

STRIKING THE BALANCE BETWEEN DISCIPLINE AND JUSTICE: THE
COMMANDER'S ROLE IN THE MILITARY JUSTICE SYSTEM AND
ITS IMPACT ON THE MILITARY PROFESSION

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by

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The opinions and conclusions expressed herein are those of the student author and do not necessarily represent the views of the U.S. Army Command and General Staff College or any other governmental agency. (References to this study should include the foregoing statement.)

ABSTRACT

STRIKING THE BALANCE BETWEEN DISCIPLINE AND JUSTICE: THE COMMANDER'S ROLE IN THE MILITARY JUSTICE SYSTEM AND ITS IMPACT ON THE MILITARY PROFESSION, by Major Jennifer L. Venghaus, 170 pages.

As military leaders renew their commitment to the military profession, debate over sexual assault and senior leader misconduct has caused several members of Congress to propose legislation that would remove commanders from the military justice process. Since enforcement of an ethical code through self-regulation is one critical characteristic of professions, any change to the military's mechanism for self-regulation could affect the military's status as a profession.

This thesis analyzes the impact that the proposed legislation would have on the United States military's status as a profession. By comparing the history of the United States military as a profession and the history of the military justice system in the United States, this thesis establishes that the evolution of the United States military profession corresponded to the evolution of the military justice system. What started as a system of discipline became a balance between justice and discipline as the system became more fair and equitable for the professional army. To retain the elements of a system of discipline, commanders must remain involved in the process. Maintaining this balance is critical to retaining the trust of American people that is necessary for American society to continue recognizing the military as a profession.

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ACRONYMS

CJCS	Chairman of the Joint Chiefs of Staff
DoD	Department of Defense
DODIG	Department of Defense Inspector General
NDAA	National Defense Authorization Act
SASC	Senate Armed Services Committee
UCMJ	Uniform Code of Military Justice

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CHAPTER 1

INTRODUCTION

No profession can survive if it loses the trust of its client; and the Army now has much to do to restore its credibility as a self-policing institution.¹

—Dr. Don Snider

Dr. Snider, a Senior Fellow in the Center for Army Profession and Ethic, gave this advice in 2005 as the Army was recovering from crimes committed by Soldiers at Abu Ghraib. However, recent debates and media attention regarding the military's handling of sexual assault and misconduct make his words even more significant today.

On January 20, 2012, *The Invisible War*, a documentary about sexual assault in the military, premiered at the 2012 Sundance Film Festival, where the film won the Documentary Audience Award.² The film's release in the United States on June 22, 2012 drew attention to the military's handling of sexual assault cases.³ Calling for change in the military's process for handling sexual assault, the documentary presents interviews of several veterans who reported being sexually assaulted while in the military, the inadequate response by the military, and the struggles they continue to cope with due to their sexual assaults.⁴ Since its release, the film received an Oscar nomination at the 2012

¹ Don M. Snider, *The U.S. Army as Profession, in THE FUTURE OF THE ARMY PROFESSION* 31 (Lloyd J. Matthews ed., 2d ed. 2005).

² *2012 Sundance Film Festival*, SUNDANCE INSTITUTE, <http://history.sundance.org/events/1141> (last visited Apr. 6, 2015).

³ *The Invisible War*, IMDB, http://www.imdb.com/title/tt2120152/?ref_=ttfc_q1 (last visited Apr. 6, 2015).

⁴ *THE INVISIBLE WAR* (Cinedigm 2012).

Academy Awards, has been nominated for and won numerous other film awards, and has received nationwide acclaim.⁵

Just after the release of *The Invisible War*, the media reported on a barrage of senior leader misconduct, which put the military's handling of misconduct in the spotlight. In a five-month period, from June through November 2012, the media reported on numerous incidents of misconduct by officers in grades of lieutenant colonel through general, leading many people to question the discipline of senior military leaders.

On June 14, 2012, a general court-martial found Army Colonel James H. Johnson III, an Army officer who previously served as the commander of the 173d Airborne Brigade Combat Team, guilty of multiple specifications of fraud, conduct unbecoming an officer, and bigamy, and sentenced him to a \$300,000 fine and a reprimand.⁶ The charges stemmed from an affair Colonel Johnson had with a woman he met while deployed to Iraq, his use of government funds to visit her, and his marriage to her in 2011 while he was still married.⁷

⁵ *The Official Academy Awards Database*, ACADEMY OF MOTION PICTURE ARTS AND SCIENCES, http://awardsdatabase.oscars.org/ampas_awards/BasicSearchInput.jsp (last visited Apr. 6, 2015).

⁶ David Rising, *Colonel found guilty of fraud, fined \$300K*, ARMY TIMES, June 14, 2012, <http://www.armytimes.com/article/20120614/NEWS/206140310/> (last visited Apr. 6, 2015).

⁷ Richard Sandza, *Colonel's sentence in bigamy case draws outrage*, ARMY TIMES, July 1, 2012, <http://www.armytimes.com/article/20120701/NEWS/207010309/Colonel-s-sentence-bigamy-case-draws-outrage> (last visited Apr. 6, 2015).

In July and August 2012, the media reported on two Department of Defense Inspector General (DODIG) reports involving misconduct of general officers.⁸ Reports of general officer misconduct continued when, on September 27, 2012, the case of Army Brigadier General Jeffrey A. Sinclair hit the media.⁹ The Army suspended Brigadier General Sinclair from his duties as the Deputy Commander of the 82d Airborne Division and initiated an investigation into numerous offenses including forcible sodomy, wrongful sexual contact, disobeying orders, engaging in and attempting to engage in an inappropriate relationship with a subordinate officer, and wrongful use of his government travel card.¹⁰ For the next eighteen months, through March 2014, national news outlets

⁸ Al Kamen, *IG report blasts missile defense chief*, WASH. POST, July 10, 2012, http://www.washingtonpost.com/blogs/in-the-loop/post/ig-report-blasts-missile-defense-chief/2012/07/10/gJQA9TCyaW_blog.html (last visited Apr. 6, 2015); Joe Gould, *DoD details 4-star's lavish spending*, ARMY TIMES, Aug. 17, 2012, <http://www.armytimes.com/article/20120817/NEWS/208170311/> (last visited Apr. 6, 2015); Inspector Gen., U.S. Dep't of Def., No. H10116727365, Report of Investigation: Lieutenant General Patrick J. O'Reilly, U.S. Army, Director, Missile Defense Agency (May 2, 2012), available at <http://www.dodig.mil/foia/ERR/O'ReillyROI.pdf> (last visited Apr. 6, 2015); Inspector Gen., U.S. Dep't of Def., No. 11-1119226-153, Report of Investigation: General William E. Ward, U.S. Army, Commander, U.S. AFRICOM (June 26, 2012), available at http://www.dodig.mil/foia/ERR/WardROI_Redacted.pdf (last visited Apr. 6, 2015).

⁹ Timothy Williams, *General Charged With Sexual Misconduct*, N.Y. TIMES, Sept. 27, 2012, http://www.nytimes.com/2012/09/28/us/decorated-general-charged-with-violations-of-military-law.html?_r=1& (last visited Apr. 6, 2015).

