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Sexual Assault in the Military: Understanding the Problem and How to Fix It

by Charles D. Stimson

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Executive Summary

The military exists to defend the nation. That is its mission. To accomplish that mission, leaders must ensure that those who serve under them are combat ready, and once ordered into armed conflict, combat effective. Maintaining good order and discipline in the armed forces is essential to accomplishing the mission.

The United States military justice system is integral to the military's mission. It is unique, and for good reason. Unlike the civilian justice system, which exists solely to enforce the laws of the jurisdiction and punish wrongdoers, our military justice system exists in order to help the military to succeed in its mission: to defend the nation. It is structured so that those in charge, commanding officers, can carry out the orders of their civilian leaders. Ultimately, it is structured to fight and win wars.

Incidents of sexual assault are a real and recognized problem, both in the military and in civilian life. While studies suggest that the number of sexual assaults in the military may be less than the number in civilian society, sexual assault has a uniquely greater damaging effect on the military, such that even one incident is unacceptable. Incidents of sexual assault are detrimental to morale, destroy unit cohesion, show disrespect for the chain of command, and damage the military as a whole, both internally as well as externally. Service members are trained for situations in which it is essential to trust both enlisted members of the unit and the chain of command completely. Sexual assault in the military destroys that trust, which can detract from the readiness of America's armed forces.

However, before Congress enacts additional legislation to address the issue of sexual assault in the military, it should take stock of the facts. Over the past few years, the military services have made huge strides with regard to addressing the issue of sexual assault, including mandatory general military training for all personnel, specific training for select individuals, and many more specific programs aimed at the uniformed military lawyers responsible for prosecuting and defending sexual assault charges. The facts also demonstrate that the military has done an admirable job training and mentoring military prosecutors and defense counsel—training that is on par with the best practices in large city district attorney and public defender offices.

The military justice system is a well-developed, unique, and integrated criminal justice system, which handles thousands of criminal cases per year, ranging from minor violations to major felonies. In almost all of these cases the system works to ensure justice is done. It is not perfect, but neither is the civilian criminal justice system, which has many flaws and must be continually improved. However,

when proposing improvements to the military justice system, Congress must realize that the military is fundamentally different from the civilian world.

Commanding officers in the military have a wide range of tools available to enforce good order and discipline. These include mild administrative remedies, such as informal counseling, formal counseling, Executive Officer Inquiry, and non-judicial punishment under Article 15 of the Uniform Code of Military Justice. The ultimate remedy for any commanding officer is the power to immediately refer a suspected criminal in the chain of command to a court-martial.

Taking that power away from commanding officers eliminates an indispensable authority that cannot be delegated or transferred to another if we are to demand accountability from commanders for prosecuting and preventing sexual assaults and other serious crimes. This notion of accountability to one's commanding officer may seem mysterious to civilians who have never served in the armed forces. But chain of command, and accountability up and down the chain of command, is essential to carrying out the missions as ordered by the President, whose authority as Commander in Chief owes accountability to the people via elections and assures a military that will not threaten a constitutional democracy—whether our country is engaged in an armed conflict or not.

Under the current system, commanders have the legal responsibility and authority to refer criminal suspects to a court-martial. They do so sometimes against the advice or recommendation of a military lawyer. The reason this sometimes happens is because commanders can refer cases to court-martial when they are convinced that there is probable cause that a crime has been committed and that the accused committed the crime. Prosecutors view cases through a different legal lens: they must be able to prove the case beyond a reasonable doubt.

Some proponents of the removal of command authority have identified as "success" stories similar policies in Canada, New Zealand, Australia, and the United Kingdom and urge the United States to follow suit. But these countries' removal of prosecutions from the chain of command can hardly be touted as a success for victims. In fact, most of our allies reported that removing the authority to prosecute from the chain of command has slowed prosecutions, and they saw no increase in the number of convictions under the new system.

What removing the power to convene courts-martial from the commander would do is undermine all commanders' ability to enforce good order and discipline across the armed forces. For example, combat commanders, when lawfully engaged in armed conflict, have the authority to order their soldiers to kill the enemy. The proposal would, among other things, eliminate those commanders' authority to prosecute those soldiers that indiscriminately kill women and children or commit other violations of the Law of Armed Conflict. In the words of a retired service member, "don't take the authority away from command; let's look at the processes that can support the commanders." As Senator Claire McCaskill (D–MO) said, "the best way to protect victims and realize more aggressive and successful prosecutions is by keeping the ... chain of command in the process at the beginning of a criminal proceeding ... there's no substitute for a commander who does it right." The Senator is correct.

In the past 50 years, Congress has formalized military justice rules and procedures through statute in a thoughtful and methodical manner, with a keen appreciation for the fact that the military justice system is uniquely calibrated to support the mission of the military.

In recent months, there have been congressional hearings, legislative proposals, debates, and an ongoing dialogue about how to address the issue of sexual assault in the military. The House has passed key reforms to the existing system in its version of the National Defense Authorization Act (NDAA), and the Senate will take up a variety of reform amendments this fall when it votes on the Senate NDAA. Some of the House and Senate proposals have merit, as discussed in this paper, and are in keeping with a long history of prudent improvements to the military criminal justice system.

In addition to those substantive reforms to the current system, Congress should look at a key structural reform to the Judge Advocate General's (JAG) Corps—those military lawyers responsible for prosecuting and defending cases in courts-martial. That long-term structural improvement to the military justice system would preserve the central role of the commander in the military justice process and would create a litigation career track for JAGs in each branch of service.

This will allow those JAGs that choose such a path to fully leverage the ample training they receive.

The combined JAG Corps have done an admirable job in providing litigation training, including sexual assault training, to military prosecutors and defense counsel, even when compared to their civilian counterparts. By establishing career tracks for military prosecutors and defense counsel, JAG litigators would be better suited to providing better legal services to victims and defendants alike in the military and align themselves structurally with best practices in the civilian bar.

A career litigation track will allow victims of sexual assault to work with experienced military prosecutors who have accumulated years of experience, much like their civilian counterparts. Defendants would be represented by learned defense counsel who have handled years of misdemeanor cases, and lower-level felonies, before graduating to sexual assault cases.

The global nature of our armed forces and the complex world in which we live, where law, rules, and regulations govern much of what we do, requires that each service have qualified, fully deployable JAGs. The demand for highly trained uniformed attorneys to defend and prosecute courts-martial is constant. Today's courts-martial, especially felonies, are more complicated to prosecute and defend than in years past.

The military justice system is similar to but distinctly different from its civilian cousin, and it revolves around the concept of enforcing good order and discipline in the armed forces. Arbitrarily taking commanders out of the business of enforcing good order and discipline within their ranks is not the solution to bettering the military's criminal justice system. Rather, the prudent way to improve the military justice system is to build upon the current system, adopt those policies that enhance the delivery of services to victims and defendants alike, and develop career litigation tracks for military prosecutors and defense counsel.

Sexual Assault in the Military: Understanding the Problem and How to Fix It

Charles D. Stimson

Introduction

The Congress of the United States has played a key role in the military justice system. Military justice within our armed forces predates the formation of the country itself. Disciplinary and criminal codes from the armed services were implemented by Presidential Executive Order through the Manual for Courts-Martial (MCM).[1] In the past 50 years, Congress has formalized those rules and procedures through statute in a thoughtful and methodical manner, with a keen appreciation for the fact that the military justice system is uniquely calibrated to support the mission of the military.

For the past few years, Congress has been focused on the issue of sexual assault in the military. In recent months, there have been congressional hearings, legislative proposals, debates, and an ongoing dialogue about how to address this issue. The House has passed key reforms to the existing system in its version of the National Defense Authorization Act (NDAA), and the Senate will take up a variety of reform amendments this fall when it votes on the Senate NDAA. Some of the House and Senate proposals have merit and are in keeping with a long history of prudent improvements to the military criminal justice system.

Senator Kirsten Gillibrand (D–NY), on the other hand, proposes a radical restructuring of the current system by eliminating the power of convening authorities to refer cases to courts-martial. Her proposal is a risky scheme that will ultimately harm victims and undermine justice, good order, and discipline in the armed forces.

The debate over how to address sexual assault in the military has thus far lacked appreciation for the unique historical purposes and features of the military justice system and has failed to include an objective analysis of how this system compares to its civilian counterparts. Upon introducing these considerations, it becomes clear that making prudent improvements to the existing system will better serve all parties concerned, including victims and those accused of sexual assault.

Before making any changes, though, it is important to take stock of the facts: Over the past few years, the military services have taken significant steps to address the issue of sexual assault, including mandatory general military training (GMT) for all personnel, specific training for select individuals, and many more specific programs aimed at the uniformed military lawyers responsible for prosecuting and defending against sexual assault charges. The facts also demonstrate that the military has done an admirable job training and mentoring military prosecutors and defense attorneys—training that is on par with the best practices in large city district attorney and public defender offices.

The military justice system is a well-developed, unique, integrated criminal justice system, which handles thousands of criminal cases per year, ranging from minor violations to major felonies. In

almost all of these cases, the system works to ensure justice is done. It is not perfect, but neither is the civilian criminal justice system, which has many flaws and must be continually improved. However, when proposing improvements to the military justice system, Congress must realize that the military is fundamentally different from the civilian world.

The military exists for one reason: to defend the nation. Mission is everything. To accomplish the mission, commanders must be combat-ready and effective in combat. To accomplish both, commanders must have the ability to maintain good order and discipline in their units. Stripping commanders of their legal authority to refer cases to court-martial eviscerates their efficacy, undercuts their moral authority, and will weaken the armed forces of the United States. As Senator Claire McCaskill (D–MO) stated, the Gillibrand approach is "...a risky approach for victims—one that would increase the risk of retaliation, weaken our ability to hold commanders accountable, and lead to fewer prosecutions."[2]

The last time Congress attempted a legislative "fix" to the issue of sexual assault in the military, the legislation made matters worse. Against the advice of subject matter experts, Congress rewrote the military rape statute in order to make it easier for the government to get convictions and harder for those accused of rape to mount a proper defense. These efforts resulted in years of unnecessary litigation and ultimately in a federal appeals court declaring the scheme unconstitutional. This time, Senator Gillibrand is pushing an even more radical idea: stripping commanders of the ability to enforce good order and discipline in their units by removing their authority to refer cases to a court-martial. As with last time, subject matter experts and the military strongly advise against this scheme.

The only policies that will work over the long haul are those that:

- Enhance and preserve a commander's ability to enforce good order and discipline;
- Respect and honor the constitutional presumption of innocence that each accused enjoys in the military;
- Respect and preserve victims' rights; and
- Draw on and build from the enormous talent of service personnel in the military justice system.

The most prudent way to address the issue of sexual assault in the military is to make prudent improvements to the existing system, including the creation of career litigation tracks for select military judge advocates (JAGS), while keeping the ability to refer cases to courts-martial with commanders.

A Primer on Military Justice: Good Order and Discipline

Military Discipline and the Convening Authority. The military justice system is unique—and for good reason. Unlike the civilian justice system, which exists to enforce the laws of the jurisdiction and punish wrongdoers, the military justice system has a different purpose: to help enforce good order and discipline in the armed forces. It is structured so that those in charge, commanding officers, can carry out the orders of their civilian leaders. Ultimately, this system is structured to allow commanders to fight and win wars.

A commanding officer in the military has a wide range of tools available to enforce good order and discipline. These tools include mild administrative remedies, such as informal counseling, formal counseling, Executive Officer Inquiry, and non-judicial punishment under Article 15 of the Uniform Code of Military Justice. These administrative tools allow for flexible, quick, and effective discipline to address misbehavior or lack of attention to detail by those who violate rules. They help the commander show the troops that there are consequences, immediate and swift, for poor decisions or performance and minor misdeeds. The ultimate administrative remedy is the ability to "fire" a service member for misconduct. The power to send a soldier, sailor, airman, or Marine to an Administrative Discharge Board (referred to as an "Admin Board" in the military) sends a clear message to all those who serve under the commanding officer: There will be consequences for misconduct or neglect of duty.

The ultimate remedy for any commanding officer is the power to refer a suspected criminal in the chain of command to a court-martial. Taking that power away from commanding officers eliminates an indispensable authority that cannot be delegated or transferred to another—at least not if we are to demand accountability from commanders

for prosecuting and preventing sexual assaults and other serious crimes.

One should not overlook the fact that the military has jurisdiction over all service members on active duty, wherever they are stationed in the world. Any active-duty service member who commits a crime anywhere, against anyone—including fellow service members or civilians—is subject to the jurisdiction of the Uniform Code of Military Justice (UCMJ). Given the worldwide deployment of U.S. military personnel, this comprehensive reach of military criminal jurisdiction is necessary. In general, military personnel who commit crimes may be prosecuted by the military, a United States Attorney in an Article III federal district court, or by the local or state prosecutor where the crime was committed. In some foreign countries international agreements allow limited jurisdiction for host nations to prosecute U.S. service members. However, U.S. policy is always to seek agreement from host nations to allow U.S. service members to be tried under the UCMJ because it provides to the accused the protection of the U.S. Constitution. Host nations regularly agree to allow the U.S. to exercise jurisdiction because of confidence in America's system.

Furthermore, some military crimes are specific to the military and cannot be prosecuted by federal court or local jurisdictions (e.g., unauthorized absence from an appointed place of duty). In contrast, civilian prosecutors only have jurisdiction over crimes that happen in their jurisdiction, no matter who commits the crime, military or civilian alike. Thus, a service member who assaults a civilian in the United States may be prosecuted by the military, a local county or city prosecutor, or in some circumstances the nearest United States Attorney. A civilian who assaults a service member in the United States can only be prosecuted by the local county or city prosecutor or in some circumstances the nearest United States Attorney.

Unlike the civilian criminal justice system, where prosecutors or police file charges against an accused in a standing court, the military justice system has no standing courts and must create one for each individual case. Courts-martial are "created" by the power invested in a convening authority.[3] The convening authority creates a court-martial by issuing a convening order.[4] The convening authority has a role reducible to neither prosecutor nor judge, for the authority details military personnel as members for a court-martial,[5] decides on the charges to be filed,[6] decides whether to use non-judicial punishment or an administrative proceeding in lieu of a trial, approves or rejects requests for expert witnesses, and accepts plea agreements. In contrast, civilian prosecutors decide only whom to investigate, whom to charge, and what to charge. The reason for the difference is that civilian prosecutors are not responsible for the defendant's training, good order, and discipline in the way that a military commander is. A convening authority also plays a key role after a case goes to court-martial.

Articles 26 and 27 of the UCMJ provide for and require independent military judges, trial counsel (prosecutors), and defense counsel to be detailed to each court-martial. In the event of a conviction, Article 60 of the UCMJ requires the findings and sentence of the court-martial to be reported to the convening authority.[7] Defendants may submit to the convening authority matters for consideration with respect to the findings of the court-martial, as well as the sentence.[8] Article 60 provides the convening authority with the flexibility to modify, approve, disapprove, commute, or suspend the sentence, in whole or in part, and it may set aside the finding of guilty by a court.[9] All convictions that result in a discharge from the military or confinement of one year or more are automatically appealed to the intermediate, service-specific appeals courts.

"There's No Substitute for a Commander Who Does It Right"

One proposal before Congress would strip commanders of the legal authority to refer cases to court-martial, and transfer that authority to an entity (a military prosecutor) outside the chain of command. This proposal lacks merit, demonstrates a lack of understanding of the current military justice system, and, if enacted, would fundamentally weaken the military.

The military exists to defend the nation: This is its mission. To accomplish that mission, leaders must ensure that those who serve under them are combat ready, and once ordered into armed conflict, combat effective. Maintaining good order and discipline in the armed forces is essential to accomplishing the mission.

