evidence, *see* Charles D. Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, at http://www.heritage.org/research/reports/2013/11/sexual-assault-in-the-military-understanding-the-problem-and-how-to-fix-it (last accessed June 18, 2014).

[4] *See* http://www2.nycbar.org/pdf/report/uploads/MilitaryJusticeImprovementSexLaw.COMAJReportFINAL 2.11.14.pdf (last accessed June 26, 2014).

[5] *Id.*

[6] *See id.*

[7] *Id.*

The investigation is arguably the most critical and important phase of the entire military justice process. The investigation is where the facts are developed, and the existence or non-existence of these facts will ultimately determine an accused's guilt or innocence. Nowhere is this principle more important than in the investigation of sexual assault crimes. From the proper collection and analysis of physical evidence, to the taking of victim statements, investigations into sexual assault require years of highly specialized training and experience. It is imperative that these investigations be conducted with true independence to the greatest extent possible, free from direct and indirect, conscious and unconscious, command influence

Currently, unit commanders have a significant amount of influence and/or discretion on how sexual assaults are investigated within the military. Commanders decide who investigates the alleged offense, decide how much time will be spent investigating, and even control many aspects of how the investigation is conducted--to include what "leads" are followed and what resources are (or are not) allocated to the investigation. Commanders appoint Investigating Officers ("IOs") to conduct the investigation, and the IO can investigate only matters that the commander decides are within the scope of the investigation. The IO reports directly--and only--to the commander, the same commander who will later write that IO's Fitness Report, rank that IO among his/her peers, and ultimately influence whether the IO is promoted or passed over.

Additionally, the vast majority of IOs do not have any specialized training or consistent experience investigating serious crimes--especially crimes as complex and sensitive as sexual assault. Many are assigned to be an IO as a secondary duty, to be completed in addition to their regular tasks. While the IO's main focus is supposed to be the investigation, practically speaking, many IOs are still required to complete their normal duties, which hampers their ability to conduct a detailed and thorough investigation. Further, the investigatory report itself is prepared for a commander--not for a prosecutor--and this critical distinction can have real effects at a later trial. In short, an IO is typically armed with the training to effectuate the completion of a report, but not to prepare the foundation for a criminal trial.

Each service branch, however, has its own specialized, highly trained, amply equipped, and vastly more experienced criminal investigation service. The Navy has the Naval Criminal Investigative Service ("NCIS"); the Air Force has the Office of Special Investigations ("AFOSI"); and the Army has its Criminal Investigation Command ("Army CID"). These agents, analogous to an FBI for each branch, were created for the purpose of investigating serious crimes, with the specific intent of preparing cases for criminal prosecution (if warranted). These agencies have a deep knowledge of the military and how it works, and are accustomed to working with commanders. They also have special training in interviewing sexual assault victims. But, while

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[8] Victims of sexual assault can report the crime along one of two different tracks: "restricted" and "unrestricted." Unrestricted reports are forwarded to the victim's chain of command for investigation, along with the details of the crime, including the victim's identity. Restricted reports, however, are confidential, and the chain of command will be notified only that "an assault has occurred and provide[d] details that will not identify the victim." Victims receive medical care, counseling and other support services under both tracks. The restricted reporting track is designed to increase reporting of sexual assaults in cases where the victim "desire[s] only medical, legal, advocate, and support services [but] no command or law enforcement involvement." *See* http://www.preventsexualassault.army.mil/policy_restricted_unrestricted_reporting.cfm (last accessed June 26, 2014).

commanders have voiced that they use these investigatory agencies for *some* sexual assault cases, they are not used in *all* sexual assault cases.

The Department of Defense should mandate that these agencies investigate every unrestricted report of sexual assault, not only because the agencies are better equipped to handle these cases, but also because the agencies are not part of anyone's chain of command. While the agents still work with the commanders, they can, if need be, elevate concerns to their true boss--the Service Secretary--while remaining insulated from retaliation by the command. Thus, using the investigatory agencies instead of IOs will increase the actual quality and independence of investigations, while also increasing public confidence in the military's handling of sexual assault cases.

But, *increased funding needs to be given to these agencies*. There were an estimated 26,000 sexual assault victims last year alone, although only about 14% reported the crime.[9] However, those reporting statistics appear to be climbing, as more and more sexual assault victims feel comfortable reporting these crimes (FY 2012 saw a 37% increase in reported sexual assaults from FY 2010). NCIS, for example, is already experiencing budgetary and staffing problems, as a result of the increased number of sexual assault investigations it conducts.[10] The Department of Defense should be petitioning Congress for increased funding based upon this increased mission--the military's sexual assault victims deserve nothing less than a completely competent, independent investigation. And an increase in these agencies' budget is a necessary step to giving them the justice they deserve.