¹⁰ Henry Cunningham, *Brig. Gen. Jeffrey Sinclair's case referred to general court-martial*, FAYETTEVILLE OBSERVER, Dec. 19, 2012, http://www.fayobserver.com/military/brig-gen-jeffrey-sinclair-s-case-referred-to-general-court/article_7709fa54-1901-5429-86da-a92284988263.html (last visited Apr. 6, 2015).

around the country reported on Brigadier General Sinclair's investigation and court-martial proceedings.¹¹

To make matters worse, on November 9, 2012, Army General (Retired) David H. Petraeus, one of the most renowned general officers of this era, submitted his resignation as Director of the Central Intelligence Agency after admitting to having an extramarital affair with his biographer while on active duty in the United States Army.¹² On March 3, 2015, General (Retired) Petraeus pled guilty to removing and retaining classified information after the Federal Bureau of Investigation found notebooks containing classified information in his home.¹³

While the focus was on the Army up to this point, an Air Force case appears to have been the "straw that broke the camel's back." What could have been a news story about the successful prosecution of a senior leader sparked Congressional action when

¹¹ In March 2014, Brigadier General Sinclair pled guilty to several offenses including adultery, conduct unbecoming an officer, and obstruction of justice, and was sentenced to a reprimand, forfeiture of \$20,000, and restitution of \$4,157. Greg Botelho & Marlena Baldacci, *Brigadier general accused of sexual assault must pay over \$20,000; no jail time*, CNN, Mar. 20, 2014, <http://www.cnn.com/2014/03/20/justice/jeffrey-sinclair-court-martial/> (last visited Apr. 6, 2015). In June 2014, the Secretary of the Army directed that Brigadier General Sinclair retire as a lieutenant colonel. Dan Lamothe, *Here's how disgraced Brig. Gen. Jeffrey Sinclair's affair will hit him in the wallet*, WASH. POST, June 20, 2014, <http://www.washingtonpost.com/news/checkpoint/wp/2014/06/20/heres-how-disgraced-brig-gen-jeffrey-sinclair-got-demoted-two-ranks> (last visited Apr. 6, 2015).

¹² *Message from General David H. Petraeus (US Army Retired)*, CENTRAL INTELLIGENCE AGENCY (Nov. 9, 2012), <https://www.cia.gov/news-information/press-releases-statements/2012-press-releases-statements/statement-to-employees-from-petraeus.html> (last visited Apr. 6, 2015).

¹³ Evan Perez, *Gen. Petraeus pleads guilty to federal charge*, CNN, Mar. 3, 2015, <http://www.cnn.com/2015/03/03/politics/general-david-petraeus-guilty-charges/> (last visited Apr. 6, 2015).

the convening authority disapproved the court-martial conviction. On November 3, 2012, a court-martial found Lieutenant Colonel James H. Wilkerson III, an United States Air Force F-16 pilot serving as the Inspector General for Aviano Airbase in Italy, guilty of aggravated sexual assault, abusive sexual contact, and conduct unbecoming an officer, in violation of Articles 120 and 133 of the Uniform Code of Military Justice (UCMJ).¹⁴ A general court-martial sentenced him to one year of confinement and dismissal from the service.¹⁵ However, on February 26, 2013, the convening authority, Air Force Lieutenant General Craig Franklin, disapproved the findings and sentence and dismissed the charges against Lieutenant Colonel Wilkerson.¹⁶ In a six-page memorandum to the Secretary of the Air Force, Lieutenant General Franklin explained that he disapproved the findings and sentence because he “concluded there was insufficient evidence to support a finding of guilt beyond a reasonable doubt.”¹⁷

Within two weeks of the reversal of Lieutenant Colonel Wilkerson’s conviction, Representative Jackie Speier (D-CA) and Senator Claire McCaskill (D-MO) proposed bills to amend the UCMJ, and other legislative proposals followed.¹⁸ As Congress began

¹⁴ *Wilkerson Record of Trial*, AIR FORCE FREEDOM OF INFORMATION ACT ELECTRONIC READING ROOM, <http://www.foia.af.mil/reading/thewilkersonfoiacase.asp> (last visited Apr. 6, 2015).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Memorandum from Lieutenant General Craig Franklin, to Secretary of the Air Force Michael Donley (Mar. 12, 2013), *available at* <http://www.foia.af.mil/shared/media/document/AFD-130403-022.pdf> (last visited Apr. 6, 2015).

¹⁸ On March 12, 2013, Representative Speier introduced H.R. 1079, the Military Judicial Reform Act. Military Judicial Reform Act, H.R. 1079, 113th Cong. (2013). On the same day, Senator McCaskill introduced S. 538. S. 538, 113th Cong. (2013).

investigating the issue of sexual assault in the military, allegations of sexual assault and misconduct by senior leaders continued to saturate the news media. Between April and June 2013, fourteen separate allegations of misconduct received significant attention by the media.

On April 5, 2013, the media reported that the Army had relieved Major General Ralph Baker, Commander of Combined Joint Task Force – Horn of Africa, due to allegations related to alcohol and sexual misconduct offenses.¹⁹ Major General Baker’s civilian policy advisor alleged that while on a business trip to Djibouti, Major General Baker “drank wine heavily, and pushed his hand between her legs afterward while they were sitting in the back seat of a sport utility vehicle.”²⁰

On April 24, 2013, a court-martial sentenced Air Force Technical Sergeant Bobby Bass to six months confinement and reduction to Staff Sergeant for his treatment of trainees, which included cruelty, assault, and wrongful sexual contact.²¹ An investigation

¹⁹ Lolita C. Baldor, *Officials: General Fired Over Alcohol, Sex Charges*, MILITARY TIMES, Apr. 5, 2013, <http://www.military.com/daily-news/2013/04/05/officials-general-fired-over-alcohol-sex-charges.html> (last visited Apr. 6, 2015). Major General Baker received a letter of reprimand and was retired as a brigadier general in September 2013. Dan Lamothe, *Army general, accused of sexual assault by senior advisor, retired quietly with demotion*, WASH. POST, Oct. 1, 2014, <http://www.washingtonpost.com/news/checkpoint/wp/2014/10/01/army-general-accused-of-sexual-assault-by-senior-adviser-retired-quietly-with-demotion> (last visited Apr. 6, 2015).

²⁰ Lamothe, *supra* note 19. Major General Baker received administrative punishment, including a fine and a reprimand, and retired as a brigadier general in September 2013. *Id.*

²¹ One news article reported that Technical Sergeant Bass “order[ed] trainees to strip naked and enter a shower with dozens of fellow recruits,” “order[ed] trainees to apply Icy Hot to their genitals as punishment,” “ordered [trainees] to do physical training in a steamy bathroom with toilets filled with feces and urine,” “forced [trainees] to PT in their underwear while other trainees looked on and mocked them,” and “called [one trainee] into his office and ordered him to do push-ups, kicking him in the sternum with

into a sexual misconduct scandal at Joint Base San Antonio-Lackland led to the charges against Technical Sergeant Bass and seventeen other Air Force instructors.²² The next week, on May 3, 2013, a court-martial convicted a Marine Corps recruiter in Alaska of sexual assault. The media was shocked when his sentence only included a reduction in rank and a dishonorable discharge from the Marine Corps – with no adjudged sentence to confinement.²³

Three days later, on May 6, 2013, the Air Force removed Lieutenant Colonel Jeffrey Krusinski from his position after police in Virginia arrested him for an alleged sexual battery. This report was particularly shocking because Lieutenant Colonel Krusinski was in charge of the Air Force Sexual Assault Prevention and Response Program.²⁴ On the same day, the media reported that Congress blocked the promotion nomination of Air Force Lieutenant General Susan J. Helms because she granted clemency in a sexual assault case in 2012. A court-martial found Captain Matthew S. Herrera guilty of sexually assaulting a lieutenant in 2009. After reviewing the transcript of the court-martial, Lieutenant General Helms granted clemency to Captain Herrera,

the toe of his steel-toed boot each time he reached the rest position.” Kristin Davis, *Former MTI gets 6 months; is 17th court-martialed in Lackland sex scandal*, A.F. TIMES, Apr. 24, 2013, <http://www.airforcetimes.com/article/20130424/NEWS/304240021/Former-MTI-gets-6-months-17th-court-martialed-Lackland-sex-scandal> (last visited Apr. 6, 2015).

²² *Id.*

²³ Michelle Theriault Boots, *Anchorage Marine rapists walks without prison time*, ALASKA DISPATCH NEWS, May 7, 2013, <http://www.adn.com/article/20130507/anchorage-marine-rapist-walks-without-prison-time> (last visited Apr. 6, 2015).