Those who have not served in the military have a difficult time understanding the concept of good order and discipline in the armed forces. While

civilians may understand the concept in theory, without living and experiencing the reality, they may not fully grasp why the military justice system diverges from the civilian justice system, which places charging powers in prosecutors. The military is different in a key respect: its mission. Commanders exist to carry out the mission, and as such, must retain the full legal authority to do just that, including but not limited to the authority to refer cases to court-martial.

This point was reinforced at a recent Senate Armed Services Committee hearing. Several senior officers fiercely defended commanders' authority and ability to refer sexual assault cases to court-martial. They explained that any delegation of referral authority to a military prosecutor outside the chain of command would undermine the ability of the commander to maintain unit discipline. They also stated that the ability to refer cases of sexual assault to a court-martial is essential to changing the climate within the military regarding sexual assault. Without the authority to discipline those who commit sexual assault and other crimes, unit commanders would be hobbled in building units that can ably defend the nation. Moreover, the testifying officers unanimously rejected the claim that commanders are unable or unwilling to bring charges in appropriate cases. Commanders, they explained, have the necessary legal training, the professional advice of a JAG to evaluate cases for trial, the tools they need to make the right decisions under the UCMJ, and the willingness to vigorously prosecute sexual assault cases.[10]

The officers also agreed that taking the authority to refer charges away from the commanders could actually *decrease* the number of sexual assaults prosecuted. Colonel Donna W. Martin, USA, Commander, 202nd Military Police Group, stated that a prosecutor would be unlikely to have the same passion for discipline as a commander.[11] Colonel Tracy W. King, USMC, Commander, Combat Logistics Regiment 15, stated that commanders do not consider judicial economy, which may be a consideration for an independent prosecutor.[12] A commander is more interested in justice and sending a message to the rest of troops in the unit. Colonel Jeannie M. Leavitt, USAF, Commander, 4th Fighter Wing, explained that there could be instances where a prosecutor might not bring a prosecution due to shortcomings in evidence, but as a commander she would prosecute to promote the discipline of the defendant and the other troops in her unit.[13] Col. King explained, "[if a] proven sexual assault occurs in my command and I don't report it, I am gone, there is no question in my mind."[14] In this way, the military has made strides in incentivizing commanders to take sexual assault seriously.

From a legal standpoint, commanders—who are not lawyers—need only probable cause to send a case to a court-martial (i.e., reason to believe that a member of the command committed a crime). Once they refer a case to court-martial, a military prosecutor prepares the case for trial. Military prosecutors, like their civilian counterparts, must prove their case beyond a reasonable doubt. On the other hand, civilian prosecutors decide whether or not to charge someone and how to charge them. In evaluating cases for prosecution, they do not weigh whether or not filing charges enforces good order and discipline in the armed forces. Rather, they weigh and balance other issues, including first and foremost the evidence and whether or not the case fits within its internal charging guidelines.

Senator McCaskill, who asked commanders tough questions during the most recent hearings, stated, "[T]he best way to protect victims and realize more aggressive and successful prosecutions is by keeping the ... chain of command in the process at the beginning of a criminal proceeding within the UCMJ, we believe that there will be less retaliation, we believe there will be more prosecutions ... [W]e believe that the only way to hold commanders accountable is to make them responsible, not to completely remove their responsibility...."[15] Later, Senator McCaskill and Representative Loretta Sanchez (D–CA) wrote in an op-ed, "... there's no substitute for a commander who does it right."[16] They are exactly right.

These legislators' sentiments were echoed in recent statements made by current and former service members.[17] For example, Chief Master Sergeant Barbara Taylor, USAF (Ret.), stated that a "commander cannot be held responsible if he does not have the authority to act."[18] While acknowledging that there is room for improvement, Fleet Master Chief Jacqueline DiRosa maintained that the authority to prosecute sexual assaults should remain with commanders: "[D]on't take the authority away from command, let's look at the processes that can support the commanders."[19]

Some proponents of the removal of command authority have identified as "success stories" similar

policies in Australia, Canada, New Zealand, and the United Kingdom and urge the United States to follow suit.[20] But these countries' removal of prosecutions from the chain of command can hardly be touted as a success for victims.[21] In fact, in most of these cases, the prosecution authority was removed for the purposes of protecting the *accused,* not the victim, as a result of court decisions of either international or domestic tribunals.[22]

The facts also do not support this argument. None of our allies has a caseload as large as the armed forces of the United States.[23] Despite this caseload, our current U.S. system remains more effective than those of our allies. For example, the Army installation at Fort Hood alone has a higher conviction rate than Canada Defense Forces and is equal to the Israeli Defense Force in courts-martial for sexual assault offenses.[24] Most of America's allies reported that removing the authority to prosecute from the chain of command has slowed prosecutions,[25] and they saw no increase in the number of convictions under the new system.[26]

This notion of accountability to one's commanding officer may seem mysterious to civilians who have never served in the armed forces. But chain of command, and accountability up and down the chain of command, is essential to carrying out the missions as ordered by the President, whose authority as Commander in Chief owes accountability to the people via elections and assures a military that will not threaten a constitutional democracy—whether America is engaged in an armed conflict or not.

Some who favor the elimination of convening authority power argue that victims of sexual assault are limited in where they can report the crime, and thus removal of the convening authority charging power is the only solution. But victims of sexual assault in the military have almost one dozen separate entities outside the chain of command to which they can report the crime.

Victims of sexual assault, whether in the military or outside of it, are often reluctant to report the crime, and share similar reasons: embarrassment; fear of what people will think about them; fear of repercussions because of the status of the perpetrator; fear that they won't be believed; reluctance to draw attention to themselves or the situation; fear that reporting might have a negative effect on their family, job, or relationships; reluctance to go through the excruciating criminal trial process; or all of the above. Of course, there are a host of other reasons. The notion that victims of sexual assault in the military don't report because the system is intentionally structured so that commanders won't take their claims seriously is belied by the facts. Failure of a commander to investigate any allegation of misconduct, especially sexual assault in one's command, is likely to be a career-ending mistake for the commander—as it should be. Radically upending the military justice system by removing convening authority power from commanders actually relieves commanders of the responsibility of proper investigation and adjudication of misconduct, which will irreparably harm the military's ability to enforce good order and discipline.

Litigation Training in the Military Aligns with Best Practices

In addition to the long-standing and ongoing general military training (GMT) regarding sexual assault in the military for all active duty and reserve component personnel (detailed in Appendix A), the services have committed themselves to litigation training for JAGs responsible for prosecuting and defending cases in courts-martial. That training, both general in nature and specific to sexual assault cases, is part of the solution to making the military criminal justice system even stronger.

As this paper argues, one key, additional component to making the military criminal justice system work better for victims and defendants alike, is for the Army, Air Force, and Marine Corps to do as the Navy JAG Corps has done and establish a litigation career track for their JAGs, as discussed later in this paper.

Proper litigation training is crucial for both prosecutors and defense counsel, in and outside the military. As this paper demonstrates, and as the facts from official reports submitted by the services each year to the Court of Appeals for the Armed Forces (CAAF) show, the military has provided ongoing, top-notch training to criminal litigators for years. The best district attorney and public defender offices in the country, not surprisingly, also provide entry-level and ongoing training to their attorneys, as this paper demonstrates. The CAAF reports also indicate that there has been a substantial increase in the amount of training and the number of programs addressing incidents of sexual assault.[27] The initial increase in sexual assault awareness began in 2005,

but the major, sustained emphasis on sexual assault prevention and prosecution began in 2008.[28] This emphasis on training is also reflected in those units of public defenders and district attorneys' offices that deal with sexual assault offenses. Clearly, the military's training comports with best practices, and must continue.

The Navy and Marine Corps. In 2007, a Military Justice Litigation Career Track program was instituted in the Navy and, subsequently, career litigators were sent to civilian post-graduate schools to further their litigation training. This career track is a step in the right direction. The program permits both prosecutors and defense counsel to remain litigators throughout their entire career as JAGs. Because the position is permanent, these litigators are able to hone their skills through experience and training, and will consequently provide the Navy with a cohort of experienced litigators with credentials similar to those of litigators in the civilian criminal justice system. Additionally, proven litigators are then able to apply and compete for positions as military-trial or appellate judges—a critical component of a properly functioning and 21st-century military justice system.

The Navy has similarly intensified its training programs. The Naval Justice School trains Navy JAGs, Coast Guard JAGs, and uniformed Marine Corps attorneys. In 2009, the Naval Justice School's Accession Judge Advocate Course was expanded from 9 weeks to 10 weeks.[29] The school also offered the following advocacy courses: Capital Litigation (with different sections for prosecution and defense), Intermediate Trial Advocacy, and Advanced Trial Advocacy.[30] In 1998, 2001, and 2002, the school also offered the National College of District Attorneys Course.[31] In 2000, a class entitled Litigating Complex Cases was offered.[32] Starting in 2003, the course in Capital Litigation was discontinued in favor of a course entitled Prosecuting and Defending Complex Cases.[33] In 2012, the school added a biannual trial counsel and defense counsel orientation, and two additional advocacy classes: Litigating Complex Cases and Senior Trial and Defense Counsel Litigation.[34] Navy Trial Counsel Assistance Program (TCAP) training presentations were also mentioned in most of the reports.[35] In 2012, the Naval Justice School offered several classes focused on the topic of sexual assault.[36] That same year, two officers participated in an externship in sex crimes divisions in state and district attorney's offices to gain experience readily adaptable to military justice practice.[37]

In addition to the new offerings at the Naval Justice School, the reports also document a number of changes to naval litigation training. For example, the 2012 report stated that increasing availability of advocacy training was a "cornerstone of the JAG's agenda" for the year.[38] It documented the progress made toward the goal of centralizing the trial advocacy training and requirements for both trial counsel and defense counsel.[39] In 2012, Code 20, the Navy's Criminal Law Division, contracted with the Justice Management Institute to produce a report on the development of Performance Measures (Metrics) for Prosecutors and Defense Counsel.[40] The performance measures were organized into six primary categories: due process, victims' rights and safety, accountability, timeliness, competency, and communication. Within each of those categories, two separate series of measures were established: systems measures focusing on the macro-level performance of the JAG Corps and individual measures focusing on whether individual performances contributed to the overall JAG Corps goals and objectives. These performance measures were to be used to conduct critical self-evaluation and increase advocacy skills and training curriculum of military justice practitioners.[41] The Navy also increased the availability of sexual assault training. In 2009, the Navy hired a sexual assault litigation specialist.[42] It also offered a continuing legal education course entitled Litigation of Sexual Assault Cases.[43] In 2010, the Navy enhanced its Victim Witness Assistance Program.[44]

In 2012, the Navy initiated its Sexual Assault Prevention and Response—Leadership/Fleet.[45] It also developed the Defense Sexual Assault Incident Database to allow for more accurate tracking and reporting of sexual assaults.[46] In addition, the criminal law division provided sexual assault litigation training for the Naval Criminal Investigative Service (NCIS), senior military, and civilian personnel.[47]

The Marines have also instituted new policies to reflect their continuing emphasis on litigation and sexual assault training. In 2010, the Marines launched an initiative to increase training, including instituting the TCAP to provide, among other things, training to trial counsel and defense counsel.[48] In 2012, the legal system was restructured to increase the experience, training, and expertise of

its personnel, with regards to litigation in general and in the area of sexual assault offense.[49] Within the new organization, a Complex Trial Team produces and implements standard operating procedures for investigating sexual assaults, consults with prosecutors dealing with complex cases, and develops training programs.[50] The Marines also implemented victim's legal assistance, including a Sexual Assault Response Coordinator and sexual assault victim advocate.[51] TCAP focused on assisting in sexual assault matters and offered courses focused on sexual assault and victim support, and supplemented these courses with sexual assault Mobile Training Teams.[52] In 2011, the Marines held their second annual Victim Witness Assistance Program conference, which provided baseline training to personnel by civilian experts on handling sexual assault victims.[53]

The Army. From 1997 to 2012, the Army JAG Corps increased its emphasis on advocacy training.[54] The Basic Course for all JAGs includes advocacy training and was adapted and expanded to emphasize advocacy training and, in particular, issues arising in sexual assault cases. In 1997, the Army reintroduced a program in which each Basic Course student acts as counsel in a contested court-martial.[55] The next year, the course was expanded to include three advocacy exercises: an administrative separation board, a guilty plea, and a contested court-martial.[56] In 2004, the number of exercises was reduced to two, and students were required to serve as counsel in only a guilty plea and a contested court-martial.[57] In 2005, the Basic Course was revised to include 12 advocacy exercises and called "The Anatomy of a Court-Martial."[58] This Basic Course was in place until 2011, when it was restructured again. In the new course, students walk through a sexual assault fact pattern from start to finish and participate in 14 advocacy workshops.[59] In each iteration of the course, the advocacy component has been increased to include more practical training methods. The Judge Advocate General's Legal Center and School (TJAGLCS) provides an increasing number of elective graduate courses in advocacy training to augment the basic course.[60] Class offerings over the years have included: Multi-Service High Profile Case Management[61] and Criminal Law Advocacy.[62] In 2012, the Army offered new JAGs two classes for litigators after the Basic Course: New Prosecutors Course and Defense Counsel 101.[63]

The Judge Advocate General's Legal Center and School also expanded its sexual assault training. In 2011 and 2012, all of the general training courses at the TJAGLCS included a sexual assault fact pattern.[64] In addition, senior officers received instruction on the Army's Sexual Harassment/Assault Response and Prevention (SHARP) program and victim and offender behavior.[65] In that class, officers work though a sexual assault fact pattern, discuss their SHARP obligations, and make a transmittal decision.[66] There is also a continued emphasis on sexual assault prosecution training.[67]

Other training offered for Army JAGs includes publication and distribution of the *Advocacy Trainer,* a learning tool that combines skill development drills and videos to augment the primary program.[68] In 2009, the Army introduced a pilot program for career judge advocates to enroll in a prosecutorial science LLM (Master of Law) program.[69] In 2009, there was also an effort to coordinate training for the development of prosecutors in civilian venues, including the National District Attorneys Association, National Advocacy Center, American Prosecutor's Research Institute, and National Center for Missing and Exploited Children.[70] The Judge Advocate General's Trial Counsel Assistance Program (TCAP) also provided regular training.[71] In 2006, TCAP developed a course entitled TC101: How to Be a Trial Counsel."[72] The judiciary also participated in teaching classes and in the advocacy training of trial and defense counsel through the Bridging the Gap and Gateway to Practice programs.[73] In 2011, TCAP introduced its New Prosecutor Course.[74]

In 2008, the Army also instituted a program aimed at identifying qualified personnel and ensuring that each JAG receives sufficient training. The Military Justice Skill Identifier program allows JAGs to obtain the following levels of recognition: Basic, Advanced, Expert, and Master Military Justice Practitioner.[75] In 2009, another program, the Trial Advocates Training Tracking System was instituted, which allows administrators to track the training and career progression of each judge advocate.[76] Through this system, administrators can monitor each judge advocate and make a determination as to whether further training is required.[77] Both of these programs were functioning during fiscal year 2012.[78] In 2010, there was a further push for increased training, beginning with the Training Synchronization meeting, which resulted in the

Consolidated Criminal Law Calendar.[79] Advocacy training opportunities were also provided in multiple civilian venues through the Criminal Law Division.[80] In 2011, the Judge Advocate General's Defense Counsel Assistance Program (DCAP) hosted a Joint Advocacy Symposium that included an intensive trial skills improvement workshop.[81]

Also in 2008, the Army made further progress toward its goal of prosecuting and preventing sexual assaults with the implementation of a new Sexual Assault Prevention and Response Program.[82] In 2009, it developed initiatives to improve the ability to effectively deal with sexual assault cases.[83] In 2009 and 2010, the Army introduced four new sexual assault litigation courses.[84] In addition, it hired Highly Qualified Experts (HQEs) to develop training programs and provide assistance in sexual assault cases and created more special victims prosecutors to provide direct input into sexual assault prosecutions.[85] The 2010 report stated that by January 2011 all prosecutors would have a designated Special Victims Prosecutor and sexual assault litigation expert.[86]

In 2012, the Army formalized its Special Victim Capability, a program staffed by Special Victim Prosecutors, Criminal Investigation Division Sexual Assault Investigators, Victim Witness Liaisons, and paralegals.[87] This capability will aid in effectively prosecuting those charged with sexual assault offenses, while protecting the victims of those offenses.