Recommendation 2: All sexual assault investigations should automatically include investigation of potential retaliation against the accuser.

The perceived threat of retaliation was cited by 47% of military sexual assault victims as a reason why they never reported a sexual assault against them.[11] When combined with the fact that approximately 86% of the estimated 26,000 sexual assault victims never reported the assault at all,[12] that means approximately 10,500 more sexual assault victims might have reported their assault if the fear of retaliation was sufficiently removed.

The 2014 NDAA made it a crime to retaliate against sexual assault accusers,[13] which was a positive step. However, while the threat of prosecution may prevent some retaliation from occurring, there are no policies in place to discover whether this retaliation is still occurring. In order to truly combat retaliation, potentially retaliatory acts need to be rooted out early. The

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[9] Johanna Lee, *The Quest for Military Sexual Assault Reform*, Harvard Political Review, Apr. 26, 2014 at http://harvardpolitics.com/united-states/quest-military-sexual-assault-reform/ (last accessed June 18, 2014).

[10] *See* http://www.airforcetimes.com/article/20131218/NEWS/312180010/NCIS-struggling-sex-assault-caseload (last accessed June 18, 2014).

[11] *See supra*, n. 9.

[12] *Id.*

[13] *Id.*

investigator therefore should be required, as a mandatory part of the investigation, to inquire into potential retaliation against the victim. Further, even after the investigation is complete, the victim's Special Victims Counsel ("SVC")[14] should follow up with the victim twice per year, for at least one year, to give the victim another opportunity to safely report retaliation to a trusted advisor outside the victim's chain of command, who is already familiar with the victim's case. It is critical that the victim be made to feel that the service actually wants to pursue retaliation claims, and following up with the victim to ensure that he/she has reported all potentially retaliatory actions is a key part of that process. This is also an additional reason why NCIS, AFOSI, or Army CID should be investigating each and every sexual assault claim--because they are best suited to provide the command independence that is necessary for these victims to report retaliation.

Recommendation 3: The decision whether to proceed to a General Court Martial after an Article 32 hearing is a decision to prosecute at a federal criminal trial, based upon whether or not there is probable cause to prosecute.[15] The post-Article 32 determination of whether or not there is probable cause to prosecute a defendant should lie with a neutral and detached magistrate, not the CA or the SJA prosecutor.

Currently, at the completion of the Article 32 hearing, the Article 32 IO prepares a report for the CA, which details the evidence for and against the accused and determines whether or not there is probable cause to proceed to a General Court Martial ("GCM").[16] The 2014 NDAA requirement that the Article 32 IO be an SJA (wherever practicable), reflects the necessity of a trained lawyer to be involved with the process of determining whether or not probable cause exists. This requirement injects a great deal of credibility and specialized legal training into the process; however, it does not create procedural safeguards to ensure that probable cause determinations are made by neutral and detached persons. The United States Supreme Court already has determined that civilian prosecutors, like police officers, cannot make probable cause determinations.[17] Prosecutors' duties are those of law enforcement, and allowing them to decide for themselves when they have met their burden of establishing probable cause is anathema to core principles of justice. As noted above, this concern relates both to the rights of the victim to have charges taken seriously, and the rights of the accused not to be subjected to unwarranted prosecution.

In the context of Article 32 hearings, the CA sits in the role of chief prosecutor--it is the CA's responsibility and duty to prosecute those cases that merit prosecution and to decline to prosecute those that do not. Because of his/her prosecutorial role, the CA should not be the one making probable cause decisions, for the same reason that prosecutors do not make them--the risk of bias

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[14] While every service branch has incorporated the SVC program, there may be differences between the branches' programs. *See* http://www.msnbc.com/msnbc/military-sex-assault-svc-program (last accessed June 18, 2014). To the extent that any branch does not automatically assign a trained SVC to every alleged sexual assault victim, the branches should immediately incorporate this minimum standard.

[15] *See* http://www.hqmc.marines.mil/Portals/135/MJFACTSHTS%5B1%5D.html (last accessed June 18, 2014).

[16] *See* MCM, Rule 406.