²⁴ Morgan Whitaker, *Head of Air Force sexual assault prevention charged with sexual battery*, MSNBC, May 6, 2013, <http://www.msnbc.com/politicsnation/head-air-force-sexual-assault-prevention-c> (last visited Apr. 6, 2015).

finding him guilty of indecent acts rather than sexual assault.²⁵ Congress continued its scrutiny of the military when, on May 9, 2013, Representative Jackie Speier (D-CA) brought a Facebook page to the attention of Marine Corps leadership. The page, maintained by several active duty Marines, included “photos of women, one of them naked and bound, with lewd captions.”²⁶

Less than a week later, the media reported that the Army had begun an investigation into allegations that Sergeant First Class Gregory McQueen, an Army Sexual Harassment/Assault Response and Prevention Coordinator at Fort Hood, Texas “persuaded a female private first class to become a prostitute who sold sex to other servicemembers.”²⁷ The next day, Fort Campbell suspended their Sexual Harassment/Assault Response and Prevention program manager, Army Lieutenant Colonel Darin Haas, after civilian police arrested him for stalking his ex-wife and

²⁵ Craig Whitlock, *General's promotion blocked over her dismissal of sex-assault verdict*, WASH. POST, May 6, 2013, http://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528_story.html (last visited Apr. 6, 2015).

²⁶ Tom Vanden Brook, *Facebook pulls page that denigrates female Marines*, USA TODAY, May 9, 2013, <http://www.usatoday.com/story/news/politics/2013/05/08/offensive-marine-corps-facebook-page-for-women/2144247/> (last visited Apr. 6, 2015).

²⁷ Tom Vanden Brook, *Suspect in Fort Hood prostitution ring identified*, ARMY TIMES, May 15, 2013, <http://www.armytimes.com/article/20130515/NEWS/305150027/Suspect-Fort-Hood-prostitution-ring-identified> (last visited Apr. 6, 2015). On 12 March 2015, a military judge found Sergeant First Class McQueen guilty of multiple specifications of attempting to pander conspiracy to patronize or solicit a prostitute, failure to obey a lawful order and dereliction of duty, cruelty and maltreatment, adultery, pandering and prostitution, and assault consummated by a battery. The judge sentenced him to twenty-four months confinement, reduction to E-1, and a dishonorable discharge. *SFC sentenced for organizing Fort Hood prostitution ring*, ARMY TIMES, Mar. 12, 2015, <http://www.armytimes.com/story/military/crime/2015/03/11/fort-hood-ncos-prostitution-ring-court-martial-begins-today/70137580/> (last visited Apr. 6, 2015).

violating a protective order.²⁸ Although the civilian court dismissed the charges three months later, the charges and arrest of Lieutenant Colonel Haas added negative attention to the military's sexual assault response program.²⁹

Between May 21st and 24th, 2013, three new reports emerged which drew more negative attention on the military's handling of misconduct. On May 21, 2013, the Army suspended Brigadier General Bryan T. Roberts from his position as Commander of the Army Training Center and Fort Jackson due to an investigation into allegations of adultery and assault.³⁰ On August 2, 2013, a criminal investigation found that Brigadier General Roberts physically assaulted a woman on three occasions. On September 16, 2013, a separate Department of the Army Inspector General investigation determined that

²⁸ Chris Smith, *Fort Campbell sexual harassment manager arrested*, USA TODAY, May 16, 2013, <http://www.usatoday.com/story/news/nation/2013/05/16/fort-campbell-sexual-harassment-manager-arrested/2182437/> (last visited Apr. 6, 2015).

²⁹ Tony Gonzalez, *Ex-Fort Campbell officer cleared of stalking charge*, ARMY TIMES, Aug. 24, 2013, <http://archive.armytimes.com/article/20130824/NEWS/308240006/Ex-Fort-Campbell-officer-cleared-stalking-charge> (last visited Apr. 6, 2015).

³⁰ Joe Gould, *Fort Jackson 1-star suspended amid misconduct allegations*, ARMY TIMES, May 21, 2013, <http://www.armytimes.com/article/20130521/NEWS/305210049/Fort-Jackson-1-star-suspended-amid-misconduct-allegations> (last visited Apr. 6, 2015). Brigadier General Roberts was relieved from command on July 11, 2013. Susanne M. Shafer, *Army relieves Fort Jackson general of command*, AUGUSTA CHRONICLE, July 12, 2013, <http://chronicle.augusta.com/news/metro/2013-07-12/army-relieves-fort-jackson-general-command> (last visited Apr. 6, 2015). In August 2013, Brigadier General Roberts received a reprimand and was fined \$5,000 for assault and adultery. He retired in April 2014 in the grade of colonel. Craig Whitlock, *Army general disciplined over mishandling of sexual-assault case in Japan*, WASH. POST, Apr. 22, 2014, http://www.washingtonpost.com/world/national-security/army-general-disciplined-over-mishandling-of-sexual-assault-case-in-japan/2014/04/22/6339f268-ca2b-11e3-a75e-463587891b57_story.html (last visited Apr. 6, 2015).

Brigadier General Roberts “engaged in two inappropriate relationships” and “improperly used government resources.”³¹

On May 22, 2013, the media began reporting on a scandal at the United States Military Academy in which a non-commissioned officer secretly videotaped female cadets while they were in the bathroom or shower.³² On May 24, 2013, the media commented on an “[o]pen season’ for sex,” referring to the suspension of Army Lieutenant Colonel Joseph L. Miley from his position as the Commander of the 49th Air Defense Artillery Battalion, Fort Greeley, Alaska, for condoning adultery and fraternization.³³

³¹ Inspector Gen., U.S. Dep’t of Army, U.S. Army Inspector General Agency Report of Investigation, Case 13-034 (Sept. 16, 2013), *available at* <http://apps.washingtontimes.com/g/page/world/brig-gen-bryan-t-roberts-investigation/768/> (last visited Apr. 6, 2015). He received non-judicial punishment for the assaults, adultery, and conduct unbecoming an officer. As a result, he received a reprimand and forfeited \$2,500 per month for two months. *Id.* Brigadier General Roberts retired as a colonel in April 2014. Whitlock, *Army general*, *supra* note 30.

³² Thom Shanker, *Women Were Secretly Filmed at West Point, the Army Says*, N.Y. TIMES, May 22, 2013, http://www.nytimes.com/2013/05/23/us/sergeant-accused-of-secretly-filming-female-cadets.html?_r=1& (last visited Apr. 6, 2015). Sergeant First Class McClendon eventually pled guilty to eight specifications of indecent acts and a general court-martial sentenced him to thirty-three months of confinement, reduction to Private, and a bad-conduct discharge. Thom Shanker, *West Point Sergeant Pleads Guilty to Videotaping Female Cadets*, N.Y. TIMES, Mar. 6, 2014, <http://www.nytimes.com/2014/03/07/us/west-point-sergeant-pleads-guilty-to-secretly-videotaping-female-cadets.html> (last visited Apr. 6, 2015).

³³ Mark Farmer, *‘Open Season’ for sex at Alaskan base, military officials say*, NBC NEWS, May 24, 2013, http://usnews.nbcnews.com/_news/2013/05/24/18477490-open-season-for-sex-at-alaskan-base-military-officials-say?lite (last visited Apr. 6, 2015); Joe Gould, *Greely commander suspended amid probe*, ARMY TIMES, June 11, 2013, <http://www.armytimes.com/article/20130611/NEWS/306110039/Greely-commander-suspended-amid-probe> (last visited Apr. 6, 2015).

The next week, the media reported on yet another misconduct scandal when the United States Military Academy announced that they had “temporarily disbanded the men’s rugby team over an ‘inappropriate’ email chain that ‘would suggest a hostile team environment or a culture of disrespect towards women.’”³⁴ An investigation into the matter found that “emails that circulated among the 60 team members contained material that . . . was, among other things, lewd, inappropriate and mocking both of team members and nonmembers.”³⁵

On June 4, 2013, after receiving numerous Congressional proposals to amend the UCMJ, the Senate Armed Services Committee (SASC) held a hearing on the topic of sexual assault in the military. Senator Carl Levin (D-MI), Chairman of the SASC explained that legislative action was necessary because “[t]he problem of sexual assault is of such scope and magnitude that it has become a stain on our military.”³⁶ The hearing included testimony from the Chairman of the Joint Chiefs of Staff (CJCS),

³⁴ Joe Gould, *West Point rugby team disbanded over 'inappropriate' emails*, ARMY TIMES, June 2, 2013, <http://www.armytimes.com/article/20130602/NEWS/306020005/West-Point-rugby-team-disbanded-over-inappropriate-emails> (last visited Apr. 6, 2015).