These official reports demonstrate that the Army leadership understands and supports continuing legal education for litigators. These formal training courses, aimed at entry-level, beginner, intermediate, and senior judge advocates, are commendable. The only way to institutionalize the efficiency and effectiveness of this training, however, is to create a career litigation track in each of the services. Such flexibility would allow career military litigators to specialize in litigation and draw more from the training programs available.

The Air Force. The Air Force also offers programs to JAGs to improve their advocacy skills and increase the expertise of its legal system in the area of sexual assault. The Air Force Judge Advocate General's School now offers courses in advanced trial advocacy and trial and defense advocacy.[88] In 2011, the school offered courses that focused on foundation advocacy.[89]

In order to place a greater emphasis on litigation training, the Senior Trial Counsel (STC) division is composed of the "Air Force's premier prosecutors."[90] This division is intended to reflect an emphasis on training litigators. The STCs attend many hours of advocacy training, including a civilian career prosecutor class and classes on advanced trial advocacy, prosecuting complex cases, and protecting children online.[91] In recent years, Senior Trial Counsel attended further advocacy training, including a number of external conferences and courses on complex cases and child protection.[92]

The Air Force sexual assault programs have undergone a similar evolution. For example, in 2009, the Air Force began increasing its emphasis on sexual assault. Its Appellate Government Counsel created an interactive training scenario based on a sexual assault case entitled, Trauma to Trial.[93] From 2009 onward, Senior Trial Counsel attended many hours of training focused on sexual assault.[94] The Military Justice Division trained personnel in the Victim and Witness Assistance Program regarding sexual assaults, and prosecutors attended advocacy training focused on sexual assault crimes.[95] In addition, in 2010 and 2011, the Air Force and Army cosponsored the Military Institute on the Prosecution of Sexual Violence.[96] Furthermore, in 2012, the Air Force implemented its Special Victims Trial Capability, consisting of senior prosecutors trained for the prosecution of specialized cases, including sexual assault cases.[97]

Taken together, these reforms and new initiatives are impressive and a step in the right direction. The military has taken considerable strides toward creating a system that successfully trains litigators who handle very complex cases—and it deserves credit for doing so. However, a career litigation track in each JAG Corps would assist these lawyers in utilizing these new programs to prosecute all felonies, including sexual assaults.

Congressional Reform of Article 120 Made Matters Worse

This year is not the first time Congress has attempted to legislate a solution to the issue of sexual assault in the military. In 2006, Congress attempted to address the issue by overhauling Article 120 of the Uniform Code of Military Justice (UCMJ), the provision that criminalizes sexual assault to make it easier to prosecute cases and win convictions. But

the amendment backfired, throwing prosecutions into disarray. That episode should serve as a cautionary tale in the current debate.

When it last attempted reform with regard to sexual assault in the military, Congress began, promisingly enough, by asking the Secretary of Defense to review the UCMJ and the Manual for Courts-Martial (MCM) in order to determine "what changes are required to improve the ability of the military justice system to address issues relating to sexual assault" and conform military law "more closely to other Federal laws and regulations that address such issues."[98] The resulting report concluded "[a]fter thorough review, the subcommittee members were unable to identify any sexual conduct (that the military has an interest in prosecuting) that cannot be prosecuted under the current UCMJ and MCM. Based on this determination, the subcommittee unanimously concluded that change is not required."[99] In fact, the report identified a number of considerations that weighed against changing the law, including the fact that lack of statutory authority to prosecute sexual assault simply was not a problem.[100]

Nonetheless, Congress responded by amending the law to strip out the requirement that the prosecution prove lack of consent by the victim to win a conviction.[101] At the same time, it reintroduced consent as an affirmative defense, available only for the most serious crimes (rape, aggravated sexual assault, aggravated sexual conduct, and abusive sexual conduct), that the accused "has the burden of proving...by a preponderance of the evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist."[102]

The new statute ran into serious problems from the start, and the CAAF, the military's highest court, heard three cases challenging different aspects of it.

In *United States v. Neal,* the defendant brought a constitutional challenge to the burden-shifting nature of consent as an affirmative defense, alleging that requiring the defendant to prove consent by a preponderance of the evidence unconstitutionally placed on the defendant the burden of disproving an element of the crime.[103] Although it rejected that argument, the CAAF was forced to adopt a narrow reading of the statute, so as to avoid running afoul of the Due Process Clause's requirement that the government prove all of the elements constituting a criminal offense. This narrow reading allowed the accused to introduce evidence of consent, even when that defense was unavailable, to rebut elements of the offense, such as the use of force.[104]

In *United States v. Prather,* the accused was charged with aggravated sexual assault against a victim who was "substantially incapacitated."[105] The CAAF concluded that the statutory interplay among relevant provisions of Article 120—when an accused raised the affirmative defense of consent to a charge of aggravated sexual assault by engaging in a sexual act with a person who was substantially incapacitated—resulted in an unconstitutional burden shift to the accused. [106] The Court further held that where the members were instructed by the military judge prior to their deliberations consistent with the statutory scheme found in Article 120, the unconstitutional burden shift was not cured by the standard Military Judge's Benchbook "ultimate burden" instructions. Accordingly, the CAAF threw out the conviction.[107]

Finally, in *United States v. Medina,* another aggravated sexual assault case that challenged the constitutionality of Article 120, the military judge did not instruct the members that the burden was on the accused to prove the affirmative defense of consent by a preponderance of the evidence. Instead, ignoring the plain language of the statute, the military judge instructed the members that the evidence raised the defense of consent and that the government had the burden of disproving the defense beyond a reasonable doubt. The CAAF found that, in deviating from the statute without explanation, the military judge was in error. However, the conviction was upheld because the judge's error was determined to be harmless beyond a reasonable doubt.[108]

Congress ultimately recognized its error and amended Article 120 in 2011. The current statute reduces the number of offenses in Article 120 to four: rape, sexual assault, aggravated sexual contact, and abusive sexual contact.[109] While lack of consent is still not an element of those offenses, it is now available as a general affirmative defense.[110] The burden-shifting provision was also removed.

Congress's Article 120 experiment was a fiasco, resulting in a four-year ordeal that unnecessarily disrupted military jurisprudence. Congress should learn from this unfortunate episode that the problem of sexual assault cannot be "fixed" by attempting to make it easier for the government to get and

sustain convictions—because quick fixes to the military justice system can have substantial unintended consequences.

Commanders are part of the solution; they are not the problem. It is important to keep in mind that there are civilian district attorneys and detectives who sometimes fail to serve the interests of victims of violent crime, including sexual assault. Fortunately, they are few and far between. The solution in those situations is not to condemn all district attorneys or detectives, but hold those few accountable for their inaction and lack of professionalism. Similarly, Congress should not eliminate the power of commanders to hold their personnel accountable by referring them to courts-martial, simply because of the actions of relatively few convening authorities.

Congress should not ignore the institutions and leaders who are responsible for military justice as it seeks to make appropriate improvements to the current system.

Current Reform Proposals

The Problem Is Real. Incidents of sexual assault are a real and recognized problem, both in the military and in civilian life. In 2005, the Department of Defense (DOD) created the Sexual Assault Prevention and Response Office (SAPRO) to report on, and respond to, the problem of sexual assault in the military.[111] In 2013, SAPRO issued a report based on a survey on the status of sexual assault in the military. Notably, the survey extrapolated that in 2012, there were an estimated 26,000 instances of "unwanted sexual contact,"[112] defined as "intentional sexual contact that was against a person's will or which occurred when the person could not consent...."[113] This number of estimated incidents amounts to 6.1 *percent* of female and 1.2 *percent* of male service members.[114]

Similar studies done by the Department of Justice in the civilian college population, a comparable population to the military due to the high percentage of younger service members, reported higher rates of sexual assault. The 2000 study reported that 19 percent of college women had been "sexually victimized,"[115] and a 2007 study reported that 13.7 percent of women had been victims of a sexual assault in college.[116]

While these studies suggest that the military's sexual assault issues may be less serious than in civilian society, sexual assault has a uniquely greater damaging effect on the military, such that even one incident is unacceptable. Incidents of sexual assault are detrimental to morale, destroy unit cohesion, show disrespect for the chain of command, and damage the military as a whole, both internally as well as externally. Service members are trained for situations in which it is essential to trust both enlisted members of the unit and the chain of command completely. Sexual assault in the military destroys that trust, which can detract from the readiness of America's armed forces.

During the past few years, there has been a wave of proposed solutions to the issue of sexual assault in the military. Both the executive and legislative branches have proposed a plethora of different reforms. Indeed, the sheer number of proposals is a testament to the commitment of both branches of government to the armed forces. However, each proposal's substance should be critically evaluated to determine whether the proposed solution, with the admirable goal of reducing the incidents of sexual assault and properly disposing of sexual assault cases, would produce unintended negative consequences for the military justice system as a whole.

Executive Proposals. The executive branch, through both executive orders and Department of Defense directives, has been continuously involved in the development of new policy reforms to decrease the prevalence of sexual assault in the military. For example, recently the executive branch created a new Military Rule of Evidence, Rule 514, which extends the confidential communications privilege to communications between victims and victim advocates.[117] In addition, Secretary of Defense Leon Panetta issued a policy in the spring of 2012 that requires the convening authority to be an O-6 or higher for certain specific sexual assault offenses.[118]

On December 16, 2011, the Deputy Secretary of Defense issued a Directive-Type Memorandum (DTM) which established policies and procedures to expedite the transfer of a service member who filed an unrestricted report of sexual assault.[119]

In the summer of 2013, Secretary of Defense Chuck Hagel continued this trend by issuing proposed additional reforms to the military justice system, including amending the legal authority that empowers commanding officers to overturn a court-martial conviction before the case is heard by an appellate court, an authority found in Article 60 of the UCMJ.

The proposal suggested two substantive changes to Article 60: First it would eliminate the discretion of a convening authority to change the findings of a court-martial, except for minor offenses that would not ordinarily warrant a court-martial; and second, it would require a convening authority to explain in writing any changes made in court-martial sentences, as well as any changes in findings involving minor offenses.[120] The intent of these changes is to "ensure that convening authorities are required to justify—in an open, transparent, and recorded manner—any decision to modify a court-martial sentence."[121] These proposals have been adopted by both the Senate and House proposals discussed, *infra*.[122]

The package of proposals in the Chairman's Mark, discussed *infra*, also mandates an assessment of the clemency procedures in the military to determine "the opportunities for clemency provided in the military and civilian systems, the appropriateness of clemency proceedings in the military system, the manner in which clemency is used in the military system, and whether clemency in the military justice system could be reserved until the end of the military justice process."[123] This assessment would allow Congress to be fully informed of the role the convening authority's Article 60 authority plays in the military justice system—an understanding that will allow for an educated determination of whether that authority should be eliminated.

On August 15, 2013, the Department of Defense proposed additional changes, above and beyond amending Article 60. Those additional measures are meant to "improve victim support, strengthen pretrial investigations, enhance oversight, and make prevention and response efforts more consistent across the military services."[124] They include:

- Creating a legal advocacy program that provides legal representation to sexual assault victims;
- Requiring a JAG to preside over Article 32 pretrial investigations in sexual assault cases;
- Giving commanders the flexibility to reassign or transfer members who are accused of sexual assault or related offenses in order to avoid contact with the victim;
- Requiring timely follow-up reports on sexual assault to be given to the first general or flag officer within the chain of command;
- Directing the DOD Inspector General to regularly evaluate closed sexual assault investigations;
- Standardizing rules prohibiting inappropriate relationships between recruiters and trainers and their recruits; and
- Proposing changes to the Manual for Courts-Martial that would allow victims to give input during the sentencing phase of courts-martial.[125]

These additional measures demonstrate the Department of Defense's commitment to improving the existing system—as opposed to fundamentally changing its structure. Since the Defense Department has firsthand experience with the military justice system, Congress should give their proposals, which work within the existing system, serious consideration.

Bypassing the Convening Authority Puts Victims at Risk

The proposal[126] by Senator Gillibrand would eliminate the power of military commanders to refer cases to court-martial and gives sole power or authority to military prosecutors. This proposal stems from a dangerous lack of understanding of the unique role of a convening authority within the military justice system, and of the military in general. Consequently, this proposal aims to fix the problem of sexual assault in the military by "shaking up" the status quo. In reality, such a blunt approach will weaken the military criminal justice system, harming victims of sexual assault, and undermining the enforcement of good order and discipline in the armed forces forever.

The power to send someone to a court-martial is separate and distinct from the power to choose what charges a person should face. The thinking behind Senator Gillibrand's proposal is that commanders cannot be trusted to hold people accountable for their crimes, and thus prosecutors must be given the power to decide whether they should be court-martialed.

In the military, prosecutors and defense attorneys do not work for the command of the accused or

the convening authority. Rather, they report to the senior prosecutor or senior defense counsel in the area. In that sense, they are already independent. So taking away convening authority power just to give the authority to an independent prosecutor in the military accomplishes nothing, as prosecutors are already independent from commanders or convening authorities.

But the Gillibrand proposal would undermine all commanders' ability to enforce good order and discipline across the armed forces. For example, combat commanders, when lawfully engaged in armed conflict, have the authority to order their soldiers to kill the enemy. The proposal would, among other things, eliminate those commanders' authority to prosecute those soldiers that indiscriminately kill women and children or commit other violations of the Law of Armed Conflict.

Under current law, commanders decide whether to send someone to a court-martial (by "referring" a case to court-martial), and decide on the charges that should be brought against the accused. Yet there is no systemic evidence that commanders are refusing to refer sexual assault cases to court-martial; in fact, the evidence points to the opposite conclusion. Some commanders refer cases to court-martial despite legal advice to the contrary, but do so to enforce good order and discipline in their unit.

Another implicit assumption underlying this proposal is that military prosecutors would routinely file charges in military sexual assault cases that convening authorities today refuse to refer to court-martial. That assumption is also incorrect.

Professional career civilian sex crimes prosecutors who work in district attorney's offices near military installations across the country routinely reject some alleged sex crimes cases arising from the military. These cases are rejected not because they are military, but because, based on these prosecutors' experience and internal charging guidelines, the cases are poor candidates for prosecution. Often times, there is either no evidence of a crime at all or the evidence is so weak that there is no reasonable likelihood of success on the merits. Of course, civilian prosecutors take some military sex crimes cases. They take some cases that the military gives them or that the military rejected. Under the current system, some of these cases, in which civilian career prosecutors would not even indict, are nevertheless referred to court-martial in the military. Some of those cases, which are nevertheless referred to court-martial, result in a not-guilty finding. There are instances where a convening authority refers a case to court-martial against the advice or recommendation of legal counsel or investigating officers in cases where civilian professional prosecutors have shown little or no interest.

Congress's goal, therefore, should not be to increase the number of sex crimes cases referred to courts-martial, which seems to be the unspoken animus behind stripping commanders of referral authority. Rather, the goal should be to create a fair, impartial system of justice for victims and defendants alike that achieves justice.

Ironically, if the Gillibrand proposal were to become law, fewer cases would likely be referred to court-martial because military prosecutors, like their civilian counterparts, would only press charges in cases where the prosecutor thinks he can prove the case beyond a reasonable doubt. As Senator McCaskill and Representative Loretta Sanchez recently concluded in a *USA Today* op-ed, the Gillibrand plan is "... a risky approach for victims—one that would increase the risk of retaliation, weaken our ability to hold commanders accountable, and lead to fewer prosecutions."[127] McCaskill and Sanchez support their conclusion by pointing out that handing the decision to refer cases to courts-martial to "outside lawyers will never carry the broad authority and legitimacy of a military commander within a unit, or [be able to understand] the close grasp of the culture and discipline" of that particular unit. Furthermore, they argued that Congress must be able to hold commanders accountable for their actions (or inaction), and that it is "impossible to hold someone accountable for fixing a problem when you strip them of their responsibilities for fixing that problem."