[17] *See Gerstein v. Pugh*, 420 U.S. 103 (1975).

that can factor into the decision. This problem is magnified by the fact that the CA can also play the role of police chief during the initial investigation phase--coordinating and directing the investigation, with broad power to decide the who, what, when and where of the investigation.[18] Thus, when the CA steps into the role of prosecutor, the CA embodies both arms of law enforcement, and cannot be considered--in any realistic terms--to be neutral or detached. It is precisely because of this involvement that a neutral and detached magistrate, a military judge, should make the ultimate determination of whether probable cause exists after an Article 32 hearing.

The same report that is prepared by the IO, should now be forwarded to a military judge, for a neutral and detached legal determination of probable cause. If the judge determines that there is probable cause, then the case should proceed to a GCM. If the judge determines that there is not sufficient probable cause to proceed to a GCM, the CA can decide whether to adjudicate the matter using a lower level of court martial, a Non-Judicial Punishment ("NJP"), an Administrative Separation ("AdSep"), or a dismissal of the charges. The CA can also decide to conduct further investigation to develop facts that can support probable cause. If, however, the CA disagrees with the military judge's legal determination that there is no probable cause, the CA should be able to appoint a prosecutor and appeal the decision to the CAAF.[19] This still allows the CA to exercise tremendous power and autonomy in adjudicating offenses, while limiting only the CA's ability to prosecute *felony* cases without probable cause.

This approach will prevent the very real problem of CAs prosecuting cases that they know lack probable cause, simply to prevent the CA, his/her command, branch, or the military in general, from looking like they are "soft" on crime.[20] It makes sense that the accused in these situations will take the court martial to a verdict, rather than enter a plea--and the military is experiencing a dramatic rise in the number of contested courts martial.[21] Further, as one retired JAG officer notes, the acquittals that almost inevitably result from these prosecutions can embolden potential offenders.[22] This change seeks to prevent the negative effects of improper prosecutions, while still affording the CA a tremendous amount of flexibility and autonomy to craft both judicial and non-judicial punishments for accused service members.

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[18] This is another reason why the services' special investigation agencies should be investigating these crimes.

[19] This is in line with MCM Rule 908(b), where interlocutory appeals halt any further judicial action until the CAAF renders its decision on the subject motion or order.

[20] *See* Brian C. Hayes, *Strengthening Article 32 to Prevent Politically Motivated Prosecution: Moving Military Justice Back to the Cutting Edge*, 19 REGENT U. L. REV. 173, 174; *see also* Charles D. Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, at http://www.heritage.org/research/reports/2013/11/sexual-assault-in-the-military-understanding-the-problem-and-how-to-fix-it (last accessed June 18, 2014).

[21] *See e.g.*, *Marine Corps Military Justice Report Fiscal Year 2013*, at http://www.hqmc.marines.mil/Portals/135/Docs/JAI/USMC%20MilJus%20Report%20FY2013.pdf (last accessed June 18, 2014).

[22] Conversation with Robert "Butch" Bracknell, Retired USMC JAG Officer, Currently Staff Legal Advisor-International Law at Headquarters, Supreme Allied Command Transformation. His comments are his personal opinions, based upon his education and years of experience in the Marine Corps; they are not representative of the Marine Corps' or NATO's position on any subject.

Recommendation 3 (Alternate): If Recommendation 3 is not accepted, then the following recommendation is provided in the alternative: CAs who do not follow the Article 32 IO's determination of probable cause should have all such decisions subject to a standard system of review.

Currently,[23] when a CA does not follow the advice of the Article 32 IO, and either proceeds or does not proceed to a GCM (against the recommendation of the IO), he/she will have that decision reviewed by a higher authority only if the case was a sexual assault case. If the case did not involve sexual assault, the CA's decision is not reviewed, and the CA does not even have to provide a justification for that decision (much less a justification based solely on the specific facts presented at the Article 32 hearing).

The 2014 NDAA recognized the need for CAs to have accountability for these decisions. While the NDAA specifically addressed sexual assault cases, the principles that require such accountability are not limited to sexual assault cases. Besides sexual assault crimes, many other high-level crimes are equally susceptible to improper CA action. These crimes should be treated the same as sexual assault cases, with a review by the appropriate higher authority--the Secretary of the Service for felonies that were determined to have probable cause, but did not proceed to a GCM, and the next higher echelon for felonies that were found to lack probable cause, but still proceeded to a GCM.