³⁵ Chris Carroll, *West Point rugby team benched over improper emails*, STARS AND STRIPES, June 3, 2013, <http://www.stripes.com/news/west-point-rugby-team-benched-over-improper-emails-1.224123> (last visited Apr. 6, 2015).

³⁶ *Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before the S. Comm. on Armed Services*, 113th Cong. 2 (2013), available at http://www.armed-services.senate.gov/download/official-transcript_-pending-legislation-regarding-sexual-assaults-in-the-military---june-4-2013 (last visited Apr. 6, 2015) [hereinafter *June 4, 2013 Hearing*].

representatives of all of the services and service judge advocates, spokespersons for victims of sexual assault, and two retired judge advocates.³⁷

Media reports on misconduct in the military did not stop after the SASC hearing. In fact, the hearing seemed to draw even more attention to the issue of misconduct in the military, resulting in media outlets filing requests under the Freedom of Information Act (FOIA)³⁸ for additional information on misconduct allegations.³⁹ In the two weeks following the hearing, the media reported on a sexual assault case in which a general officer was relieved for failing to take action,⁴⁰ an investigation finding that a general officer misused his position,⁴¹ and Navy charges against three United States Naval Academy football players for sexually assaulting another student.⁴²

³⁷ *Id.*

³⁸ 5 U.S.C. § 552 (2014).

³⁹ Craig Whitlock, *Military brass, behaving badly: Files detail a spate of misconduct dogging armed forces*, WASH. POST, Jan. 26, 2014, http://www.washingtonpost.com/world/national-security/military-brass-behaving-badly-files-detail-a-spate-of-misconduct-dogging-armed-forces/2014/01/26/4d06c770-843d-11e3-bbe56a2a3141e3a9_story.html (last visited Apr. 6, 2015).

⁴⁰ On June 7, 2013, the Army suspended Major General Michael Harrison from his duties as Commander, United States Army – Japan, for failing to take action on a report that a subordinate had sexually harassed and assaulted a female Japanese civilian employee. Kirk Spitzer, *Army Suspends Top Commander in Japan*, TIME, June 10, 2013, <http://nation.time.com/2013/06/10/army-suspends-top-commander-in-japan/> (last visited Apr. 6, 2015). In August 2014, the Secretary of the Army directed that Major General Harrison be retired as a brigadier general. Chris Carroll, *Army general forced out, forfeits star for mishandling sex assault claim*, STARS AND STRIPES, Aug. 27, 2014, <http://www.stripes.com/news/army/army-general-forced-out-forfeits-star-for-mishandling-sex-assault-claim-1.300199> (last visited Apr. 6, 2015).

⁴¹ In June 2013, media obtained and reported on a DODIG report regarding Army Lieutenant General David Huntoon, Superintendent of the United States Military Academy. The report found that Lieutenant General Huntoon “improperly used Government personnel for other than official purposes, improperly accepted gifts of

By August 2013, it became clear that the media was unhappy with the military's release of information on misconduct of senior leaders. A *USA Today* report by Ray Locker on August 8, 2013 attacked the military for "covering up the problems of its senior officers," citing an investigation report on Army Major General Joseph Fil, Jr. that was completed in 2012 but was not released until a Freedom of Information Act (FOIA) request was filed.⁴³ Additional reports continued to surface over the next few months,

services from subordinates, and misused his position to induce a benefit to a friend." Michael Hill, *Report criticizes West Point superintendent*, ARMY TIMES, June 14, 2013, <http://www.armytimes.com/article/20130614/CAREERS03/306140017/Report-criticizes-West-Point-superintendent> (last visited Apr. 6, 2015); Inspector Gen., U.S. Dep't of Def., No. H11L120171242, Report of Investigation: Lieutenant General David H. Huntoon, U.S. Army, Superintendent, United States Military Academy, West Point, NY, (May 1, 2012), available at <http://www.dodig.mil/FOIA/ERR/H11L120171242.pdf> (last visited Apr. 6, 2015).

⁴² On June 17, 2013, the Navy announced that they had filed charges against three football players at the United States Naval Academy for sexually assaulting another student. Annys Shin, *U.S. Naval Academy football players to face charges over alleged 2012 rape*, WASH. POST, June 17, 2013, http://www.washingtonpost.com/local/naval-academy-football-players-face-charges-over-alleged-2012-rape/2013/06/17/146be01e-d770-11e2-a9f2-42ee3912ae0e_story.html (last visited Apr. 6, 2015). The Navy dismissed the charges against two of the students and a court-martial found the third student not guilty of sexual assault in March 2014. Helene Cooper, *Former Naval Academy Football Player Is Acquitted of Sexual Assault*, N.Y. TIMES, Mar. 20, 2014, http://www.nytimes.com/2014/03/21/us/former-naval-academy-football-player-is-acquitted-of-sexual-assault-charges.html?_r=0 (last visited Apr. 6, 2015).

⁴³ Ray Locker, *Pentagon keeps covering up officers' dirty laundry*, USA TODAY, Aug. 8, 2013, <http://www.usatoday.com/story/nation/2013/08/08/general-fil-inspector-general-report-delayed/2631527/> (last visited Apr. 6, 2015). According to the DODIG report, while serving as the Commanding General, Eighth United States Army/United States Army - Korea, Major General Fil improperly accepted gifts of a value of approximately \$6,500 and failed to report the gifts, in violation of the Joint Ethics Regulation. Inspector Gen., U.S. Dep't of Def., No. H11-120936321, *Alleged Misconduct: Major General Joseph F. Fil, Jr., United States Army, Former Commanding General, Eighth United States Army and Chief of Staff, United Nations Command/Combined Forces Command/United States Forces Korea*, available at <http://www.dodig.mil/FOIA/ERR/H11-120936321.pdf> (last visited Apr. 6, 2015).

including reports that the Navy removed a flag officer from his position for using counterfeit poker chips;⁴⁴ the Air Force relieved a general officer from command for “personal misbehavior;”⁴⁵ an Army officer sent e-mails that contained inappropriate sexual innuendos about a Congresswoman;⁴⁶ and an Air Force general officer engaged in an inappropriate relationship and consumed alcohol while on duty.⁴⁷

⁴⁴ On October 10, 2013, the media reported that the Navy removed Vice Admiral Tim Giardina from his position after a criminal investigation found that he used counterfeit poker chips at a casino. *U.S. Navy Vice Admiral fired from nuclear post amid gambling probe*, CBS NEWS, Oct. 10, 2013, <http://www.cbsnews.com/news/us-navy-vice-admiral-fired-from-nuclear-post-amid-gambling-probe/> (last visited Apr. 6, 2015).

⁴⁵ On October 11, 2013, the Air Force relieved Major General Michael J. Carey from his command of the 20th Air Force for “personal misbehavior.” Justin Fishel, *Air Force general in charge of nuclear weapons fired over ‘conduct’*, FOX NEWS, Oct. 11, 2013, <http://www.foxnews.com/politics/2013/10/11/air-force-general-in-charge-nuclear-missiles-to-be-fired-officials-say/> (last visited Apr. 6, 2015).

⁴⁶ An August 2013 Department of the Army Inspector General investigation determined that Brigadier General Martin P. Schweitzer, Deputy Commanding General (Operations) for the 82d Airborne Division, “failed to demonstrate exemplary conduct” and “used an Army communication system for an unauthorized purpose.” The investigation disclosed that Brigadier General Schweitzer sent two e-mails from his government e-mail account that contained inappropriate sexual innuendos about a Congresswoman. Inspector Gen., U.S. Dep’t of Army, U.S. Army Inspector General Agency Report of Investigation, Case 13-024 (Aug. 23, 2013), *available at* <http://apps.washingtonpost.com/g/page/world/martin-p-schweitzer-investigation/770/> (last visited Apr. 6, 2015).