Under the current system, as Colonel Leavitt suggested, commanders refer cases to court-martial to send a message, sometimes against the advice of the JAG. For example, commanders can refer cases to court-martial when they are convinced that there is probable cause that a crime has been committed and that the accused committed the crime. Commanders view the court-martial as a forum where both the prosecution and defense can fully litigate the case, and where qualified members (jurors) can render an informed verdict. Prosecutors—military and civilian—view cases through a slightly different legal

lens: they must be able to prove the case beyond a reasonable doubt. And on rare occasions, a convening authority will refer a case to court-martial and the assigned military prosecutor will not be able to ethically take the case to trial, because the state bar's ethics rules require a slightly different standard to allow for prosecution. The case is then reassigned to another military prosecutor barred in a different state.

If the goal is to ensure that military prosecutors have a say in terms of which charges to file, Congress could require that uniformed prosecutors have a seat at the table with the convening authority before charges are referred. In most cases today, military prosecutors already work closely with the convening authority and a Staff Judge Advocate before charges are referred, but that is only custom and habit and not required as a matter of law.

Finally, some who favor the Gillibrand proposal have attempted to sell it by suggesting—without any evidence—that it is "cost neutral." But this proposal, if enacted, would require current JAGs to leave non-litigation billets to create the roles of Chief Prosecutors across the services. Forcibly removing dozens and dozens of JAGs from fields such as operational law, international law, and other critical billets highly valued by service secretaries, generals, and admirals inevitably will result in those positions being back-filled by other JAGs. In other words, it will be cost negative, as leaders have come to rely on the expert legal advice of JAGs in those non-litigation jobs, and they will move quickly to replace them.

The solution to making the military justice system work better for victims and defendants alike is not taking the Convening Authority out of the equation. As Senator McCaskill and Representative Sanchez said, "... there's no substitute for a commander who does it right."[128] Eliminating the commander from the equation will only make matters much worse, as it will fundamentally weaken the military at the expense of faux justice.[129]

Senate Proposals

Perhaps the best way to strengthen the military criminal justice system over the long term is for the Army, Air Force, and Marine Corps to establish career litigation tracks for military defense counsel and prosecutors, as is the case with the Navy JAG Corps. Over time, well-developed career tracks will produce even more experienced military defense counsel and prosecutors, and deliver justice for victims and defendants alike. There is no substitute for actual experience, in any discipline. Career tracks must be part of the legislative solution.

That said, there are other legislative proposals, some of which have merit. The Chairman's Mark of S. 1197, for instance, contains 30 provisions aimed at improving both the military policy towards preventing and reporting sexual assault, and the military justice system's disposing of sexual assault cases. These provisions range from minor housekeeping issues, to major substantive changes in the military's policy towards sexual assault. However, by working within the current system and building upon the procedures in place, some of these provisions are a step in the right direction.

For example, Section 532 provides for the Secretary of Defense and the Secretaries of each military branch to create guidelines for the temporary reassignment or removal of those individuals accused of a sexual assault offense.[130]

It is important to remember that those accused of crimes in the military, just like a civilian, are presumed under the law to be innocent unless—and until—they are proven guilty by legal and competent evidence beyond a reasonable doubt. Just because someone is accused of a crime does not mean that they are guilty. Military personnel accused of a crime are either placed in pretrial confinement (a rare occurrence), pretrial restriction, or given military protective orders, which are similar to civilian restraining orders. Additionally, the accused's chain of command can supervise the accused closely. Some accused are just allowed to continue to work at their command until the trial. If enacted, this provision would require careful implementation. At the same time, it is obviously very troubling for victims of crime to be working near their alleged attacker, especially in cases of sexual assault. This provision requires careful scrutiny by Congress.

Section 535 increases the responsibilities of SAPRO to include, among other things, its serving as the "single point of authority, accountability, and oversight for the sexual assault prevention and response program."[131]

In addition, SAPRO would collect and maintain data regarding the incidence of sexual assault in the armed services on a quarterly and annual basis. This data would be analyzed using metrics developed by

SAPRO to evaluate the effectiveness of prevention programs and be compiled into quarterly and annual reports. The data collected pursuant to the proposed statute would include the unit of each victim and perpetrator of every sexual assault offense.[132]

Section 536 requires the Secretary of Defense to review the sexual assault training of each branch of the military and prescribe "appropriate" measures in response to the shortfalls the Secretary identifies. The Secretary must also review the expertise of those individuals involved in the area of sexual assault prevention and response to ensure they are able to carry out their responsibilities. Furthermore, the proposal states that the Secretary of Defense shall promulgate regulations regarding the minimum levels of expertise necessary for those individuals involved in the area of sexual assault, requirements for improvements to training for those individuals, and improvements to the process by which those individuals are selected. The section also requires the Secretary of Defense to submit a report that includes, among other things, recommendations for legislative action to improve the sexual assault prevention program and ways to ensure sexual assault positions are considered "career enhancing assignments."[133]

Several provisions relate to the ability of the armed forces to adequately provide for the victims of sexual assault. Section 537 provides Sexual Assault Response Coordinators to members of the National Guard and the reserves.[134]

Section 539 requires each branch of the armed services to create a Special Victims' Counsel, who will provide legal advice to the victim of a sexual assault regarding the victim's potential criminal liability, responsibilities to the court, potential civil litigation, as well as the military justice process in general, restraining or protective orders, military and veteran benefits, legal assistance in civil matters regarding the sexual assault, and any other matters later specified.[135] In conformity with the new Military Rule of Evidence (MRE) 514, allowing for a confidential communications privilege between a victim and a victim advocate, this section provides that the relationship between victim and Special Victim Counsel is an attorney-client relationship.[136]

Section 553 provides that any request by defense counsel to interview the complaining witness shall be made through trial counsel. It allows the victim to request that the trial counsel, counsel of the witness, or outside counsel shall be present for the interview.[137] This proposal will likely be opposed by the criminal defense bar, and for good reason. In the military justice system, the defense already has to funnel requests for resources, including witnesses, through the prosecutor, a procedure that defense counsel do not otherwise have to follow outside of the military. Opponents will argue that requiring defense counsel to go through the prosecutor to interview the complaining witness adds yet another impediment to effective advocacy and zealous representation. On the other hand, those who will support this provision argue that it merely protects the complaining witness. Congress should take testimony from experts on this provision and debate it before voting on it.

The provisions also require commanders to submit any allegations of sexual assault to the proper military criminal investigative organization, and directs the Inspector General to investigate alleged retaliation resulting from reporting a "rape, sexual assault, or other sexual misconduct."[138]

There are several provisions that create mandated assessments of both the current system and the proposed changes. Section 544 provides for a comparison of the clemency procedures of the military and civilian criminal justice system and an assessment of how clemency procedures in the military system are used and whether clemency should be reserved until completion of the appeals process. It also provides for an assessment of how the names of alleged offenders in restricted reports could be collected into a database only available to "appropriate personnel" for the limited purpose of identifying those persons who have been accused of multiple sexual assaults.[139]

Section 545 requires a review of all proposed sexual assault provisions offered by the Senate Armed Services Committee. This review serves to evaluate the Response Systems Panels created under Section 576 of the FY 2013 NDAA and their potential effectiveness.[140] Section 546 provides for an assessment of the current system of restitution and compensation for victims and an evaluation of ways to expand such relief.[141]

The provisions also mandate enhanced oversight over convening authorities, yet in a manner that preserves their actual authority. Section 552 provides that the Secretary of Defense "shall require" the Secretaries of military departments to arrange

for review of decisions by convening authorities not to refer charges in the following cases: rape, sexual assault, forcible sodomy, or attempt of the listed offenses. If this decision not to refer charges was made against a Staff Judge Advocate's recommendation to refer charges, the convening authority must forward the case to the Secretary of its respective branch for review. If the recommendation of the Staff Judge Advocate not to refer charges is followed, the convening authority must forward the case to a superior officer with general court-martial authority for review.[142] This additional review process, if enacted, preserves the overall power of the convening authority, but provides additional review by an entity one-step removed from the case at hand. In that sense, the process is roughly analogous to a senior supervising district attorney reviewing a decision not to prosecute made by a junior front-line civilian prosecutor.

Section 555 limits the convening authority's Article 60 power in three ways. First, it limits the power of the convening authority to dismiss a finding of guilty to "qualified offenses." Those "qualified offenses" exclude sex offenses. Second, it removes the authority of the commander to reduce the offense a service member is convicted of to a lesser-included offense. Third, the new provision requires that any modification to the findings or sentence of a court-martial be in writing.[143] Section 556 requires a copy of the portion of the matter regarding the complaining witness, submitted to the convening authority for consideration, also be given to the complaining witness. The complaining witness would then have 10 days to provide a written response.[144]

In the Chairman's Mark to S. 1197, there are proposed sections that would explicitly state the sense of the Congress as to the current and optimal state of the military regarding sexual assault offenses. One section reaffirms Congress's beliefs as to the proper command climate and who is responsible for that climate. For example, in Section 540, Congress explicitly states the requirement to hold commanders responsible for maintaining a proper command climate that allows victims to report without fear of retaliation, and that those commanders who fail to maintain this climate should be removed from command. In addition, Congress reaffirmed its understanding that it is the responsibility of senior commanders to evaluate the command climate of their subordinates as a part of the normal, periodic evaluation process.[145] Furthermore, Section 558 explicitly states the "sense of the Senate" regarding the disposition of sexual assault charges. The provision makes it clear that the Senate prefers courts-martial to other forms of non-judicial punishment and it expects that a non-judicial punishment for a sexual assault offense be accompanied by a written justification.[146] Section 559 states that the Senate expects the armed services to prosecute those accused of sexual assault offenses instead of administratively discharging them. The provision also states that administrative discharge should be used sparingly in sexual assault cases and that, if the facts of a case warrant discharge, the victim should be consulted whenever possible.[147]

In summary, this broad range of proposals, some of which have merit, represent a comprehensive approach to further improving the military justice system. Any proposal, however, must be considered in light of whether it: (1) protects victims; (2) balances the constitutional rights and liberty interests of those accused of crimes; and (3) maintains the ability of commanders to enforce good order and discipline in their units.

House Proposals

Over the decades the House of Representatives in general and the House Armed Services Committee (HASC) in particular, have taken a leadership role in shaping and making prudent changes to the military justice system.[148] The House, in a bipartisan manner, has once again taken the helm and passed an NDAA with a variety of proposals targeting the issue of sexual assault in the military. Many of these proposals have merit, as they are measured, prudent improvements to the existing system. Not surprisingly, some of these proposals have been picked up in some form by the Senate in its version of the NDAA, including: Article 60 reform, provisions regarding dismissal and statutes of limitations for sex-related crimes, the reassignment of personnel based on a report of a sexual assault offense, the participation of the victim in the clemency process, and the elimination of the MCM Rule 306 factor regarding the character and military service of the accused.[149]

One key theme in the House NDAA provisions targeting the prevention and prosecution of sexual assault is what The Heritage Foundation has been saying from the beginning: Proceed with caution.[150] Instead of passing a radical, unnecessary, and untested reform to the military justice system as

the Gillibrand proposal does, the House NDAA takes a more prudent course and directs the Response Systems Panel established under Section 576 of the 2013 NDAA to study the potential consequences of removing the disposition authority on the reporting and prosecution of sexual assaults from the chain of command.[151]

Of the 27 provisions, three of them merit further discussion because of their potential impact on sexual assault cases.

First, Section 531 of the House proposal limits a commander's power under UCMJ Article 60 to change the findings of a court-martial or overturn convictions, a power they currently have under the law. In the House-passed revision to Article 60, a commander may set aside a finding of guilty or change a finding of guilty to a lesser included offense only for qualified offenses. A qualified offense would not include those offenses for which the maximum punishment is more than two years; a sentence that includes dismissal, a dishonorable discharge, or confinement for more than six months; an offense under Article 120 (sexual assault offenses), as well as the other categories listed in Section 531(b).[152] In order to bring more transparency to the system, the House also amended Article 60 to require a commander who does make use of Article 60 powers with respect to a qualified offense to put the reason for the change in writing and make it part of the trial record.[153]

Two other provisions provide mechanisms for ensuring additional accountability for commanders. This is important, as critics of the current system argue that some commanders who fail to investigate allegations of sexual assault suffer no adverse consequences from not investigating. These provisions provide for a record of sexual assault reports that can be used against commanders who fail to take the appropriate action. They also provide a way to include a lack of proper command climate in a commander's fitness report. Section 545 requires that an incident report be submitted and provided to the installation commander, the first O-6 in the victim's chain of command, and the first general or flag officer in the victim's chain of command within eight days after an unrestricted sexual assault report is made.[154] The purpose of the report is "to detail the actions taken or in progress to provide the necessary care and support to the victim of the assault, to refer the allegation of sexual assault to the appropriate investigatory agency, and to provide the initial notification of the serious incident when that notification has not already taken place."[155]

In addition to incentivizing commanders to investigate allegations of sexual assault in their command, the House also passed Section 547, which focuses on offenders. It requires commanders to include those letters of reprimand, non-punitive letters of actions, and counseling statements that involve "substantiated cases" of sexual assault or harassment that a service member receives in his or her performance evaluation.[156] The purpose of this provision is explicitly stated: to provide commanders with additional background information regarding members of their unit; to identify and prevent trends of bad behavior early before repeated actions hinder a positive command climate; and to prevent the transfer of sex offenders.[157]

In summary, the House sexual assault provisions included in the NDAA take a measured, pragmatic approach to further improving the military justice system.

Military Could Benefit from Career Litigation Tracks

A dispassionate review of training and career development best practices from large city district attorney and public defender offices shows that the military has adopted and deployed similar professional training for military prosecutors and defense counsel across the services. Litigation training for military attorneys is ubiquitous, and sexual assault-specific training has taken place over the years, but has increased dramatically in the last few years.

However, with the exception of the Navy, the services have failed to develop career litigation tracks for prosecutors and defense counsel like the civilian bar. This common and best practice should be the optimal end state and will require modest adjustments within the Army and Air Force JAG Corps, and for Marine Corps judge advocates. However, these modifications are entirely feasible as this paper demonstrates and will further improve the delivery of services to victims and defendants alike.

Best Practices: Public Defender Offices. Although each large public defender office across the country has a slightly different way to train and develop professional criminal defense attorneys, there are many similarities between these offices. At the outset, it is important to note that there is no central national training organization

for public defender offices like district attorneys have. Prosecutors have the National District Attorney's Association (NDAA) and the Association of Prosecuting Attorneys (APA), each of which offers professional training on a host of topics for prosecutors, including military prosecutors. That said, the National Association of Criminal Defense Lawyers (NACDL) and the National Legal Aid and Defenders Association (NLADA) offer top-notch courses to criminal defense attorneys, including public defenders and JAGs. Additionally, many states as well, as the federal public defender system, have state-wide public defender organizations which provide continuing education to public defenders in the area of criminal defense, geared to all levels of practice.

For example, the California Public Defender Association (CPDA) offers both a basic trial skills and intermediate trial skills seminar annually. The New York State Defender Association (NYSDA) Defender Institute offers a program called The Basic Trial Skills Program, which is an intensive, nationally recognized trial advocacy trainer held each summer at Rensselaer Polytechnic Institute in Troy, New York.

New public defenders in large offices are put through an in-house training course that lasts one to three weeks—defense attorney-specific training, taught by seasoned defense attorneys. This training is designed to supplement the attorney's education and focuses on all aspects of the law: evidence, procedure, and practice as it relates to misdemeanor practice.