Recommendation 4: Article 32 IOs should be required to be an SJA "unless a SJA is unavailable."

The 2014 NDAA included the following change to which types of officers could serve as Article 32 IOs: "where practicable, you will have a judge advocate conduct the Article 32 investigation."[24] The policy chief of the Army's Criminal Law Division, Col. John Kiel, Jr., has interpreted the "where practicable" language to allow the Army to substitute infantry line officers for SJAs if the Army wanted the Article 32 IO to be able to "put [him/herself] in the shoes of the accused."[25] Or, if the case involved a "complex [temporary duty] fraud," the Army "might want to have a finance officer as the IO."[26]

As discussed *supra*, the ultimate function of the Article 32 IO is to provide a determination of whether or not there is probable cause to proceed to a GCM. That determination is a legal question, and CAs should not be appointing an Article 32 IO because that IO can "put [him/herself] in the shoes of the accused." This standard injects an entirely subjective element into the determination of whether probable cause exists. Putting oneself in the shoes of the accused is more appropriate for sentencing recommendations, not probable cause determinations.

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[23] "Currently" means post-2014 NDAA (which may not be entirely phased in, but will be phased in over the coming months).

[24] David Vergun, *New Law Brings Changes to Uniform Code of Military Justice*, ARMY NEWS SERVICE, Jan. 8, 2014, located at http://www.defense.gov/news/newsarticle.aspx?id=121444 (last accessed June 18, 2014).

[25] *Id.*

[26] *Id.*

Furthermore, if the concern is giving sufficient protection to the accused at the Article 32 hearing, defendants already have heightened protections, which flow from the nature of the Article 32 hearing itself (as compared to a grand jury hearing, for example). Principally, these protections include the ability to be represented by defense counsel and cross-examine the witnesses at the hearing. In fact, the Navy, Marine Corps and Air Force already routinely used SJAs as Article 32 IOs; it was only the Army that did not, and it was the Army that lobbied for this language change, "largely because" it did not have enough SJAs.

While the 2014 NDAA's language recognizes the need for flexibility in cases where a SJA is not available, the Army's interpretation of "where practicable" frustrates the underlying purpose of the 2014 NDAA's change--that SJAs are best-suited to make determinations of probable cause, and SJAs should be used if they are available.

Thus, we urge that the "where practicable" language be interpreted so that an SJA should be used if available. We also recommend that the 2014 NDAA language be amended to read as follows: "You will have a judge advocate conduct the Article 32 investigation, unless a judge advocate is unavailable." To be clear, this proposal is not an indictment of the Army; it is simply a recognition that the language creates a loophole which makes it susceptible to being interpreted by all the service branches in a more expanded way than the rationale for the 2014 amendment justifies.

Recommendation 5: The authority to enter into a pre-trial agreement ("PTA") for sex crimes or felony offenses should be vested solely with the SJA, not with the CA.

The 2014 NDAA removed all CAs' ability to set aside the verdict from a court martial and/or change the punishment awarded in sex crime cases. Prior to the 2014 NDAA, a CA could, after a court martial found a defendant guilty of rape, completely override that finding and declare the person innocent, or merely guilty of a lesser-included offense. The CA could adjust the sentence awarded by the court as well. After cases like that of Lt. Col. James Wilkerson--who was convicted by a jury[27] of aggravated sexual assault, but was then unilaterally acquitted by a three star general because the general did not believe the victim's story--Congress amended Article 60 of the UCMJ to ensure that these types of situations do not happen again. Specifically, CAs are no longer allowed to change a court martial's finding of guilt or innocence for any sex crime, and CAs cannot adjust a finding of guilt for a felony offense if the sentence is more than six months, or results in a discharge.

Unfortunately, Article 60 still allows CAs the ability to accomplish the same result by exercising their pre-trial powers, which were left unchanged. CA's have unfettered power to enter into PTAs with defendants, setting not only what crime the defendant will be found guilty of, but also the maximum punishment the defendant can receive.[28] In other words, the CA can effectively

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[27] A jury is called a "panel" in the military.

[28] When a PTA is involved, the trial proceeds in two phases. In the first phase, guilt is adjudicated for the offense to which the defendant pleaded. In the second phase, the court imposes a sentence on the defendant, then compares it to the maximum sentence allowed under the PTA; if the PTA's maximum sentence is lower than that awarded by the court, the defendant receives the lower sentence.

bypass the 2014 NDAA changes to achieve the same result. In a post-2014 NDAA iteration of the Lt. Col. Wilkerson case, the CA would now be incentivized to enter into a PTA with the defendant, allowing him to plead guilty to a much lower offense with a much lighter sentence. While a complete acquittal is taken off the table, the ability of a CA to usurp justice with virtual impunity is not.