⁴⁷ An inspector general report on Air Force Brigadier General David C. Uhrich found that he “engaged in an inappropriate relationship” and “consumed alcohol in a manner that was of a nature to bring discredit upon the armed forces.” The investigation detailed that Brigadier General Uhrich kept alcohol in his desk and frequently drank while on duty. Inspector Gen., U.S. Dep’t of Air Force, Report of Investigation (S7077P) Brig Gen David C. Uhrich (Sept. 2013), *available at* <http://apps.washingtonpost.com/g/page/world/report-on-gen-david-c-urich/769/> (last visited Apr. 6, 2015).

The Problem

It is no surprise these high-profile allegations of sexual assault and general officer misconduct prompted congressional action. In the twenty-four month period between January 2013 and December 2014, members of Congress introduced over forty bills to amend the UCMJ.⁴⁸ Some of the proposals specifically related to sexual assault cases. For example, part of the Better Enforcement for Sexual Assault Free Environments (BE SAFE) Act, introduced by Representative Michael Turner (R-OH) and Senator Claire McCaskill (D-MO) proposed to provide legal counsel to victims and require discharge from the service of anyone found guilty of rape or sexual assault.⁴⁹ However, several of the proposals sought to make significant changes to not only sexual assault cases, but to the military justice system as a whole.

Under the current military justice system, commanders play a central role in the court-martial process. When a service member commits a violation of the UCMJ, the service member's commander determines the appropriate disposition for the offense. If the commander determines that the offense does not warrant a court-martial, then the commander may impose non-judicial punishment.⁵⁰ However, if the commander determines that the offense warrants a court-martial, then the commander may prefer

⁴⁸ See Appendix A, *infra*.

⁴⁹ Better Enforcement for Sexual Assault Free Environments (BE SAFE) Act of 2013, H.R. 1867, 113th Cong. (2013); Better Enforcement for Sexual Assault Free Environments (BE SAFE) Act of 2013, H.R. 2207, 113th Cong. (2013); Better Enforcement for Sexual Assault Free Environments Act of 2013, S. 1032, 113th Cong. (2013).

⁵⁰ Commanders at all levels, from company commander through commanding general may administer non-judicial punishment. The nature and amount of punishment authorized varies depending on the level of the commander. UCMJ art. 15 (2014).

charges.⁵¹ Once the commander prefers court-martial charges, the commander forwards the charges through the chain of command, to the commander exercising court-martial convening authority.⁵² If the court-martial convening authority agrees that the offense warrants a court-martial, the court-martial convening authority convenes the court-martial and details the members of the court-martial.⁵³ Commanders serving as court-martial convening authorities also have the authority to accept plea bargains and must complete other administrative tasks.⁵⁴ After a court-martial, the court-martial convening authority must conduct a post-trial review of the court-martial proceedings and has the authority to set aside certain convictions, and approve, disapprove, commute, or suspend certain court-martial sentences.⁵⁵

Several of the proposals made between 2013 and 2014 sought to completely change this system by removing commanders from the military justice process and establishing an independent office of lawyers responsible for prosecutions. The two most significant of these proposals are the Sexual Assault Training and Prevention (STOP)

⁵¹ Pursuant to Article 30 of the UCMJ, any person that is subject to the UCMJ may sign the charges, but “[u]pon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.” UCMJ art. 30 (2014). In practice, when a commander determines that an offense warrants a court-martial, that commander signs the charges and reads the charges to the accused. This practice is known as the preferral of charges.

⁵² UCMJ arts. 30 and 33 (2014). UCMJ arts. 22, 23, and 24 specify which commanders may convene each type of court-martial. UCMJ arts. 22-24 (2014).

⁵³ UCMJ arts. 22, 23, 24, and 25 (2014).

⁵⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(d)(3) (2012).

⁵⁵ UCMJ art. 60 (2014).

Act⁵⁶ and the Military Justice Improvement Act.⁵⁷ These proposals sparked significant debate in Congress over whether commanders or lawyers should be responsible for making decisions regarding courts-martial. Thus, the proposals bring back the long-standing debate over whether the military justice system is a system of discipline, or a system of justice.

Sexual Assault Training Oversight and Prevention (STOP) Act

On November 16, 2011, Representative Jackie Speier (D-CA)⁵⁸ introduced H.R. 3435, the Sexual Assault Training Oversight and Prevention (STOP) Act to the House of Representatives, but no action was taken on it during the 112th Congress.⁵⁹ In the midst of the vigorous debates in Congress in 2013 over the issue of sexual assault in the military, Representative Jackie Speier (D-CA) reintroduced the bill on May 6, 2013 as

⁵⁶ Sexual Assault Training Oversight and Prevention (STOP) Act, H.R. 1593, 113th Cong. (2013).

⁵⁷ Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2013).

⁵⁸ Elected in 2008, Rep. Speier serves as ranking member of the House Armed Services Committee, Subcommittee on Investigations and Oversight, and the House of Representatives Democratic Senior Whip. In 1978, while serving as a Congressional staff member, Rep. Speier was shot five times. As a result of this incident and her “passionate and compelling speeches on the House floor,” Rep. Speier is known as a “fighter” and is a leader in the debate over sexual assault in the military. CONGRESSWOMAN JACKIE SPEIER, http://speier.house.gov/index.php?option=com_content&view=article&id=13&Itemid=2 (last visited Apr. 6, 2015).

⁵⁹ Sexual Assault Training Oversight and Prevention (STOP) Act, H.R. 3435, 112th Cong. (2011).

H.R. 1593. However, the House Armed Services Committee took no action on it during the 113th Congress.⁶⁰

H.R. 1593 removes commanders from the court-martial process for sex-related offenses only. Under the bill, a “Sexual Assault Oversight and Response Council,” composed of “a majority of civilians” appointed by the President and the Secretary of Defense, would appoint a Director of Military Prosecutions and personnel for a Sexual Assault Oversight and Response Office. The Director of Military Prosecutions would oversee the prosecution of sex-related offenses, refer sex-related offenses to courts-martial, and serve as the convening authority for sex-related offenses.⁶¹

Military Justice Improvement Act

On March 13, 2013, with Senator Kirsten Gillibrand (D-NY) presiding, the SASC, Subcommittee on Personnel held a hearing on sexual assaults in the military.⁶² Two months later, on May 16, 2013, Senator Gillibrand first introduced the Military Justice Improvement Act of 2013, S. 967, to the Senate.⁶³ On the same day, Representative Dan Benishek, (R-MI) introduced the same bill in the House of

⁶⁰ Sexual Assault Training Oversight and Prevention (STOP) Act, H.R. 1593, 113th Cong. (2013).

⁶¹ *Id.*

⁶² *Testimony on Sexual Assaults in the Military: Hearing Before the Subcomm. on Personnel of the S. Comm. on Armed Services*, 113th Cong. (2013), available at http://www.armed-services.senate.gov/download/official-transcript_-testimony-on-sexual-assaults-in-the-military---personnel-subcommittee---march-13-201313 (last visited Apr. 6, 2015) [hereinafter *March 13, 2013 Hearing*].

⁶³ Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013).

Representatives as H.R. 2016.⁶⁴ The SASC held hearings on Senator Gillibrand's bill on June 4, 2013.⁶⁵

On November 20, 2013, Senator Gillibrand revised her bill and re-introduced it as S. 1752.⁶⁶ The bill reached the Senate floor for debate on March 6, 2014. However, shortly after debate began, several Senators made a motion to close debate on the bill.⁶⁷ If three-fifths of the Senate approves a cloture motion, debate ends and the Senate votes on the bill.⁶⁸ In this case, the cloture vote received only fifty-five of the sixty votes required to close the debate. Therefore, the Senate did not vote on the bill and the bill returned to the Senate calendar for further debate.⁶⁹

Senator Gillibrand re-introduced the bill as S. 2970, Military Justice Improvement Act of 2014, on December 2, 2014.⁷⁰ A week later, she expanded the bill and re-

⁶⁴ Military Justice Improvement Act of 2013, H.R. 2016, 113th Cong. (2013).