This basic training in large public defender offices is both similar and different than the training JAGs receive in their basic lawyer courses. Basic military lawyer courses, on average, last eight weeks. They are generic courses, aimed at familiarizing all JAGs with any number of subjects, including legal assistance, evidence, criminal law, criminal procedure, the Rules for Court-Martial, and a multitude of other topics. Student JAGs receive the same course work from the same instructors, whether they are slated to become prosecutors or defense attorneys. The course material is not assembled and taught by defense attorneys exclusively for new defense attorneys, or seasoned prosecutors exclusively for new prosecutors. These new attorneys, some of whom will be thrust into contested courts-martial in a matter of weeks, are not given the benefit of defense/prosecution-specific training.

Topics during the indoctrination course for the San Diego Public Defender course include evidentiary objections, search and seizure, speedy trial, criminal discovery, subpoenas, common misdemeanor offenses, and misdemeanor sentencing, as well as procedural issues and training on client interviewing and counseling. All topics are taught by seasoned, experienced public defenders.

Additionally, all new attorneys in the San Diego Public Defender's Office begin in the Central Misdemeanor Unit. Training commences with a week-long orientation focusing on substantive law and courtroom procedure. Then trainees are given a misdemeanor caseload, and an experienced team leader supervises them and provides support and direction when needed. Before progressing to felony practice, attorneys must demonstrate trial proficiency and good legal skills. Similarly, new hires in the Philadelphia Defender Association begin with a three-week intensive classroom-training program, including mock trial simulations.

Such training is vital, as it allows seasoned counsel to orient new criminal defense attorneys to the law, issues, cases, and practice pointers—before they ever step into the courtroom. In addition to classroom work, these beginner courses typically include mock courtroom exercises, such as direct examination of witnesses, cross-examination of witnesses, opening statements, and closing arguments. Best practices include mock exercises followed by critique by senior attorneys in the office.

To their credit, the JAG schools have begun to videotape new counsel during mock courtroom exercises. Yet the critique of counsel, arguably the most important learning tool, is conducted by instructors who (for the most part) teach basic trial advocacy teaching points, rather than defense- or prosecutor-specific training. JAG instructors do this because they do not want to come across to students as a "defense-oriented" or "prosecution-oriented" instructor. Of course, that is exactly what new defense counsel desperately need: defense-oriented advice from experienced, career defense attorneys.

After successful completion of new attorney training, new public defenders are then typically sent to a misdemeanor trial rotation. During that rotation, which varies in length but can last from one to three years depending on the office, new public defenders are assigned the entire range of misdemeanor cases. Those cases typically include things

like petty theft, passing bad checks, fraud, trespass, public intoxication, and disorderly conduct.

Learning how to defend these types of cases takes time. This process includes learning how to interview witnesses, and how to work with investigators (if they are available), and how to cross-examine police officers (a key skill for criminal defense attorneys). They also learn the delicate art of working with clients.

Because it takes time and experience, including trying cases before juries, the model public defender office requires attorneys to prove themselves before handling more complicated misdemeanor or low-level felony cases. Many offices require new counsel, either before or after a misdemeanor trial rotation, to defend juveniles in juvenile court. There, counsel defend juveniles on charges ranging from simple assault to attempted murder, getting experience with more serious crimes but not serious sentence exposure, as juveniles typically can only be held while under the jurisdiction of the juvenile court.

The concept of "dwell time"—spending time in one area before moving on to the next—is not unique to large city public defender offices. For example, in Virginia, new public defenders are typically responsible for a misdemeanor caseload and are not allowed to move on to felonies until their office gives them permission to advance.[158] The University of Virginia Law School handbook warns potential applicants "felony cases are often the cases which draw attorneys to this work in the first place and even the most active misdemeanor practice can become stultifying after a year or two."[159] Stultifying or not, professionals know that it takes a year or more of courtroom experience before a criminal defense attorney is ready to handle more complicated crimes.

For example, the Dade County Public Defender's Office trains attorneys with less than two years of experience in the County Court Division, where there is an emphasis on training and education.[160] "Where possible, the Training Attorney should second chair trials, to permit the lawyer to learn by performance and observation." In Alameda County, California, public defenders are assigned to felony cases by the end of their third year.[161] This practice stands in sharp contrast with most JAG attorneys who often are assigned to defend felony cases—including rape and sexual assault cases—in their first litigation tour. This practice, which occurs across the services, needs to end. It is not fair to the JAGs ordered to take on these complex cases so early in their careers, and it is certainly not fair to victims or defendants. No large city district attorney or public defender office would ever support such a practice.

In the San Diego County Public Defender's Office, one of the finest in the country, new attorneys are assigned to a misdemeanor caseload. It is only when these lawyers have "demonstrated trial proficiency and good legal skills" that they are allowed to take on felony cases.[162] Assignment to the misdemeanor unit lasts 18 to 24 months before transfer to an independent calendar of misdemeanors in the outlying branch offices around San Diego County. There, these neophytes spend another 18 to 24 months trying more misdemeanor cases. Similarly in Santa Clara County, entry-level attorneys are assigned misdemeanors until they have proven themselves capable of handling a more complex caseload.[163]

Many public defender offices have mentor programs in which new lawyers are paired with more experienced public defenders.[164] In addition, public defenders are encouraged to participate in continuing legal education and training programs.[165] For example, the Defender Association of Philadelphia's New Attorney Training Program is a year-long program that combines lectures with hands-on, supervised courtroom experience and independent courtroom experience.[166]

Upon "graduating" from misdemeanors, an attorney starts defending lower-level felony cases. It takes years of work in many of the finest offices before any public defender will be given the responsibility of handling a violent felony or rape case. The best career tracks take a "crawl, walk, run, and sprint" approach to attorney development, where attorneys gain experience over time, starting with misdemeanors, then complicated misdemeanors, then low-level felonies, then more complicated felonies, and ultimately the most serious cases.

Finally, the best public defender offices in the country have full-time criminal investigators. This is an invaluable resource, as experienced investigators, working closely with public defenders, assist the defense in the pretrial, discovery, and trial portions of cases. Their work, protected under the attorney-client privilege, gives attorneys a fighting chance to develop facts and other evidence that is rarely provided to them by the government and is crucial for the proper representation of their clients. Professional criminal investigators also unearth

information that assists the defense in deciding whether to agree to a guilty plea; thus, they contribute to the efficient disposition of cases. In other words, even though it costs money to hire full-time criminal investigators, it also saves money in the long run because good investigations often result in dispositions short of trial, in the form of reduced charges, charges being dropped, or guilty pleas.

Best Practices: District Attorney Offices. Not surprisingly, large city district attorney's offices also devote enormous amounts of resources and time to train new prosecutors on their job responsibilities. Beginning with introductory courses, these programs last from one to three weeks and include classroom instruction and mock court. Training topics, taught by prosecutors for prosecutors, include things like the rules of evidence and procedure, constitutional rights, conducting basic investigations, bail and bond hearings, and jury selection.[167] The best introductory training courses include classroom training and hands-on training, such as mock court, visits to the courthouse and jail, and demonstrations from police officers about drug, gun, prostitution, and other cases.

The model district attorney's office offers a career path in which litigators gain experience on small cases and eventually progress to larger ones.[168] In most district attorney's offices, new attorneys are given a misdemeanor caseload to gain sufficient experience before they are allowed to work the more complex felony cases.[169]

For example, in the Suffolk County District Attorney's Office, entry-level attorneys start with misdemeanors and violation offenses in the District Court Bureau.[170] Some Assistant District Attorneys (ADA) handle their misdemeanors in the Domestic Violence Unit.[171] When an ADA has sufficient trial experience, he moves on to the Case Advisory Bureau where he will be able to gain experience with felony cases.[172] After that, an ADA will move on to a division of the office where he will gain specialized skills.[173]

Also of note is the Bronx District Attorney's Office (380 attorneys), which has an impressive career development track. There, new Deputy District Attorneys (DDA) begin their careers with a mandatory three-week, in-house course where they are trained by experienced career prosecutors. Eighty percent is classroom work, but 20 percent involves simply observing arraignments, trials, etc. Bronx DDAs then go through an intensive three-year misdemeanor rotation, with 85 percent of them handling general misdemeanors and 15 percent going to specialized units such as Sex Crimes, Investigations, Domestic Violence, or Appeals.

At the six-month to one-year mark, all Bronx DDAs go through another three-week course, this time aimed at teaching them everything they need to know about felony cases. They use a current misdemeanor case as a teaching tool and, through intensive mock trial, are trained on every aspect of the case—including investigation, charging, jury selection, direct and cross- examination, opening statements, and closing arguments. DDAs then rotate back to a specialized unit to try more misdemeanors or to the Grand Jury unit, and then on to other specialized units. Regardless of where they rotate in the first three years, they are trying misdemeanor cases.

Going into their fourth year in the office, Bronx DDAs then take a month-long intensive training course focused exclusively on felony trials. At this point in their careers, DDAs have tried approximately five to 10 misdemeanor trials, carried an average caseload of 150 cases, and have done approximately 750 guilty pleas. Over a 20-year-plus career in the Bronx DA's Office, a career prosecutor will have tried 50 to 100 jury trials, pleaded out thousands of cases, conducted thousands of direct/cross examinations, and interviewed tens of thousands of witnesses.

The Philadelphia District Attorney's Office develops new prosecutors in much the same way. The first year is spent in the Municipal Court Unit, handling misdemeanors and felony preliminary hearings.[174] Then the prosecutor moves to the Juvenile Unit, and handles juvenile crimes, including felonies and misdemeanors, for approximately six to 12 months.[175] After that, the prosecutor handles felony waivers for approximately a year.[176] Only after completion of this track does an ADA choose a unit in which to specialize, including the Family Violence and Sexual Assault Unit.[177] In other words, before a prosecutor in the Philadelphia District Attorney's Office is allowed to handle a sexual assault case, that prosecutor has had a minimum of two and a half years of experience trying cases of varying complexity.

Many jurisdictions also provide mentors for less-experienced prosecutors.[178] Both entry-level and experienced prosecutors attend continuing legal education.[179]

Finally, just as the best public defender offices around the country have full-time criminal

investigators, the best DA offices employ criminal investigators as well. They work closely with prosecutors and law enforcement to build cases. Civilian prosecutors also develop close working relationships with law enforcement, often working side-by-side from the investigation to the conclusion of a case. These relationships are founded on trust and confidence that has been built up over years. Senior prosecutors come to rely on senior law enforcement and vice versa. Although they serve different purposes, and naturally disagree on some matters, a close working relationship between law enforcement and prosecutors is indispensable in the quest for justice.

To conclude, the combined JAG Corps have done an admirable job in providing litigation training, including sexual assault training, to military prosecutors and defense counsel, even when compared to their civilian counterparts. By establishing career tracks for military prosecutors and defense counsel, the Army, Air Force, and Marine Corps would align themselves with best practices, thereby providing better legal services to victims and defendants alike.

Suggested Elements of a JAG Career Litigation Track. The military justice system has a long history of excellence. Uniformed military lawyers have distinguished themselves everywhere they have served. As part of this system, the JAG Corps exists to provide legal support and advice to the client, which, in this case, is the service: the Navy, the Army, the Air Force, or the Marine Corps. As such, the JAG Corps, like military doctors and nurses and chaplains, staff the warfighters, which is why they are referred to as part of the "staff corps." Attorneys in uniform, the JAG Corps are all graduates of ABA-accredited law schools. They are admitted to, licensed by, and subject to the professional supervision of a state or the District of Columbia. They have all graduated from officer school and military justice school. Some are former pilots, special forces, line officers, intelligence officers, or come from other military occupational specialties before joining the JAG Corps. They are commissioned officers and fully integrated within the armed forces.

Unlike their civilian counterparts, JAGs are fully deployable, at a moment's notice. Each JAG has met demanding physical fitness requirements and has been given appropriate security clearances. Todays' recruits hail from some of the top law schools in the country. Competition to get into the JAG Corps is keen, as many law school graduates are naturally drawn toward the challenges of life as a military lawyer.

The services offered by JAGs are in high demand across the military, as commanders of all services have benefited from the advice and counsel of these attorneys. The following is a partial list of the assignments or subject matter expertise, in addition to defense and prosecution duties, of JAGs:

- Staff Judge Advocate;
- International and Operational law;
- Environmental law;
- Health care law;
- Personnel law;
- Legal assistance;
- Claims and tort litigation;
- Administrative law;
- General civil litigation;
- Admiralty and maritime law;
- Cybersecurity;
- Information operations;
- Intelligence law;
- Labor law;
- Government contract and commercial law;
- Air and space law; and
- Fiscal law

However, the fact of the matter is that the primary duty of the JAG Corps is to prosecute and defend courts-martial. While the rest of American legal community has already moved to increased specialization a long time ago, the JAG Corps has, for the most part, rejected specialization when it comes to

litigation. Today's civilian career prosecutors and defense counsel in large city offices are, by definition, specialists. Not only do they dedicate their careers to either prosecution or defense, many further specialize in a type of crime, like homicide, domestic violence, sex crimes, etc. Part of this narrowing of one's practice is a function of the high volume of cases in large cities, but much of the decision to specialize comes from the basic fact that becoming an expert takes time.

The military, by contrast, has a much lower volume of criminal cases than the civilian bar. (See Appendix B.) That is a good thing, and in part stems from the fact that the military does not recruit people with criminal records, and military personnel tend to be law abiding. But with the lower volume of cases comes the heavy responsibility of prosecuting and defending serious cases. Often, because of the lack of career litigation tracks, those cases are prosecuted and defended by JAGs who have little actual trial experience—a reality that provides even more reason to carve out career litigation tracks for military defense and prosecution.

What would a JAG Corps litigation track look like if it was built around the uniqueness of the military justice system and military life in general, but borrowing best practices from the civilian bar? Today, the Navy has 830 active duty JAGs, 65 of whom are in the career litigation track. That career track, still in its infancy, has begun to show promising results. Active duty Navy JAGs can apply to become part of the Military Justice Litigation Career Track (MJLCT), and, if accepted, are then designated as JAGs with a Military Justice Litigation Qualification (MJLQ)

The reason behind the creation of the Navy's career litigation track is contained in the implementing instruction: "The JAG Corps recognizes that litigation skills are perishable; therefore, we must identify judge advocates with the requisite education, training, experience and aptitude to litigate and preside over complex cases and to continue to cultivate their development." Within the Navy's litigation MJLQ track, judge advocates advance from entry-level litigators (Specialist I), to intermediate (Specialist II), to experienced litigators (called Expert).

Candidates will normally be eligible to apply for Specialist I designation after their fourth year on active duty, and must have tried at least five jury trials. At about the 10th year on active duty, Specialist Is can apply for Specialist II designation. To be considered for Specialist II designation, candidates must have tried at least 10 jury trials. At about the 16th year of active duty, MJLQ Specialist IIs may apply for Expert designation; candidates must have tried at least 20 jury trials. Officers have seven years to advance from Specialist I to Specialist II, and seven years to move from Specialist II to Expert.

These minimum jury trial requirements pale in comparison to the dozens or hundreds of jury trials career civilian prosecutors and public defenders try during the course of their careers. That is all the more reason the JAG Corps must adopt career tracks, as it gives military attorneys the chance to get actual trial experience so as to better represent victims and defendants alike.

Those on the Navy litigation track selection board look at the number of contested trials, but also include other indicia of experience, such as the number of direct examinations, cross-examinations, dealings with experts, opening statements, closing arguments, and jury selection. Applicants may submit letters of recommendations from other more experienced JAGs, including from military judges.

The Navy's career litigation track anticipates at least one "disassociated tour" early in one's career. A disassociated tour is a tour of duty where a judge advocate will do something other than litigation, such as a deployment or Staff Judge Advocate job. This idea has a lot of merit, as it familiarizes the young judge advocate with Navy operations outside of litigation, and makes the judge advocate a better advocate because of those experiences. Those in the career track also have the opportunity to go to law school to get an LLM in trial advocacy, paid for by the government.