To rectify this problem, PTAs for sex crimes and felony crimes should be made by the SJA, not the CA. The CA can--and should--give his/her recommendation on whether or not a PTA should be offered, and what the PTA should include, but the ultimate decision of whether or not to accept a plea to a felony or sex crime should rest with the prosecutor. The CA will still retain the unilateral power to enter into PTAs for non-felony offenses and other non-sex crimes (which includes all "good order and discipline" offenses). However, the CA would lose the ability to change before trial what he/she is no longer allowed to change after trial.

Recommendation 6: The Department of Defense should mirror the federal judiciary's public filing and tracking system for court documents.

While GCMs and Special Courts Martial ("SpCMs") are federal criminal trials, the court filings generated before, during and after these federal trials are not publicly available. The non-military federal courts across the country use a single system which allows attorneys and clerks (and judges through their clerks) to electronically file, store, and remotely access all court documents. This system, called the Public Access to Court Electronic Records ("PACER") system, is also publicly accessible, giving the federal judiciary the public oversight it needs to remain accountable for its actions.

Although military courts lack this capability, they desperately need it. Civilian federal courts are "standing" courts, meaning that the courts themselves are essentially permanently-created institutions. Military courts, however, are largely[29] "convened" courts, meaning that the court is created (convened) when it is needed (the reason the military still uses a "convening authority"). It is precisely for this reason that a centralized filing system would be advantageous for the military; the lack of standing courts only exacerbates the need for a standing filing system, common across all branches and the rest of the federal government, that follows the case from cradle to grave. The flexibility that would be afforded by remote filing and remote access cannot be understated for an ever-moving military. Of course, confidential and classified information would be redacted before being entered into the system.

There are additional benefits to implementing the PACER system, namely, adding transparency into the system and reducing the added workload the military currently faces by requiring court documents to be released only upon a filing of a Freedom of Information Act ("FOIA") request. Opening the system to enhanced public review will give the public a deeper understanding of the military justice system.[30] This is a much-needed--and timely--reform, because "[t]he first

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[29] The CAAF, however, is a standing court.

[30] Summary Report, *Global Seminar on Military Justice Reform*, Yale Law School, Oct. 18-19, 2013, p. 9, located at http://responsesystemspanel.whs.mil/public/docs/Public_Comment_Unrelated/06-Dec-13/04_GlobSeminar_MJReform_2013_Report.pdf (last accessed June 18, 2014).

casualty of [the military justice system's] lack of transparency is public confidence in the military justice system."[31] It should not take a FOIA request to make available documents from a court martial absent compelling reasons specific to each case.

Practically speaking, the military is run by civilians (*e.g.*, the Commander-in-Chief, the Secretary of Defense, each Service's Secretary) for the very reason that public oversight of the military is a necessary component of our American system of government. This public/civilian oversight is also integrally linked to the First Amendment and the oversight of the free press. It is the ability of the press to report on issues, both good and bad, that inform the public and provide the level of oversight contemplated in the Constitution. The "sunlight" of the press and public is necessary to help the military justice system shed its image as insular and subject to cronyism, and to increase confidence both inside and outside the military that the problems that led to the review of the military justice system are being addressed effectively and that true reforms are being made.

Moreover, this system will make it easier for the Department of Defense, Congress, the Service Secretaries, and the military community--active, reserve and retired--to better monitor, track, and study the military justice system. This will allow them to identify and correct weak links more efficiently--hopefully reducing the current improprieties that are giving the military justice system its bad reputation. Part of that solution depends on there being documents to review, in addition to having easier access to those documents. Too often, there is no accessible record of documents for anyone to review, military or civilian. And when records are delayed or denied after a FOIA request, this causes the ironic result that it is currently harder to access certain court martial records than it is to access the records from a Guantanamo Bay commission.[32]

Recommendation 7: Remove the CA's power to select the members of the panel in a court martial, unless the CA can prove that such authority is necessary for operational concerns.