⁶⁵ *June 4, 2013 Hearing, supra* note 36.

⁶⁶ Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2013).

⁶⁷ 160 CONG. REC. S1335-38 (daily ed. Mar. 6, 2014). The following Senators made the cloture motion: Harry Reid (D-NV), Kirsten E. Gillibrand (D-NY), Barbara Boxer (D-CA), John D. Rockefeller IV (D-WV), Tammy Baldwin (D-WI), Benjamin L. Cardin (D-MD), Patrick J. Leahy (D-VT), Debbie Stabenow (D-MI), Richard Blumenthal (D-CT), Christopher A. Coons (D-DE), Claire McCaskill (D-MO), Jon Tester (D-MT), Mark Begich (D-AK), Barbara Mikulski (D-MD), Maria Cantwell (D-WA), Charles E. Schumer (D-NY), Dianne Feinstein (D-CA). *Id.*

⁶⁸ WALTER J. OLESZEK, CONG. RESEARCH SERV., RL 98-780, CLOTURE: ITS EFFECT ON SENATE PROCEEDINGS (2008), *available at* <http://www.senate.gov/CRS/Reports/crs-publish.cfm?pid=%26%2A2%3C4Q%3C%3B%3B%0A> (last visited Apr. 6, 2015).

⁶⁹ 160 CONG. REC. S1349-38 (daily ed. Mar. 6, 2014).

⁷⁰ Military Justice Improvement Act of 2014, S. 2970, 113th Cong. (2014).

introduced it as S. 2992 on December 9, 2014, but the Senate did not act on the re-introduced bill before the 113th Congress recessed.⁷¹

In the Military Justice Improvement Act, Senator Gillibrand proposes to remove the authority of commanders to determine whether to proceed to trial by court-martial for certain non-military offenses. Instead of commanders, judge advocates in the grade of O-6 or higher with significant military justice experience and outside the chain of command of the accused would be responsible for determining the disposition of charges.⁷² The proposal also establishes a separate office under each service to convene general and special courts-martial and detail members of the courts-martial for the designated non-military offenses.⁷³ Under Senator Gillibrand's proposal, commanders retain the authority to determine disposition, convene courts-martial, and detail members for the military offenses listed in Articles 83 through 117, 133, and 134 of the UCMJ, and offenses of conspiracy, solicitation, and attempt to commit such offenses.⁷⁴

Current Status

As proposals to amend the UCMJ were pending in Congress, debate began over the National Defense Authorization Act (NDAA) for Fiscal Year 2014 (FY14). Rather than enacting separate legislation to amend the UCMJ, the Armed Services Committees decided to include the legislation in the FY14 NDAA. After months of debate in

⁷¹ Military Justice Improvement Act of 2014, S. 2992, 113th Cong. (2014).

⁷² *Id.* at § 2.

⁷³ *Id.* at § 3.

⁷⁴ *Id.* at §§ 2-3.

Congress, the FY14 NDAA passed both the Senate and the House of Representatives and President Obama signed it into law on December 26, 2013.⁷⁵ Although it included several major changes to the way the military handles misconduct, the legislation did not incorporate any of the proposals to remove commanders from the court-martial process.

However, some members of Congress have vowed to continue pursuing the issue.⁷⁶ Representative Jackie Speier (D-CA) introduced the Sexual Assault Training Oversight and Prevention (STOP) Act in both the 112th and 113th Congresses. On April 29, 2015, she introduced a version of the bill as an amendment to the House Armed Services Committee mark-up of H.R. 1735, the National Defense Authorization Act for Fiscal Year 2016.⁷⁷ Although the House Armed Services Committee voted not to include the amendment in the National Defense Authorization Act for Fiscal Year 2016, it is likely that Representative Speier will continue introducing the bill. Senator Kirsten Gillibrand (D-NY) has introduced the Military Justice Improvement Act four times and has stated that she will re-introduce it during the 114th Congress.⁷⁸ Either of these

⁷⁵ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1701-1753, 127 Stat. 672 (2013); *see infra* chapter 2.

⁷⁶ Helene Cooper, *Senate Rejects Blocking Military Commanders from Sexual Assault Cases*, N.Y. TIMES, Mar. 6, 2014, http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html?_r=0 (last visited Apr. 6, 2015); Dennis Yusko, *Gillibrand vows to keep fight for sex abuse bill*, TIMES UNION, Sept. 27, 2014, <http://www.timesunion.com/local/article/Gillibrand-Military-sex-abuse-bill-will-pass-5785655.php> (last visited Apr. 6, 2015).

⁷⁷ *Markup of H.R. 1735 – National Defense Authorization Act for Fiscal Year 2016*, U.S. HOUSE OF REPRESENTATIVES COMMITTEE REPOSITORY, <http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=103288> (last visited May 5, 2015).

⁷⁸ Yusko, *supra* note 76; Anna Palmer & Darren Samuelsohn, *Kirsten Gillibrand gears up for another round*, POLITICO, Jan. 7, 2015, <http://www.politico.com/>

proposals, if enacted, impacts the role of commanders in the military justice process. While proponents for the legislation assert that removing commanders from the military justice process will improve the prosecution of major crimes in the military, it is unclear what impact, if any, the change would have on the United States military's status as a profession.

Research Questions

Primary Research Question: Will removing commanders from the court-martial process affect the United States military's status as a profession?

Secondary Research Question 1: What is a profession?

Secondary Research Question 2: Is the military a profession?

Secondary Research Question 3: How are commanders currently involved in the court-martial process?

Limitations

Due to the researcher's location at Fort Leavenworth, Kansas, research will be limited to the Combined Arms Research Library, The Judge Advocate General's Legal Center and School Library, and online sources.

Scope and Delimitations

Several other countries, such as the United Kingdom, Australia, Canada, and Israel either do not include commanders in their military justice processes or have limited the role of commanders in their military justice system. While an analysis of the military

story/2015/01/kirsten-gillibrand-military-sexual-assault-114018.html (last visited Apr. 6, 2015).

justice systems of these countries may be useful in determining whether the removal of commanders from their military justice systems affected their military's status as a profession, such analysis is beyond the scope of this thesis.

The Response Systems to Adult Sexual Assault Crimes Panel, Role of the Commander Subcommittee conducted an analysis of the military justice systems of allied nations and determined that “[n]one of the military justice systems employed by our Allies was changed or set up to deal with the problem of sexual assault, and the evidence does not indicate that the removal of the commander from the decision making process in non-U.S. military justice systems has affected the reporting of sexual assaults.”⁷⁹ Additionally, because the society for which a profession serves determines whether a particular occupation is a profession, American society will determine whether the United States military remains a profession if Congress removes commanders from the military justice process. As noted by the Legal Counsel to the CJCS,

the move by our allies to more civilianized systems mirrors a general global trend towards demilitarization, especially among countries that no longer require or maintain truly expeditionary militaries. The role of the United States military is different, and it will continue to be different. While many countries can afford for the center of the[ir] military justice systems to be located . . . far from the arenas of international armed conflict, we require a more flexible capability that can travel with the unit as it operates in any part of the world.⁸⁰

Therefore, while analysis of the military justice systems of other countries does inform the debate by explaining how our allies have dealt with the issue, such analysis is

⁷⁹ REPORT OF THE ROLE OF THE COMMANDER SUBCOMM. TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 113 (2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/02_RoC/ROC_Report_Final.pdf (last visited Apr. 6, 2015) [hereinafter REPORT OF THE RoC SUBCOMM.].

⁸⁰ *Id.* at 108.

not relevant to the determination of whether American society will continue to recognize the United States military as a profession if Congress removes commanders from the military justice process.

Conclusion

This study will examine whether removing commanders from the military justice process will affect the United States military's status as a profession. Chapter 2 includes a survey of existing literature on the elements of a profession, the military's status as a profession, and the arguments for and against commander involvement in the military justice process. Chapter 3 presents the methodology for this study and Chapter 4 provides a historical case study of the military as a profession in the United States and military justice in the United States. Chapter 5 concludes the study with an analysis to determine whether removing commanders from the military justice process will impact the military's status as a profession.