Despite the concerns of some who feared that JAGs who specialize would hurt their chances for promotion, Navy judge advocates in the career litigation track have been promoted at the same or better percentage than Navy JAGs not in the litigation track. Indeed, Navy leaders have inserted language in promotion selection board precepts to ensure that an adequate number of litigation specialists are selected for the next rank each promotion cycle. These specialists can remain in the litigation track throughout their career if they prove themselves and are promoted accordingly.

In time, as the Navy refines its litigation track policies, training and practices, and more litigation track judge advocates gain invaluable experience,

victims and defendants will be better served. Victims of sexual assault will work with military prosecutors who have accumulated years of experience, much like their civilian counterparts.

There is every reason to believe that the Army (over 1300 JAGs), the Air Force (over 1100), and the Marine Corps (556) could create similar career tracks for their military lawyers. Creating career tracks within those services will take careful planning but can and should be done.

The structure of the Navy's career litigation track may not be the model other services should copy, but it is well thought out structurally and in its implementation. Indeed, each service is unique from its sister service, thus necessitating a unique and custom career litigation track structure. Each JAG Corps, although they have many similarities, serves different clients and operates under service-specific rules. Likewise, each JAG Corps is fully capable, if required, of developing a career litigation track appropriate for its mission.

At a minimum, a service career litigation track should have several attributes based on best practices and the unique nature of military practice. Such a career track would do the following:

- Give judge advocates, early in their litigation career, the opportunity to serve as both trial and defense counsel. This practice of serving as both trial and defense counsel is unique to the military, and gives judge advocates a better appreciation for the challenges of each job.

- Establish a viable career litigation track. Consider carving out separate career tracks for prosecutors and defense counsel. If designing a prosecutor and defense career track, give entry-level, career-track litigators the opportunity to try both prosecution and defense before being forced to choose between the two tracks.

- Provide for training opportunities at all stages of a litigation career. This should include defense attorney-specific training taught by experienced defense attorneys, and prosecutor-specific training taught by experienced prosecutors, at entry-level, intermediate, and advanced levels.

- Require that judge advocates have one "disassociated tour," preferably early in their careers, so they can get to know the service members whom they will represent.

- Give the Service Secretary the flexibility to insert precept language in promotion selection boards requiring selection of a certain percentage of military justice career-track judge advocates.

- Provide for an opportunity for litigation career-track judge advocates to get an LLM in criminal law/litigation.

- Establish and fully fund full-time defense criminal investigators.

Conclusion: Steps for Congress

Military law has a long and distinguished history. It has evolved over the centuries and America's military justice system is a model for other countries to emulate. Judge advocates from each service have visited uniformed attorneys from myriad other countries to train them on our Constitution, the rule of law, and our military justice system. The global nature of America's armed forces and the complex world in which we live—where law, rules and regulations govern much of what we do—requires that each service have qualified, fully deployable judge advocates. The demand for judge advocates, experienced in an impressive variety of legal disciplines, is only going up, not down.

Although new areas of law have emerged (intelligence law, space law, cyber law) that will require specialization, the demand for highly trained uniformed attorneys to defend and prosecute courts-martial is constant. Today's courts-martial, especially felonies, are more complicated to prosecute and defend than in years past. There are more expert witnesses; there is more forensic and scientific evidence; and there is a need for a more sophisticated approach in pretrial motions from both defense and prosecution. Because of this, there is all the more need for career prosecutors and defense counsel who specialize in their fields. Gone are the days when the services can "get by" with attorneys who learn on the fly and are generalists. It takes decades to create a great litigator, and years in court before an attorney is properly prepared to handle the most serious cases, including sexual assault cases. Forcing JAGs to prosecute or defend sexual assault cases in their first or second litigation tour, before they gain the breadth of

experience they really need in all variety of cases, is unwise and unnecessary. Yet that is what happens in military courtrooms right now.

Victims of crime deserve and should expect that their cases will be handled by career military prosecutors. Defendants, especially those accused of felonies, deserve and should expect that career military defense counsel will also handle their cases.

Improving the already outstanding criminal justice system in the military is a noble and worthwhile cause. That unique system of justice—similar to, but distinctly different from its civilian cousin—revolves around the concept of enforcing good order and discipline in the armed forces. Arbitrarily taking commanders out of the business of enforcing good order and discipline within their ranks is not the way to better the military's criminal justice system. Such an approach is a risky proposal that will harm victims and severely undermine a commander's ability to enforce good order and discipline.

Rather, the prudent way to improve the military justice system is to build upon the current system, adopt those policies that enhance the delivery of services to victims and defendants alike, and develop career litigation tracks for military prosecutors and defense counsel.

Appendix A: Sexual Assault Prevention Training Important and Ongoing

Over the last five years, on average, the military has successfully recruited 165,644 civilians into active duty in the armed forces. Each year, tens of thousands of people leave the armed forces, either through retirement or by completing their obligated service. Thus, the turnover of personnel within the armed forces is quite fluid. Those new recruits must be trained on a host of topics, including but not limited to rules and regulations within the armed forces.

One critic of the current system says you "can't train your way out of this [sexual assault] problem." While that is true, sexual assault prevention training must remain part of the solution.

A misimpression in this debate is that the military does not take the problem of sexual assault seriously and that service personnel lack substantial awareness of the issue. The facts contradict that impression. Anyone who has served on active duty since at least 1992 knows that annual general military training (GMT) includes training about sexual assault and sexual harassment. Service members receive mandatory sexual assault awareness training throughout their military careers, including accession training, professional military education, and pre-command training.[180] SAPR policy also requires annual sexual assault training for all service members.[181]

In 2012, each branch of the military continued to implement training programs aimed at eradicating sexual assault from the military. The Army continued their I. A.M. Strong campaign, which focuses on creating a climate free of sexual assault.[182] The Navy implemented "bystander intervention training" at all technical training locations. The Navy also implemented Take the Helm training for those in leadership to raise awareness of sexual assault and the SAPR program, create a proper command climate through responsible leadership, and explain prevention strategies.[183] The Marine Corps implemented a Command Team Training program to educate commanders on their responsibility to maintain a proper command climate.[184] Junior non-commissioned officers participate in Take a Stand training, in which they teach enlisted members bystander intervention.[185] The Marine Corps also required the completion of ethical decision games for all-hands training.[186] The Air Force completed its service-wide Bystander Intervention Training, which consisted of 90-minute classes in which members participated in guided discussions about realistic scenarios.[187]

In 2012, SAPRO implemented the DOD Sexual Assault Advocate Certification Program (D-SAACP).[188] This program has three functions:

1. It creates a credentialing infrastructure for sexual assault response coordinators (SARC) and sexual assault prevention and response victim advocates (SAPR VA).

2. It provides a framework for "skill-based competencies."

3. It conducts oversight and evaluation of SARC and SAPR VA training.[189]

Each branch of the armed services is also working to increase the level of awareness of reporting options. For example, the Army provided instruction on reporting in all Army training, in SHARP training, and through newspapers, public service announcements, pamphlets, and other similar media.[190] The Navy produced a marketing campaign focused on awareness of the SAPR program, which included website messages, printed materials, and public service announcements.[191] The Marines provided reporting information in all SAPR training materials, and on websites, helplines, and in print materials.[192] In its annual SAPR Leader Summit, the Air Force emphasized reporting,[193] while providing localized reporting information including postings on bulletin boards and the Commander's Access Channel.[194]

SAPRO also reports statistics on service members' views on sexual assault training. Among active duty personnel, 96 percent of women and 97 percent of men stated they received sexual assault training in the previous year.[195] Ninety-four percent of both women and men responded that the SAPR training provided a "good understanding" of what constitutes sexual assault.[196] Ninety-four percent of both men and women stated the training explained the available reporting options, 92 percent of women and 93 percent of men responded they were trained on the points of contact for reporting a sexual assault, and 92 percent of women and 93 percent of men responded that they were trained on the resources available for victims.[197]

These numbers indicate that training about sexual assault is pervasive and ongoing. Ongoing training is critically important, as it contributes to a climate of respect for all individuals, thus reducing the incidence of sexual assault. While there may be room for further improvement, it is unlikely that more training alone is going to substantially reduce the incidence of sexual assault.

Appendix B: Number of Army, Navy/Marine Corps, and Air Force Courts-Martial, Including Guilty Pleas from 1997–2012

The statistics contained in Table 1 on the next page represent the number of courts-martial held in each branch of the armed forces from 1997–2012, as reported by the services to the CAAF. These numbers are broken out by type of court-martial (General v. Special) and whether the forum was military judge alone (a bench trial) or a member's trial (jury trial).

These statistics include guilty pleas, which represent the vast majority of cases held each year. Thus, when compared to the volume of cases in any large city district attorney and public defender office, the opportunity for JAGs to try contested cases is quite small.

From 1997–2012, the number of Army general courts-martial decreased by 16, from 741 in 1997 to 725 in 2012.[198] The Navy/Marine Corps felony caseload decreased by 299 general courts-martial, from 548 in 1997 to 249 in 2012, and a decrease in misdemeanor cases of 2,225, from 2,698 in 1997 to 473 in 2012.[199] The Air Force witnessed a decrease of 345 felony cases, from 527 general courts-martial in 1997 to 182 in 2012, and a decrease in misdemeanor cases of 19, from 408 special courts-martials in 1997 to 389 in 2012.[200] As a result, there are fewer cases to go to around, and those that do arise tend to be more complicated than in years past. By contrast, most civilian public defender and prosecutor offices in large cities handle thousands of guilty pleas per year and hundreds of jury trials.

APPENDIX B TABLE 1

Army, Navy/Marine Corps, and Air Force Courts-Martial (CM), Including Guilty Pleas

ARMY	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Judge-General CM	499	514	533	555	588	626	537	520	652	606	632	536	462	452	476	555
Judge-Special CM	217	214	329	312	295	499	559	603	624	508	576	444	455	390	406	419
Members-General CM	242	171	202	176	182	162	152	127	173	143	177	138	161	158	158	170
Members-Special CM	108	73	105	74	62	93	85	79	76	71	59	44	103	64	56	46

NAVY/MARINE CORPS*	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Judge-General CM	427	346	256	344	397	403	249	241	278	229	215	191	177	78	193	147
Judge-Special CM	2437	2143	1965	2250	2147	2077	1732	1746	1512	1226	944	895	739	118	485	366
Members-General CM	121	130	93	84	84	96	66	72	81	49	82	78	59	44	101	102
Members-Special CM	261	180	137	131	117	111	116	126	98	75	105	89	99	33	119	107

AIR FORCE	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Judge-General CM	300	246	238	258	277	359	235	213	262	193	193	97	105	105	130	79
Judge-Special CM	236	164	178	187	154	246	311	319	362	335	335	188	238	208	193	180
Members-General CM	227	196	183	180	213	205	116	143	160	148	148	106	117	110	132	103
Members-Special CM	169	140	155	133	186	138	160	195	155	120	120	172	181	172	209	209

* Navy and Marine Corps military justice statistics are reported as a unit.
Source: United States Court of Appeals for the Armed Forces (CAAF), annual reports for 1997–2012, http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm (accessed October 31, 2013).

Endnotes

1. See John D. Altenburg, *Military Justice*. National Security Law: Fifty Years of Transformation—An Anthology (2012).
2. Claire McCaskill & Loretta Sanchez, *Commanders Must Fight Sexual Assault in the Military*, USA Today, Aug. 29, 2013, *available at* http://www.marshfieldnewsherald.com/usatoday/article/2725081.
3. *See* Manual for Courts-Martial, R.C.M. 504, R.C.M. 103(6); UCMJ, art. 22.
4. *See* Manual for Courts-Martial, R.C.M. 504.
5. *See* Manual for Courts-Martial, R.C.M. 503(a)(1).
6. Charges are "filed" by the prosecutor in the civilian criminal justice system. In some jurisdictions, prosecutors seek indictments from a grand jury, and the grand jury issues an indictment. In the military, prosecutors do not "file" charges. Rather, the convening authority "refers" charges to a court-martial. *See* Manual for Courts-Martial, R.C.M. 407.
7. UCMJ, art. 60(a).
8. UCMJ, art. 60(b)(1).
9. UCMJ, art. 60(c)(2).
10. *Oversight: Pending Legislation Regarding Sexual Assaults in the Military: Hearing before the S. Comm. on Armed Services*, 113th Cong. (June 4, 2013), http://www.armed-services.senate.gov/hearings/event.cfm?eventid=a98b6adb153eafb92badf66142162840.
11. *Id.* (statement of Col. Martin).
12. *Id.* (statement of Col. King).
13. *Id.* (statement of Col. Leavitt).
14. *Id.* (statement of Col. King).
15. *Press Conference on Military Sexual Assault Reforms* (Jul. 25, 2013) (statement of Sen. McCaskill), http://www.youtube.com/watch?v=Le8lDEwekTE. For Sen. McCaskill's comments to commanders at the recent hearing, see *Oversight: Pending Legislation Regarding Sexual Assaults in the Military: Hearing before the S. Comm. on Armed Services*, 113th Cong. (Jun. 4, 2013), http://www.armed-services.senate.gov/hearings/event.cfm?eventid=a98b6adb153eafb92badf66142162840.
16. McCaskill & Sanchez, *supra* note 2.
17. *See, e.g.*, *Press Conference on Military Sexual Assault Reforms* (Jul. 25, 2013) (statement of Col. Ana Smythe, USMC (Ret.)), http://www.youtube.com/watch?v=Le8lDEwekTE ("If we dismantle or weaken the chain of command we are lost … don't throw away the structure on which the military is built, don't take away from the commander the most important thing he has…. It will be better for the victim because the commander sets the climate…."); *id.* (statement of Col. Lisa Schenck, JAG, USA (Ret.)) ("If you take out the convening authority from the process, you are essentially gutting the military justice process."); *id.* (statement of Chief Petty Officer Penny Collins, USCG Reserve (Ret.)) ("In my opinion, the commands need to maintain that authority for investigation or prosecution of sexual harassment or sexual assault.").
18. *Id.* (statement of Chief Master Sergeant Taylor, USAF (Ret.)).
19. *Id.* (statement of Fleet Master Chief DiRosa, USN (Ret.)).
20. *See, e.g.*, Letter from Brigadier Gen. Richard C. Gross, USA, Legal Counsel to the Chairman of the Joint Chiefs of Staff to Sen. Carl Levin (Jul. 19, 2013) ("Yesterday at the reconfirmation hearing for General Dempsey and Admiral Winnefeld, and earlier at the recent Senate Armed Services Committee hearing on sexual assault, several Senators had questions about our allies' military justice systems."); Patrick J. Murphy, *Why Senator Gillibrand is Right About Military Sexual Assault*, MSNBC, Jun. 17, 2013, http://tv.msnbc.com/2013/06/17/why-senator-gillibrand-is-right-about-military-sexual-assault/.
21. Letter from Sen. James M. Inhofe to Senate Colleagues (Jul. 26, 2013).
22. Letter from Brigadier Gen. Richard C. Gross, USA, Legal Counsel to the Chairman of the Joint Chiefs of Staff to Sen. Carl Levin (Jul. 19, 2013).
23. *Id.*
24. *Press Conference on Military Sexual Assault Reforms* (Jul. 25, 2013) (statement of Col. Schenck), http://www.youtube.com/watch?v=Le8lDEwekTE.
25. Letter from Brigadier Gen. Richard C. Gross, USA, Legal Counsel to the Chairman of the Joint Chiefs of Staff to Sen. Carl Levin (July 19, 2013).
26. Letter from Sen. James M. Inhofe to Senate Colleagues (Jul. 26, 2013).
27. In 1997 the reports were between 8 and 12 pages long, and in 2012 the reports were 15, 19, and 29 pages long. *See* Annual Report of the Code Committee on Military Justice Including Separate Reports of the U.S. Court of Appeals for the Armed Forces, The Judge Advocates General of the U.S. Armed Forces and the Chief Counsel of the U.S. Coast Guard for the Period October 1, 1996 to September 30, 1997 at § 3, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY98Rept.htm [hereinafter 1997 CAAF Report]; *id.* at § 4; *id.* at § 5; Annual Report Submitted to the Committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense, Secretary of Homeland Security and Secretaries of the Army, Navy and Air Force Pursuant to the Uniform Code of Military Justice for the Period October 1, 2011, to September 20, 2012, at § 3, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY12AnnualReport.pdf [hereinafter 2012 CAAF Report]; *id.* at § 4; *id.* at § 5.