Currently, CA's have essentially unilateral ability to select which service members will sit on a panel for a particular case. The members the CA selects are subject to *voir dire*, but the prosecutor and defense have only one peremptory challenge each.[33] Thus, the CA is able to select which people will sit in judgment of the defendant. We recognize that this power has deep historical roots and still retains an element of necessity in the forward-deployed, wartime theatre, where the number of potential panel members is severely limited. Thus, we propose that CAs should have the ability to select only the *pool* of potential panel members, with the prosecutors and defense attorneys selecting the actual panel members through *voir dire* and peremptory challenges. This will allow the CA to retain significant power in peacetime, and his/her full complement of powers in wartime.

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[31] *Id.*

[32] *Id.*

[33] *See* http://jurylaw.typepad.com/deliberations/2013/09/member-jury-selection-in-general-courts-martial.html (last accessed June 18, 2014).

Outside of the wartime context, the needs of the military justice system to ensure actual and perceived fairness outweigh the CA's need to select the personnel on the panel itself. Our recommendation would still allow the CA to ensure the members of the panel meet the UCMJ's minimum requirements, while mitigating any perceived undue influence. Justification for this recommendation starts with the UCMJ itself, which only requires that panel members have sufficient "age, education, training, experience, length of service, and judicial temperament."[34] These criteria are not rigorous--and would seem to include most officers, Staff NCOs, and potentially senior NCOs in the command.[35] Further, the requirements themselves appear to follow a balancing test, since a lower-ranked person could be qualified by virtue of his/her training, experience, and/or even temperament, rather than a particularly high rank.

Allowing the CA to actively select the individual panel members, rather than disqualifying personnel who do not meet the UCMJ's requirements, increases the risk of creating a biased panel. That risk is magnified by the fact that the typical panel only requires *five* members, and does not have to be unanimous to render a verdict. Thus, every panel member the CA appoints has an inordinately large effect on the outcome of the trial.[36] This presents a serious risk of potential bias, and where operational concerns are not involved, the need to avoid the possibility of biased or influenced panel members should take priority.

That risk of potential bias is both real and significant. Retired JAG officers note that it is not uncommon to hear CAs seeking to find "hammers" to serve on the panel--service members who are more likely to find defendants guilty and/or recommend harsher punishments if the defendant is found guilty.[37] When this happens, the CA is seeking these personnel specifically because they do not have the proper "judicial temperament" required by the UCMJ. And even though the CA is not directly influencing the verdict, the CA can nonetheless indirectly influence the verdict. By choosing panel members, CAs can influence how the panel interprets the words "reasonable doubt," how likely the panel is to ignore evidentiary limiting instructions, or how likely panel members are to use their rank to influence other panel members. This creates the potential for both wrongful convictions and unnecessary acquittals.

Bias is a pervasive concern because it can be both conscious and unconscious. Unconscious bias played a major role in most of the wrongful convictions later overturned through DNA evidence.[38] But it is not just the unconscious bias of the CAs that must be mitigated: several convictions (including convictions for rape) have recently been overturned by the United States Court of Appeals for the Armed Forces ("CAAF") because of Unlawful Command Influence

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[34] UCMJ art. 25(d)(2).

[35] Assuming the defendant is enlisted and requested enlisted members on the panel.

[36] Because the verdict is not unanimous, a single "holdout" juror cannot prevent a conviction. This means that the CA only needs to appoint/influence two-thirds of the panel, rather than every member, to gain a conviction.

[37] *See supra*, n. 22.

[38] *See* http://www.innocenceproject.org/understand/# (last accessed June 18, 2014); in-depth examinations of the case profiles and exoneration trends clearly indicate that unconscious bias affects victims, police, crime labs technicians, expert witnesses, lawyers and judges alike.

("UCI") stemming from comments made by the President of the United States and the Commandant of the Marine Corps.[39] Military service members at all levels, while hoped to be completely unbiased, are arguably more susceptible to unconscious bias because of the ingrained aspects of "good order and discipline" and increased allegiance to authority.

Even military judges are susceptible to conscious and unconscious bias. Recently, a military judge stated that if a defendant has made it past the Article 32 hearing, and is now at a GCM, that defendant is guilty--and it is up to the prosecutor to confirm that guilt.[40] This is not an uncommon perspective for CAs to possess, either.[41] Thus, restricting the CA's ability to select the panel members reduces the CA's potential influence on the trial before that trial even begins. We recommend that CAs be limited to selecting members of a larger pool of potential panel members, unless that power is necessary due to operational restrictions. Practically speaking, the CA would ensure that the entire pool meets UCMJ Article 25(d)(2)'s requirements by disqualifying those personnel the CA feels do not meet its standards. The prosecutors and defense attorneys then select the panel from that pool through *voir dire* and peremptory challenges. However, because the attorneys will now be selecting the panel from a larger pool, both the prosecutor and defense counsel need to receive an increased number of peremptory challenges, as well.