CHAPTER 2

LITERATURE REVIEW

In order to determine whether removing commanders from the military justice process will affect the military's status as a profession, one must first understand the definition and characteristics of a profession. Then, using the definition of a profession, one must be able to conclude that the military is currently a profession. This chapter reviews sociological literature in order to define the elements of a profession. Next, this chapter surveys existing literature on whether the military is a profession. Finally, this chapter will summarize the arguments for and against commander involvement in the military justice process.

What is a Profession?

Although professions have existed for centuries, the modern concept of a profession did not exist until the nineteenth century, and sociologists did not begin to study professions until the twentieth century.⁸¹ Sociology, the study of social behavior, includes a significant body of research and literature on the study of professions. However, a review of sociologic literature indicates that there is no clear definition of the concept of a "profession."

Sir A. M. Carr-Saunders and Paul Alexander Wilson were among the first sociologists to define the concept of a profession when they published *The*

⁸¹ ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 3 (1988). See also Talcott Parsons, *The Professions and Social Structure*, 17 *SOCIAL FORCES* 457 (1939) ("Perhaps the closest parallel is the society of the Roman Empire where, notably, the Law was highly developed as a profession indeed.").

Professions in 1933.⁸² These two English sociologists defined professions as “organized bodies of experts who applied esoteric knowledge to particular cases. They had elaborate systems of instruction and training, together with entry by examination and other formal prerequisites. They normally possessed and enforced a code of ethics or behavior.”⁸³

Other sociologists in this era attempted not to define professions, but to delineate their role in society. In 1939, Talcott Parsons explained that the profession “is the institutional framework in which many of our most important social functions are carried on.”⁸⁴ Although Parsons recognized many elements of a profession, he distinguished professions from occupations by their interest and professional authority. Businessmen, he noted, pursue their own self-interest, whereas professionals serve the interests of others.⁸⁵ Parsons also distinguished professionals based on the professional authority they wield resulting from the technical competence they hold in a particular field.⁸⁶

In 1957, Samuel P. Huntington adopted a similar trait-based definition of professions when he described the military officer corps as a profession in his seminal book, *The Soldier and the State*.⁸⁷ Huntington wrote that professions have three

⁸² ABBOTT, *supra* note 81, at 4 (citing A. M. SAUNDERS & PAUL A. WILSON, *THE PROFESSIONS* (1933)).

⁸³ *Id.*

⁸⁴ Parsons, *supra* note 81, at 467.

⁸⁵ *Id.* at 458.

⁸⁶ *Id.* at 460.

⁸⁷ SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* (1957).

characteristics: expertise, responsibility, and corporateness.⁸⁸ He explained that a professional “is an expert with specialized knowledge and skill in a significant field of human endeavor [sic]” and that a professional acquires expertise through education and experience.⁸⁹ The expertise of a professional is “essential to the functioning of society,” and as such, professionals have a responsibility to society rather than their own wealth and well-being.⁹⁰ Due to their responsibility to society, professions have values and ideals that are generally “codified into written canons of professional ethics.”⁹¹ Finally, Huntington asserted that “members of a profession share a sense of organic unity and consciousness of themselves as a group apart from laymen.”⁹² This unity is usually evident through professional associations with rules or standards for professional responsibility.⁹³

After World War II, “white-collar service occupations grew at an unprecedented rate, and this fuelled demand for professional recognition.”⁹⁴ For this reason, for over thirty years sociologists continued to use definitions, such as Huntington’s definition, to distinguish between occupations and “professions.” These definitions generally focused on the expertise of professions, trust between the client and professional, and the existence of formal associations and licensing bodies with

⁸⁸ *Id.* at 8.

⁸⁹ *Id.*

⁹⁰ *Id.* at 9.

⁹¹ *Id.* at 10.

⁹² HUNTINGTON, *supra* note 87, at 10.

⁹³ *Id.*

⁹⁴ Alan Aldridge, *Series Editor’s Preface* to ROBERT DINGWALL, *ESSAYS ON PROFESSIONS*, at vii (2008).

codes of ethics.⁹⁵ However, the 1960s brought about additional research and change in the study of professions.⁹⁶

In 1964, Geoffrey Millerson identified that any definition of professions based on a set of characteristics could be “moulded [sic] to fit arguments.”⁹⁷ Thus, by defining a profession based on traits alone, one can easily include or exclude a particular occupation from the category of professions by adding or excluding traits from the definition of profession. To avoid this problem, Millerson attempted to define professions without any specific characteristics. He defined professions as “a type of higher-grade, non-manual occupation, with both subjectively and objectively recognized status, possessing a well-defined area of study or concern and providing a definite service, after advanced training and education.”⁹⁸

Around the same time, Harold Wilensky, another well-known sociologist, argued that although occupations were becoming more “professionalized,” there are only thirty to forty professions.⁹⁹ Wilensky stated that “any occupation wishing to exercise professional authority must find a technical basis for it, assert an exclusive jurisdiction, link both skill and jurisdiction to standards of training, and convince the public that its services are uniquely trustworthy.”¹⁰⁰ However, he found that the distinction between an occupation and a profession lies in the fact that “[t]he job of

⁹⁵ ABBOTT, *supra* note 81, at 5.

⁹⁶ *Id.*

⁹⁷ GEOFFREY MILLERSON, *THE QUALIFYING ASSOCIATIONS* 3 (1964).

⁹⁸ *Id.* at 10.

⁹⁹ Harold L. Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOCIOLOGY 137, 141 (1964).

¹⁰⁰ *Id.* at 138.

the professional is technical-based on systematic knowledge or doctrine acquired only through long prescribed training” and “[t]he professional man adheres to a set of professional norms.”¹⁰¹

The study of professions continued to evolve after the 1960s and sociologists published a majority of the literature regarding the study of professions between the 1960s and the 1980s. During this period, most literature focused on one profession, usually law or medicine. Sociologists then derived general theories about professions as a whole from their analysis of that one profession.¹⁰² For example, Eliot Freidson, a prominent sociologist in the study of professions, focused most of his work on the profession of medicine. In his book *Profession of Medicine*, Freidson centered his analysis of the profession of medicine on two characteristics, autonomy and preeminence.¹⁰³

Beginning in 1975, another theory developed regarding the relation of professions to society. Jeffrey Berlant, writing in 1975, and Magali Larson, writing in 1977, both adopted a monopoly theory in their analysis of the medical profession.¹⁰⁴ These two sociologists hypothesized that the medical profession developed in an attempt to dominate the medical field, thus establishing a monopoly.¹⁰⁵ While her book focused on her monopoly theory of professions, Larson began her book by articulating that professions are distinct from other occupations based on several

¹⁰¹ *Id.*

¹⁰² Sida Liu, *Forward* to THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS (Robert Dingwall & Philip Lewis eds., 2014).

¹⁰³ ELIOT FREIDSON, *PROFESSION OF MEDICINE* xv and 5 (1970).

¹⁰⁴ JEFFREY L. BERLANT, *PROFESSION AND MONOPOLY* (1975); MAGALI LARSON, *THE RISE OF PROFESSIONALISM* (1977).

¹⁰⁵ ABBOTT, *supra* note 81, at 6.

“general dimensions.”¹⁰⁶ She posited that professions have a “body of knowledge and techniques which the professionals apply in their work,” required training to obtain the knowledge, a service orientation, ethics “which justify the privilege of self-regulation granted them by society,” autonomy, and prestige.¹⁰⁷

The study of the military as a profession increased in the 1970s and 1980s with scholars such as Sam C. Sarkesian,¹⁰⁸ Allan R. Millett,¹⁰⁹ General Sir John Hackett,¹¹⁰ and Anthony E. Hartle.¹¹¹ While these authors offered new ideas in the study of the military as a profession, they derived their trait-based definitions of a profession from existing sociology literature. These authors included the following characteristics in their definitions: organizational structure, special knowledge, education, ethical codes and self-regulation, a calling or commitment, service to society, autonomy, group identity, and authority.¹¹²

¹⁰⁶ LARSON, *supra* note 104, at x.