28. Annual Report of the Code Committee on Military Justice Including Separate Reports of the U.S. Court of Appeals for the Armed Forces, the Judge Advocates General of the U.S. Armed Forces for the Period October 1, 2004 to September 30, 2005 § 3 at 13–14, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY05AnnualReport.pdf [hereinafter 2005 CAAF Report] (Fact pattern in Basic Course altered to reflect mandatory training of the Sexual Assault Response Program); *id.*, § 5 at 6 (Air Force continued to develop and implement sexual assault prevention and response, including the training of JAGs, sexual assault response coordinators, victim advocates, Air Force Office of Special Investigations Agents, and medical personnel). The Air Force program continued to be recognized in subsequent reports. *See e.g.*, Annual Report of the Code Committee on Military Justice Including Separate Reports of the U.S. Court of Appeals for the Armed Forces, the Judge Advocates General of the U.S. Armed Forces for the Period October 1, 2006, to September 30, 2007, § 5 at 10, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY07AnnualReport.pdf [hereinafter 2007 CAAF Report]; Annual Report of the Code Committee on Military Justice Including Separate Reports of the U.S. Court of Appeals for the Armed Forces, the Judge Advocates General of the U.S. Armed Forces for the Period October 1, 2007, to September 30, 2008, § 5 at 9, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY08AnnualReport.pdf [hereinafter 2008 CAAF Report]; Annual Report of the Code Committee on Military Justice Including Separate Reports of the U.S. Court of Appeals for the Armed Forces, the Judge Advocates General of the U.S. Armed Forces for the Period October 1, 2008 to September 30, 2009 § 5 at 12, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY09AnnualReport.pdf [hereinafter 2009 CAAF Report]; Annual Report Submitted to the Committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense, Secretary of Homeland Security and Secretaries of the Army, Navy and Air Force Pursuant to the Uniform Code of Military Justice for the Period October 1, 2010, to September 20, 2011, § 5 at 14, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY11AnnualReport.pdf [hereinafter 2011 CAAF Report]. Before 2005 there were only cursory mentions of sexual assault prevention training in the CAAF reports. Before 2000, there were only two mentions of sexual assault training in the reports; a 1997 Army New Developments Course featuring an expert in the area of child sexual abuse, and a 1999 Air Force training project that included victim witness assistance training. 1997 CAAF Report, *supra* note 27, § 3 at 7; Annual Report of the Code Committee on Military Justice Including Separate Reports of the U.S. Court of Appeals for the Armed Forces, The Judge Advocates General of the U.S. Armed Forces, and the Chief Counsel of the U.S. Coast Guard for the Period October 1, 1998, to September 30, 1999, § 5 at 7, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY99Rept.htm [hereinafter 1999 CAAF Report]. From 2000–2004 the Army included a sexual assault scenario in their training. Annual Report of the Code Committee on Military Justice Including Separate Reports of the U.S. Court of Appeals for the Armed Forces, The Judge Advocates General of the U.S. Armed Forces, and the Chief Counsel of the U.S. Coast Guard for the Period October 1, 1999, to September 30, 2000, § 3 at 3, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY00Rept.htm [hereinafter 2000 CAAF Report]; Annual Report of the Code Committee on Military Justice Including Separate Reports of the U.S. Court of Appeals for the Armed Forces, The Judge Advocates General of the U.S. Armed Forces, and the Chief Counsel of the U.S. Coast Guard for the Period October 1, 2000 to September 30, 2001, § 3 at 6–7, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY01AnnualReport.pdf [hereinafter 2001 CAAF Report]; Annual Report Submitted to the Committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense, Secretary of Transportation and Secretaries of the Army, Navy and Air Force Pursuant to the Uniform Code of Military Justice for the Period October 1, 2001 to September 20, 2002, § 3 at 9, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY02AnnualReport.pdf [hereinafter 2002 CAAF Report]; Annual Report Submitted to the Committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense, Secretary of Homeland Security and Secretaries of the Army, Navy and Air Force Pursuant to the Uniform Code of Military Justice for the Period October 1, 2002, to September 20, 2003, § 3 at 9, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY03AnnualReport.pdf [hereinafter 2003 CAAF Report]. In 2000, the Army created a multidisciplinary Process Action Team Joint Counsel for Sexual Misconduct Initiatives, which recommended some improvements for the treatment of sexual assault in the Army. 2000 CAAF Report, *supra*, § 3 at 4. The Air Force introduced a sexual assault prevention policy in 2004. Annual Report of the Code Committee on Military Justice Including Separate Reports of the U.S. Court of Appeals for the Armed Forces, the Judge Advocates General of the U.S. Armed Forces for the Period October 1, 2003, to September 30, 2004, § 5 at 6, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY04AnnualReport.pdf [hereinafter 2004 CAAF Report]. The Air Force also offered a class entitled "Legal Aspects of Sexual Assault" from 2003–2006. 2003 CAAF Report, *supra*, § 5 at 8; 2004 CAAF Report, *supra*, § 5 at 8; 2005 CAAF Report, *supra*, § 5 at 8; Annual Report of the Code Committee on Military Justice Including Separate Reports of the U.S. Court of Appeals for the Armed Forces, the Judge Advocates General of the U.S. Armed Forces For the Period October 1, 2005, to September 30, 2006, § 5 at 8, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY06AnnualReport.pdf [hereinafter 2006 CAAF Report].

29. 2009 CAAF Report, *supra* note 28, § 4 at 13; *see also* 1997 CAAF Report, *supra* note 27, § 4 at 7; Annual Report of the Code Committee on Military Justice Including Separate Reports of the U.S. Court of Appeals for the Armed Forces, The Judge Advocates General of the U.S. Armed Forces, and the Chief Counsel of the U.S. Coast Guard for the Period October 1, 1997, to September 30, 1998, § 4 at 5, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/fy98/FY98CoverPage.pdf [hereinafter 1998 CAAF Report]; 1999 CAAF Report, *supra* note 28, § 4 at 8; 2000 CAAF Report, *supra* note 28, § 4 at 11; 2001 CAAF Report, *supra* note 28, § 4 at 6; 2002 CAAF Report, *supra* note 28, § 4 at 11; 2003 CAAF Report, *supra* note 28, § 4 at 9; 2004 CAAF Report, *supra* note 28, § 4 at 8; 2005 CAAF Report, *supra* note 28, § 4 at 8; 2006 CAAF Report, *supra* note 28, § 4 at 9; 2007 CAAF Report, *supra* note 28, § 4 at 7; 2008 CAAF Report, *supra* note 28, § 4 at 8.

30. 1997 CAAF Report, *supra* note 27, § 4 at 9; 1998 CAAF Report, *supra* note 29, § 4 at 6; 1999 CAAF Report, *supra* note 28, § 4 at 9; 2000 CAAF Report, *supra* note 28, § 4 at 13; 2001 CAAF Report, *supra* note 28, § 4 at 7; 2002 CAAF Report, *supra* note 28, § 4 at 13 (no advanced trial advocacy offered).

31. 1998 CAAF Report, *supra* note 29, § 4 at 6; 2001 CAAF Report, *supra* note 28, § 4 at 7; 2002 CAAF Report, *supra* note 28, § 4 at 13.

32. 2000 CAAF Report, *supra* note 28, § 4 at 13.
33. 2003 CAAF Report, *supra* note 28, § 4 at 10. Intermediate and Advanced Trial Advocacy continued to be offered. 2004 CAAF Report, *supra* note 28, § 4 at 9; 2005 CAAF Report, *supra* note 28, § 4 at 9; 2006 CAAF Report, *supra* note 28, § 4 at 10; 2007 CAAF Report, *supra* note 28, § 4 at 8; 2008 CAAF Report, *supra* note 28, § 4 at 9; 2009 CAAF Report, *supra* note 28, § 4 at 15; Annual Report Submitted to the Committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense, Secretary of Homeland Security and Secretaries of the Army, Navy and Air Force Pursuant to the Uniform Code of Military Justice for the Period October 1, 2009, to September 20, 2010, § 4 at 15, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY10AnnualReport.pdf [hereinafter 2010 CAAF Report]; 2011 CAAF Report, *supra* note 28, § 4 at 14.
34. 2012 CAAF Report, *supra* note 27, § 4 at 66–67.
35. *See, e.g.*, 1997 CAAF Report, *supra* note 27, § 4 at 4; 1998 CAAF Report, *supra* note 29, § 4 at 3; 1999 CAAF Report, *supra* note 28, § 4 at 6. 6.
36. *Id.* at 65–67 (Including: Prosecution of Alcohol Facilitated Sexual Assault, East and West Coast Sexual Assault Prosecution and Investigation Mobile Training Teams, Defending Sexual Assault Cases, Basic and Advanced SJA Courses, which include Victim Witness Assistance Program and Sexual Assault Initial Disposition Authority training, and the Senior Officer Course in Military Justice and Civil Law which includes sexual assault case disposition).
37. *Id.* at 69–70.
38. 2012 CAAF Report, *supra* note 27, § 4 at 55.
39. *Id.* at 55–56.
40. *Id.* at 56.
41. *Id.*
42. 2009 CAAF Report, *supra* note 28, § 4 at 2.
43. *Id.* at 15.
44. 2010 CAAF Report, *supra* note 33, § 4 at 2.
45. 2012 CAAF Report, *supra* note 27, § 4 at 55.
46. *Id.* at 55.
47. *Id.* at 56.
48. 2010 CAAF Report, *supra* note 33, § 4 at 17; *id.* at 20.
49. 2012 CAAF Report, *supra* note 27, § 4 at 76.
50. *Id.* at 76–77. Team is composed of an HQE, 2 experienced prosecutors, military criminal investigators, a legal administrative officer, and paralegals. *Id.*
51. *Id.* at 78.
52. *Id.* at 79.
53. 2011 CAAF Report, *supra* note 28, § 4 at 17–18.
54. This emphasis is both explicit, in terms of section length, and explicit, embedded in the formatting of the reports. For example, from 1997–2005, the Army placed the education section in the back of the report, following the reports on each division. Starting in 2006, the education and training section of the Army report placed in the front of the report. 2006 CAAF Report, *supra* note 28, § 3 at 1.
55. 1997 CAAF Report, *supra* note 27, § 3 at 6.
56. 1998 CAAF Report, *supra* note 29, § 3 at 7; *see* 1999 CAAF Report, *supra* note 28, § 3 at 8; 2000 CAAF Report, *supra* note 28, § 3 at 12; 2001 CAAF Report, *supra* note 28, § 3 at 10; 2002 CAAF Report, *supra* note 28, § 3 at 14; 2003 CAAF Report, *supra* note 28, § 3 at 13.
57. 2004 CAAF Report, *supra* note 28, § 3 at 12.
58. 2005 CAAF Report, *supra* note 28, § 3 at 13; *see* 2006 CAAF Report, *supra* note 28, § 3 at 2; 2007 CAAF Report, *supra* note 28, § 3 at 3; 2008 CAAF Report, *supra* note 28, § 3 at 4; 2009 CAAF Report, *supra* note 28, § 3 at 1–2 (new changes to the structure of the overall curriculum, but no mention of changes to advocacy training); 2010 CAAF Report, *supra* note 33, § 3 at 2.
59. 2011 CAAF Report, *supra* note 28, § 3 at 2.
60. *See, e.g.*, 1997 CAAF Report, *supra* note 27, § 3 at 6; 1998 CAAF Report, *supra* note 29, § 3 at 7 (offered two advocacy training electives); 2002 CAAF Report, *supra* note 28, § 3 at 14; 2003 CAAF Report, *supra* note 28, § 3 at 13; 2005 CAAF Report, *supra* note 28, § 3 at 14; 2006 CAAF Report, *supra* note 28, § 3 at 3.
61. 1999 CAAF Report, *supra* note 28, § 3 at 9.
62. 2000 CAAF Report, *supra* note 28, § 3 at 12 (including 11 small group practical exercises, and the student had to serve as counsel for a contested court-martial and a guilty plea); 2001 CAAF Report, *supra* note 28, §3 at 10 (current trial practitioners who are reserve judge advocates assisted in the training); 2002 CAAF Report, *supra* note 28, §3 at 14; 2004 CAAF Report, *supra* note 28, §3 at 12; 2006 CAAF Report, *supra* note 28, § 3 at 3; 2007 CAAF Report, *supra* note 28, §3 at 4. In 2012, the Criminal Law Advocacy Course was retired and replaced with Intermediate Trial Advocacy. 2012 CAAF Report, *supra* note 63, § 3 at 34.