Recommendation 7 (Alternative): If Recommendation 7 is not accepted, then the following recommendation is provided in the alternative: defense counsel should receive three times the number of peremptory challenges, in order to serve as a counterbalance against the selection power of the CA. If the CA selects a truly independent panel, then the challenges will not be necessary; however, if they are necessary, they should be available to discharge potentially biased panel members. This will prevent later appeals for UCI--and later re-trials if that appeal is successful.[42]

Recommendation 8: The Department of Defense should mandate the creation of a dedicated litigation career track in each branch, as well as mandate the creation of a Special Victims Prosecutor program in each branch.

It is an unfortunate fact that the level of complex trial expertise in the military is often insufficient to properly litigate complex or sensitive trials involving expert witnesses, cutting-edge scientific evidence, or financial fraud crimes.[43] Across the services, military prosecutors with only a few months' experience are being assigned complex rape prosecutions that, in the

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[39] *See* http://www.jag.navy.mil/courts/documents/archive/2014/HOWELL-201200264-UNPUB.pdf (last accessed June 18, 2014); Erik Slavin, *Judge: Obama sex assault comments 'unlawful command influence'* , STARS AND STRIPES, June 13, 2013, located at http://www.stripes.com/judge-obama-sex-assault-comments-unlawful-command-influence-1.225974 (last accessed June 18, 2014).

[40] *See* http://www.jag.navy.mil/courts/documents/archive/2014/HOWELL-201200264-UNPUB.pdf (last accessed June 18, 2014)

[41] *See supra*, n. 22.

[42] *See supra*, n. 39.

[43] *See supra*, n. 22.

civilian sector, would be tried only by senior prosecutors with years of experience litigating similar cases.[44] The military owes its service members, and especially its sexual assault victims, more than a prosecutor--it owes them an experienced and trial-hardened prosecutor (especially since defendants can hire outside counsel with decades of experience handling complex trials). It is with that fact in mind that the Navy instituted the Military Justice Litigation Career Track, which was designed to "identify and cultivate judge advocates with the requisite education, training, experience, and aptitude to litigate and [later] preside over complex cases."[45] This need is even more acute, since the number of complex, contested courts martial, especially sexual assault courts martial, is exploding.[46] The Army possesses a somewhat similar program to the Navy, while the Air Force and Coast Guard have no such programs.[47]

An additional program that all the Services should implement is the Army's Special Victim Prosecutor ("SVP") program. SVPs are "dispersed across the Army. . . [and] focus exclusively on litigation and training, with an emphasis on sexual assault and family violence," including child abuse cases.[48] SVPs are "individually selected from the Army's most experienced trial lawyers . . . to serve not only the installation at which they are located, but also their geographic area of responsibility. Special Victim Prosecutors assignments are three-year assignments . . . not subject to deployment without approval from The Assistant Judge Advocate General for Military Law and Operations."[49] Further, "SVPs undergo specialized training at military and civilian courses, and spend two weeks with a civilian District Attorney's Office observing how civilian Special Victim Prosecutor/Sexual Assault units function."[50] This program, or a Service-specific version of it, should be required in every branch.

Recommendation 9: The Department of Defense should--when especially experienced trial counsel is needed, but unavailable--encourage the use of Administrative Separations in order to allow prosecution by the local United States Attorney's Office.

Unfortunately, even if Recommendation 8 is accepted, it will take years, if not decades, for the JAG programs to distribute experienced litigators sufficiently across the world. Practically speaking, however, not every duty station can be staffed with an experienced litigator. There will be instances where a complex trial will occur, but the base will lack a JAG attorney with sufficient experience. In such cases, commanders should be encouraged to work with civilian

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[44] *Id.*

[45] *See supra*, n. 2; http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q76.pdf (last accessed June 18, 2014).

[46] *See supra*, n. 21.

[47] *See supra*, n. 45.

[48] *Id.*

[49] *Id.*

[50] *Id.*

federal prosecutors to have the military member administratively separated[51] and then prosecuted by the local US Attorney's Office--especially where the crime occurred off-base, or the victim is a civilian. This option has been used successfully in the past at recruiting commands,[52] and smaller bases, despite the fact that the crime happened on-base and between two military members.[53] To be clear, however, this method should be used only in cases where the commander would administratively separate the alleged offender even if he/she was found not guilty at the trial/court martial.