63. 2012 CAAF Report, *supra* note 27, § 3 at 34.
64. 2011 CAAF Report, *supra* note 28, § 3 at 1; 2012 CAAF Report, *supra* note 27, § 3 at 34(except for the General Officer Legal Orientation Course, which is provided to General Officers individually).
65. 2011 CAAF Report, *supra* note 28, § 3 at 2.
66. *Id.* at 3.
67. *Id.*; 2012 CAAF Report, *supra* note 27, § 3 at 39, 41 (listing the different training provided by TCAP and DCAP focusing on sexual assault, including the sexual assault trial advocacy course).
68. 1997 CAAF Report, *supra* note 27, § 3 at 7; 1998 CAAF Report, *supra* note 29, § 3 at 7; 2000 CAAF Report, *supra* note 28, § 3 at 12.
69. 2009 CAAF Report, *supra* note 28, § 3 at 3.
70. *Id.*
71. *See, e.g.*, 1997 CAAF Report, *supra* note 27, § 3 at 2; 1998 CAAF Report, *supra* note 29, § 3 at 2; 1999 CAAF Report, *supra* note 28, § 3 at 2-3; 2000 CAAF Report, *supra* note 28, § 3 at 3; 2001 CAAF Report, *supra* note 28, § 3 at 6; 2002 CAAF Report, *supra* note 28, § 3 at 8; 2003 CAAF Report, *supra* note 28, § 3 at 8; 2004 CAAF Report, *supra* note 28, § 3 at 8; 2005 CAAF Report, *supra* note 28, § 3 at 9.
72. 2006 CAAF Report, *supra* note 28, § 3 at 12.
73. 2004 CAAF Report, *supra* note 28, § 3 at 5.
74. 2011 CAAF Report, *supra* note 28, § 3 at 15. This course "focused equally on the fundamentals of military justice and prosecution of sexual assaults." *Id.*
75. 2008 CAAF Report, *supra* note 28, § 3 at 7; 2009 CAAF Report, *supra* note 28, § 3 at 3–4.
76. 2009 CAAF Report, *supra* note 28, § 3 at 4.
77. *Id.*
78. 2012 CAAF Report, *supra* note 27, § 3 at 32–33.
79. 2010 CAAF Report, *supra* note 33, § 3 at 5.
80. These civilian venues included: the National District Attorney's Association, the National Advocacy Center, the American Prosecutor's Research Institute, and the National Center for Missing and Exploited Children. 2010 CAAF Report, *supra* note 33, § 3 at 5.
81. 2011 CAAF Report, *supra* note 28, § 3 at 12.
82. 2008 CAAF Report, *supra* note 28, § 3 at 7 (including hiring 5 additional Trial Counsel Assistance Program JAGs, 15 Special Victims Prosecutors, and 7 highly qualified experts, as well as publishing practice aids and developing training programs).
83. 2009 CAAF Report, *supra* note 28, § 3 at 11.
84. *Id.* at 3; 2010 CAAF Report, *supra* note 33, § 3 at 5.
85. 2009 CAAF Report, *supra* note 28, § 3 at 11.
86. 2010 CAAF Report, *supra* note 33, § 3 at 15.
87. 2012 CAAF Report, *supra* note 27, § 3 at 31-32.
88. 1997 CAAF Report, *supra* note 27, § 5 at 7; 1998 CAAF Report, *supra* note 29, § 5 at 7–8; 1999 CAAF Report, *supra* note 28, § 5 at 8; 2000 CAAF Report, *supra* note 28, § 5 at 9–10; 2001 CAAF Report, *supra* note 28, § 5 at 8–9; 2002 CAAF Report, *supra* note 28, § 5 at 7–8; 2003 CAAF Report, *supra* note 28, § 5 at 7–8; 2004 CAAF Report, *supra* note 28, § 5 at 8; 2005 CAAF Report, *supra* note 28, § 5 at 8; 2006 CAAF Report, *supra* note 28, § 5 at 8–9; 2007 CAAF Report, *supra* note 28, § 5 at 11; 2008 CAAF Report, *supra* note 28, § 5 at 10 ; 2009 CAAF Report, *supra* note 28, § 5 at 14; 2010 CAAF Report, *supra* note 33, § 5 at 14; 2011 CAAF Report, *supra* note 28, § 5 at 16; 2012 CAAF Report, *supra* note 27, § 5 at 100–01.
89. 2011 CAAF Report, *supra* note 28, § 5 at 16.
90. 2007 CAAF Report, *supra* note 28, § 5 at 6–7; 2008 CAAF Report, *supra* note 28, § 5 at 6.
91. 2008 CAAF Report, *supra* note 59, § 5 at 6–7.
92. 2009 CAAF Report, *supra* note 28, § 5 at 7–8.
93. *Id.* at § 5 at 5.
94. *Id.* at 7–8 (Including: Sexual Assault Prosecution Training at Michigan Domestic Violence Prevention and Treatment Board, National Institute of Crime Prevention's Advanced Domestic Violence and Sexual Assault Course, Prosecuting Sexual Assaults Course, Sexual Assault Prosecution Training produced by the National Institute for Trial Advocacy, and Sexual Assault and Major Crimes Prosecutions Course produced by the National District Attorneys Association). 2011 CAAF Report, *supra* note 28, § 5 at 8; 2012 CAAF Report, *supra* note 27, § 5 at 94 (including, a Special Victims Unit Course, and a Sexual Assault Investigation and Prosecution Course).
95. 2009 CAAF Report, *supra* note 28, § 5 at 12.
96. 2010 CAAF Report, *supra* note 33, § 5 at 12; 2011 CAAF Report, *supra* note 28, § 5 at 14.
97. 2012 CAAF Report, *supra* note 27, § 5 at 92–93.

98. Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice 1 (2005), *available at* http://www.dod.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc (quoting P.L. 108-375, §571).
99. *Id.*
100. *Id.* at 15. *See id.* at 58 ("Despite some critics' claim that the military's sexual offenses are outdated, Article 120, in particular, 'has been driven by judicial interpretation which reflects flexibility and a greater awareness broadening in the interpretation of the concepts of 'force' and 'consent.'' As such, the law has been continuously updated by judicial decisions, and revision of the underlying statute is unnecessary."(quoting Timothy W. Murphy, *A Matter of Force: The Redefinition of Rape*, 39 A.F.L. Rev. 19, 26 (1996)).
101. *Compare* UCMJ, art. 120, 10 U.S.C.§ 920 (2000) (amended 2006), *with* UCMJ, art. 120(t)(16), 10 U.S.C. § 920(t)(16) (2006) (amended 2011).
102. UCMJ, art. 120(t)(16), 10 U.S.C. § 920(t)(16) (2006) (amended 2011).
103. United States v. Neal, 68 M.J. 289 (C.A.A.F. 2010).
104. *Neal*, 68 M.J. at 301 ("Read narrowly, however, the provision could be interpreted as providing that consent is not 'an issue'—a discrete matter—that must be proved beyond a reasonable doubt as an element of the offense.... As such, the statement in the legislation that consent is not 'an issue' may be interpreted narrowly as emphasizing that consent is not an element, thereby underscoring and reinforcing the legislation's deletion of the prior requirement that the prosecution prove beyond a reasonable doubt that the accused acted 'without consent' from the alleged victim.").
105. United States v. Prather, 69 M.J. 338, 339 (C.A.A.F. 2011).
106. *Id.* at 343.
107. *Id.* at 343–45; s*ee also* United States v. Medina, 69 M.J. 462, 464 (2011) ("In this court's recent opinion in *Prather*, we analyzed the shifting burdens found in Article 120(t)(16), UCMJ, and held that the statutory interplay among Article 120(c)(2), UCMJ, Article 120(t)(14), UCMJ, and Article 120(t)(16), UCMJ, resulted in an unconstitutional burden shift to an accused.") (citing *Prather*, 69 M.J. at 343).
108. *Medina,* 69 M.J. at 464 (internal citations omitted).
109. UCMJ, art. 120, 10 U.S.C. § 920.
110. UCMJ, art. 120(f), 10 U.S.C. § 920(f).
111. *Mission and History*, SAPRO, http://www.sapr.mil/index.php/about/mission-and-history (last visited Aug. 21, 2013).
112. 1 Sexual Assault Prevention and Response, Dep't Def., Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2012, at 13 fig. 6 (2013), a*vailable at* http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf [hereinafter SAPRO Report].
113. *Id.*, Annex A, at 1. Note, this is not a term defined in the UCMJ, instead it is a term used to encompass multiple acts prohibited by the UCMJ. *Id.*
114. Rosa Brooks, *Is Sexual Assault Really an 'Epidemic'?*, Foreign Policy, July 10, 2013, http://www.foreignpolicy.com/articles/2013/07/10/is_sexual_assault_really_an_epidemic?page=0,0.
115. *Id.* (citing Fisher, et. al., Nat'l Inst. of Justice, The Sexual Victimization of College Women (2000)) (The author added the percentages of rape and attempted rape added to the 15.5% of "'sexually victimized' in some other way" to obtain the total number cited).
116. *Id.* (citing Nat'l Criminal Justice Reference Serv., U.S. Dep't Justice, Campus Sexual Assault Study, Final Report (2007), https://www.ncjrs.gov/app/publications/abstract.aspx?ID=243011).
117. Exec. Order No. 13,593, 76 Fed. Reg. 78,451 (Dec. 16, 2011), *available* at http://www.loc.gov/rr/frd/Military_Law/pdf/MCM_2011-EO_13593.pdf.
118. Karen Parrish, *Officials Explain New Sexual Assault Policies*, U.S. Dep't Def. (Apr. 23, 2012), http://www.defense.gov/news/newsarticle.aspx?id=116052.
119. DTM 11-603. Expedited Transfer of Military Service Members Who File Unrestricted Reports of Sexual Assault, dated December 16, 2011.
120. *Statement from Secretary Hagel on Sexual Assault Prevention and Response*, U.S. Dep't Def. (April 8, 2013), http://www.defense.gov/releases/release.aspx?releaseid=15917.
121. *Id.*
122. H.R. 1960, 113th Cong. (as received by Senate, Jul. 8, 2013); S.1197, 113th Cong. § 555 (as reported by S. Comm. on Armed Services, Jun. 20, 2013).
123. *Id.* at § 544.
124. *Secretary Hagel's Statement on New Sexual Assault Prevention and Response Measures*, U.S. Dep't Def., (Aug. 15, 2013), http://www.defense.gov/releases/release.aspx?releaseid=16205.
125. *Id.*
126. Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013) (amends Title 10 of the United States Code), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113s967is/pdf/BILLS-113s967is.pdf.
127. McCaskill & Sanchez, *supra* note 2.
128. *Id.*
129. *Id.*
130. S.1197, 113th Cong. § 532 (as reported by S. Comm. on Armed Services, Jun. 20, 2013).

131. *Id.* at § 535.
132. *Id.*
133. *Id.* at § 536.
134. *Id.* at § 537.
135. *Id.* at § 539.
136. *Id.*
137. *Id.* at § 553.
138. *Id.* at §§541, 542.
139. *Id.*at § 544.
140. *Id.* at § 545.
141. *Id.* at § 546.
142. *Id.* at § 552.
143. *Id.* at § 555.
144. *Id.*
145. *Id.* at § 540.
146. *Id.* at § 558.
147. *Id.* at §559.
148. *See* John D. Altenburg, *Military Justice*, National Security Law: Fifty Years of Transformation—An Anthology (2012).
149. *See* H.R. 1960, 113th Cong. (as received by Senate, Jul. 8, 2013); S. 1197, 113th Cong. (as reported by S. Comm. on Armed Services, Jun. 20, 2013).
150. Charles Stimson & Steven P. Bucci, *Changing the Military Justice System: Proceed with Caution*, May 9, 2013, http://www.heritage.org/research/reports/2013/05/changing-the-military-justice-system-proceed-with-caution.
151. H.R. 1960, 113th Cong. § 549 (as received by Senate, Jul. 8, 2013).
152. *Id.* at § 531
153. *Id.*
154. *Id.* at § 545.
155. *Id.*
156. *Id.* at § 547.
157. *Id.*
158. Mortimer Caplin Pub. Serv. Ctr., Univ. Va. Sch. of Law, How to Get A Job in a Public Defender's Office 5, *available at* http://www.law.virginia.edu/pdf/pubservice/defendersmanual1011.pdf.
159. *Id.*
160. *Officewide Training Plan*, Miami Dade Pub. Defender, 4–5 (Oct. 7, 2005), http://www.pdmiami.com/officewidetrainingplan.pdf.
161. Hiring Practices of California Public Defender Offices 6 (2009), *available at* http://www.law.berkeley.edu/students/career_services/ads/2009CAPDHiringGuide.pdf.
162. *Id.* at 26.
163. *Id.* at 30.
164. *See, e.g.*, *id.* at 25 (San Bernardino County mentor program); Tim Wilson, *Training*, Okla. Cnty. Pub. Defender, http://www.oklahomacounty.org/departments/publicdefender/training.asp (last visited Sept. 10, 2013) ("All inexperienced lawyers (those with less than ten jury trials) are paired up with senior lawyers for any trials."); Wyo. State Pub. Defender, Office of the Public Defender Strategic Plan 4 (compiled by Diane Lozano, 8th ed. 2009), *available at* http://wyodefender.state.wy.us/files/strategicplan.pdf ([M]ost of the training provided by the Public Defender is done by mentoring and by hands-on experience.").
165. *See, e.g.*, *Divisions of the Public Defender's Office*, Cook Cnty. Ill., http://www.cookcountygov.com/portal/server.pt/community/public_defender,_law_office_of/260/divisions_of_the_public_defender%27s_office (last visited Sept. 10, 2013) (Division of Professional Development); *Programs*, Tex. Defender Serv., http://www.texasdefender.org/index.php?option=com_content&view=section&layout=blog&id=10&Itemid=63 (click on "Training and Education") (last visited Sept. 10, 2013); Tim Wilson, *Training*, Okla. Cnty. Pub. Defender, http://www.oklahomacounty.org/departments/publicdefender/training.asp (last visited Sept. 10, 2013).
166. *Training and Continuing Legal Education*, Defender Assoc. of Philadelphia, http://www.philadefender.org/training.php (last visited Sept. 10, 2013).
167. In some jurisdictions, such as California, most misdemeanors are tried before a jury. In other jurisdictions, like Maryland, misdemeanors are bench trials.
168. *See, e.g.*, *Legal Staff Employment*, N.Y. Cnty. Dist. Attorney's Off., http://manhattanda.org/legal-staff-employment (last visited Sept. 10, 2013).

169. *Careers & Recruiting*, Suffolk Cnty. Dist. Attorney's Off., http://www.suffolkcountyny.gov/da/CareersRecruiting.aspx (last visited Sept. 10, 2013) ("Entry level Assistant District Attorneys begin their tenure at the District Court Bureau where they prosecute misdemeanor crimes and violation offenses."); Julie Reynolds, *How to Become a Prosecutor*, D.C. Bar, (Jan. 2007), http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/january_2007/prosecutor.cfm (In the U.S. District Attorney's for the District of Columbia, new prosecutors start in the general misdemeanor or appellate section.).
170. Suffolk Cnty. Dist. Attorney's Off., *supra* note 169.
171. *Id.*
172. *Id.*
173. *Id.*
174. Donna Gerson, *"Career" Prosecutor at Home in the Courtroom*, DonnaGerson.com (2007), http://donnagerson.com/articles_pros.html.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Assistant District Attorneys*, Queens Dist. Attorney's Off., http://www.queensda.org/ada.html (last visited Sept. 10, 2013) ("'[F]irst-year assistants' attend an intensive training program ... which pairs them with experienced prosecutors and highlights the fundamentals and foundations of trail advocacy."); *Legal Training*, N.Y. Cnty. Dist. Attorney's Off., http://manhattanda.org/legal-training (last visited Sept. 10, 2013) ("Besides formal training, ADAs receive informal mentoring from their supervisors and more experienced peers."); *The Benefits of Working at Justice*, Dep't Justice, http://www.justice.gov/careers/legal/why-justice.html#mentors (last visited Sept. 10, 2013) ("When attorneys with less than five years experience join Justice, they are assigned a more experienced attorney ... [the mentors] help these attorneys build their confidence and shorten their learning curve."); *United States Attorney's Office Northern District of Illinois*, Dep't Justice, http://www.justice.gov/usao/iln/about.html (last visited Sept. 10, 2013) ("New[] AUSAs are quickly assigned responsibilities in investigations under the supervision of more senior prosecutors....").
179. *See, e.g.*, *About the Office*, U.S. Dist. Attorney's Off. S. District Fla., http://www.justice.gov/usao/fls/office.html (last visited Sept. 10, 2013) ("[T]he Training Unit sponsors frequent in-house training events that educate AUSAs on a wide variety of substantive and procedural legal issues and provide AUSAs with practical advice on the application of the law to their cases. In addition, the Training Unit sponsors in-house training events for support staff on issues that specifically relate to their duties...."); *Assistant District Attorneys*, Queens District Attorney's Off., http://www.queensda.org/ada.html (last visited Sept. 10, 2013) ("[T]he Queens District Attorney's Office conducts monthly lectures ... moreover, each year many Assistant District Attorneys attend the Summer College of New York Prosecutors Training Institute...."); *Legal Training*, N.Y. Cnty. District Attorney's Off., http://manhattanda.org/legal-training (last visited Sept. 10, 2013) ("Training begins with orientation, where arriving ADAs are instructed on the fundamentals ... as they progress in their careers, ADAs receive training in trial advocacy, grand jury procedures, supreme court practice, and homicide prosecution. Additionally, the office offers extensive ongoing training programs that allow ADAs to remain abreast of changing legal matters and to develop expertise in particular areas of law."); Nat'l Dist. Attorneys Ass'n, National Prosecution Standards 14 (3rd ed. 2009), *available at* http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf.
180. SAPRO Report, *supra* note 112, at 9 (citing DoD Instruction 6495.02, "SAPR Program Procedures" (Mar. 2013)).
181. *Id.*
182. *Id.* at 10.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 31.
189. *Id.*
190. *Id.* at 20.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 13.
196. *Id.*
197. *Id.* at 26.

198. 1997 CAAF Report, *supra* note 27, § 3 app. at 2; 2012 CAAF Report, *supra* note 27, § 3 app. at 51.

199. 1997 CAAF Report, *supra* note 27, § 4 app. at 2; 2012 CAAF Report, *supra* note 27, § 4 app. at 84–85.

200. 1997 CAAF Report, *supra* note 28, § 5 app. at 2; 2012 CAAF Report, *supra* note 27, § 5 app. at 104.

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