An additional benefit of administratively separating such serious offenders is that their pay and benefits will terminate upon discharge. This procedure can prevent situations like that of Major Nidal Hasan, the Fort Hood shooter, who received nearly $300,000 in pay while awaiting a military trial.[54] Commands also routinely resort to sending sexual assault suspects to other installations in an effort to separate them from their alleged victims, despite the fact that the accused will be administratively separated, even if a court martial does not result in a discharge. The costs of such orders can be inordinate upon the command, and may create another situation where it is better to discharge the offender for civilian prosecution, rather than keep him/her in the service awaiting trial and/or appeal.

Recommendation 10: When the death penalty is sought, those cases should be litigated by the Department of Justice, unless operational concerns necessitate otherwise.

Capital crimes are rare in the military, and thus the military lacks both prosecutors and defense attorneys with the requisite experience.[55] This presents persons convicted of a capital crime with a potentially successful appeal on the grounds of malpractice or ineffective assistance of counsel. Further, the costs of prosecuting and defending a capital case can easily accrue to hundreds of thousands of dollars, where learned counsel is involved.[56] This money comes out of the command's budget, and may provide an incentive to not seek top-level charges or punishments because that money cannot then be spent on training or equipment. Because of this combination of problems, these cases should be given to experienced Department of Justice prosecutors. Once the case is given to the Department of Justice, the defendant will gain access to free federal capital defense attorneys who specialize in defending federal capital cases.

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[51] If there is probable cause to refer a case to a GCM after an Article 32 hearing, there is sufficient basis to administratively separate the service member. Further, the crime will often be accompanied by inappropriate conduct that independently warrants an administrative separation.

[52] *See e.g.*, http://www.newsday.com/long-island/nassau/new-charges-added-in-marine-s-fatal-hit-and-run-case-1.1629466 (last accessed June 18, 2014).

[53] *See* http://www.washingtonpost.com/local/crime/ex-marine-scheduled-to-formally-join-death-row/2014/05/29/0b9784d6-e68b-11e3-afc6-a1dd9407abcf_story.html (last accessed June 18, 2014).

[54] *See http://www.nbcdfw.com/investigations/Accused-Fort-Hood-Shooter-Paid-278000-While-Awaiting-Trial-208230691.html* (last accessed June 18, 2014).

[55] *See supra*, n. 22.

[56] *Id.*

Recommendation 11: Defense counsel should be able to submit all defense witnesses (including expert witnesses) directly to the military judge (*ex parte*).

Currently, defense counsel has to request to subpoena his/her witnesses through the prosecutor (who forwards the request to the CA). This results in the defense telegraphing major aspects of its defense strategy in advance, and gives the prosecutor the opportunity not only to influence the witness, but also to convince the CA not to produce the witness.[57] Prosecutors, however, do not have to submit their witnesses through the defense. This problem is unique to courts martial--because even the defense counsel for the alleged terrorists undergoing military commissions at Guantanamo Bay do not have to submit their witness lists through the prosecution. Thus, the requirement that defense counsel for military members request their witnesses through the prosecution places a unique, undue and unjust burden upon the defense.

If the military judge orders the production of a witness, and the CA refuses to produce that witness, the issue should be appealed to the CAAF, and the proceeding should be stayed automatically until the decision is finalized.

Recommendation 12: The Department of Defense should allow all court martial convictions to have one appeal, with the ability to waive that appeal in a PTA.

Under present law, only certain convictions by court martial have the right to an appeal/review (*i.e.*, if a defendant is awarded a sentence that includes death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more).[58] Thus, every conviction at a SpCM (a misdemeanor federal conviction), and any non-qualifying conviction at a GCM (a felony federal conviction) are ineligible for an appeal.

As a result, there are a multitude of unreviewable cases with potentially egregious legal or factual errors. Further, these convictions are far from minor, and can result in serious collateral consequences, such as deportation, sex offender registration, or the inability to own/use a firearm (which will cause the person to become ineligible for continued military service). Thus, Article 66 of the UCMJ should be modified to allow an appeal of any court martial conviction. However, in the interests of efficiency, defendants should be allowed to waive this right as part of a PTA.

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[57] *Id.*

[58] UCMJ Art. 66(b)(1).