¹⁰⁷ *Id.*

¹⁰⁸ See SAM C. SARKESIAN, *THE PROFESSIONAL ARMY OFFICER IN A CHANGING SOCIETY* (1975).

¹⁰⁹ See ANTHONY E. HARTLE, *MORAL ISSUES IN MILITARY DECISION MAKING* 21 (1989) (citing ALLAN R. MILLETT, *MILITARY PROFESSIONALISM AND OFFICERSHIP IN AMERICA* (1977)).

¹¹⁰ See GENERAL SIR JOHN HACKETT, *THE PROFESSION OF ARMS* (1983).

¹¹¹ See HARTLE, *supra* note 109.

¹¹² Sam Sarkesian’s definition includes four characteristics: “(1) organizational structure; (2) special knowledge and education; (3) self-regulation; and (4) calling and commitment.” SARKESIAN, *supra* note 108, at 9. Allan Millett notes that six attributes are generally included when analyzing professions: “1. The occupation is a full-time and stable job, serving continuing social needs. 2. The occupation is considered a lifelong calling by the practitioners, who identify themselves personally with their job subculture. 3. The occupation is organized to control performance standards and recruitment. 4. The occupation requires formal, theoretical education. 5. The occupation has a service orientation in which loyalty to standards of competence and loyalty to clients’ needs are paramount. 6. The occupation is granted a great deal of

Most sociologists in the last century focused their research on defining professions and determining what makes an occupation a profession. In 1988, Andrew Abbott approached the study of profession in a different manner. Although Abbott loosely defined professions as “exclusive occupational groups applying somewhat abstract knowledge to particular cases,” his book, *The System of Professions*, presents a theory that professions are part of a larger system and that a profession’s role in that system depends on the other professions in the system.¹¹³ Thus, rather than focusing on defining which occupations are professions, Abbott centered his theory on explaining how professions interact within the system of professions.¹¹⁴

Within the last few decades, scholars studying the military as a profession have adopted Abbott’s systems theory.¹¹⁵ However, Army doctrine uses a trait-based definition and defines a profession as “a trusted self-policing and relatively autonomous vocation whose members develop and apply expert knowledge as human

collective autonomy by the society it serves, presumably because the practitioners have proven their high ethical standards and trustworthiness.” HARTLE, *supra* note 109, at 21 (citing MILLETT, *supra* note 109, at 18). General Sir John Hackett defines a profession as “an occupation with a distinguishable corpus of specific technical knowledge and doctrine, a more or less exclusive group coherence, a complex of institutions peculiar to itself, an educational pattern adapted to its own specific needs, a career structure of its own and a distinct place in the society which has brought it forth.” HACKETT, *supra* note 110, at 9. Rather than adopting his own definition, Anthony Hartle cites other definitions and concludes that “[m]ost authorities would accept the following five elements as ones constituting the distinguishing attributes of a profession. 1. Systematic theory; 2. Authority; 3. Community sanction; 4. Ethical codes; 5. A culture.” HARTLE, *supra* note 109, at 19 (citing Ernest Greenwood, *Attributes of a Profession*, in MAN, WORK, AND SOCIETY 207 (Sigmund Nosow and William H. Form, eds., 1962)).

¹¹³ ABBOTT, *supra* note 81, at 33.

¹¹⁴ *Id.* at 315.

¹¹⁵ See generally THE FUTURE OF THE ARMY PROFESSION (Lloyd J. Matthews ed., 2d ed. 2005).

expertise to render an essential service to society in a particular field.”¹¹⁶ The Army definition further explains that a profession has five characteristics: “[p]rofessions provide a unique and vital service to the society served,” professions “apply[] expert knowledge and practice,” “[p]rofessions earn the trust of the society because of effective and ethical application of their expertise,” “[p]rofessions self-regulate,” and professions are “granted significant autonomy and discretion in their practice of expertise on behalf of the society.”¹¹⁷

Despite the varied analysis of professions in the last century, most definitions of a profession share common characteristics. As depicted in Table 1, below, a majority of the scholars evaluated include some form of knowledge or expertise, training or education, ethical code or self-regulation, and service-orientation, calling or commitment in their definition of a profession. After approximately 1970, authors also generally include organizational structure or group identity, and some form of autonomy, preeminence, dominance, prestige, or authority in their definitions.

¹¹⁶ U.S. DEP’T OF ARMY, DOCTRINE REFERENCE PUB. 1, THE ARMY PROFESSION para. 1-3 (June 2013) [hereinafter ADRP 1].

¹¹⁷ *Id.*

Table 1. Comparison of Definitions of a Profession

	Knowledge / Expertise	Training / Education	Ethical Code / Self-Regulation	Service-Oriented / Calling or Commitment	Org. Structure / Group Identity	Autonomy	Preeminence/ Dominance / Prestige / Authority
Carr-Saunders	✓	✓	✓				
Parsons	✓			✓			
Huntington	✓	✓	✓	✓	✓		
Millerson	✓	✓		✓			
Wilensky	✓	✓	✓				
Freidson						✓	✓
Larson	✓	✓	✓	✓		✓	✓
Millet		✓	✓	✓	✓	✓	
Sarkesian	✓	✓	✓	✓	✓		
Hackett	✓	✓			✓		✓
Hartle	✓		✓	✓	✓		✓
ADRP 1	✓		✓	✓		✓	✓

Source: Created by author. Data derived from ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 4 (1988) (citing A. M. SAUNDERS & PAUL A. WILSON, *THE PROFESSIONS* (1933)); Talcott Parsons, *The Professions and Social Structure*, 17 *SOCIAL FORCES* 457, 467 (1939); SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* (1957); GEOFFREY MILLERSON, *THE QUALIFYING ASSOCIATIONS* 10 (1964); Harold L. Wilensky, *The Professionalization of Everyone?*, 70 *AM. J. SOCIOLOGY* 137, 138 (1964); ELIOT FREIDSON, *PROFESSION OF MEDICINE* xv and 5 (1970); MAGALI LARSON, *THE RISE OF PROFESSIONALISM* x (1977); ANTHONY E. HARTLE, *MORAL ISSUES IN MILITARY DECISION MAKING* 21 (1989) (citing ALLAN R. MILLETT, *MILITARY PROFESSIONALISM AND OFFICERSHIP IN AMERICA* (1977)); SAM C. SARKESIAN, *THE PROFESSIONAL ARMY OFFICER IN A CHANGING SOCIETY* 9 (1975); GENERAL SIR JOHN HACKETT, *THE PROFESSION OF ARMS* 9 (1983); ANTHONY E. HARTLE, *MORAL ISSUES IN MILITARY DECISION MAKING* 19 (1989) (citing Ernest Greenwood, *Attributes of a Profession, in MAN, WORK, AND SOCIETY* 207 (Sigmund Nosow and William H. Form, eds., 1962)); U.S. DEP'T OF ARMY, *DOCTRINE REFERENCE PUB. 1, THE ARMY PROFESSION* para. 1-3 (June 2013).

The Military Profession

Despite the extensive research and literature on the study of professions, the military is notably absent from traditional sociologic studies of professions and it is only within the last sixty years that scholars began to recognize the military as a profession. However, by applying the characteristics of a profession described above to the military, it is clear that the modern military is a profession.

Morris Janowitz, a sociologist, and Samuel P. Huntington, a political scientist, led the movement of studying the military as a profession in the late 1950s. In 1957, Samuel P. Huntington published his book, *The Soldier and the State*, which is now considered a preeminent text on civil-military relations.¹¹⁸ Huntington began his book by stating that “[t]he modern officer corps is a professional body and the modern military officer a professional man.”¹¹⁹ While many social scientists considered this proclamation novel and even controversial when it was written, the idea of the military as a profession has since become commonplace.

At the same time as Huntington was conducting research into civil-military relations from a political science perspective, Morris Janowitz studied the military profession from a sociology perspective. In 1960, Janowitz published *The Professional Soldier: A Social and Political Portrait*, the first literature in the field of military sociology.¹²⁰ That same year, Janowitz founded the Inter-University Seminar on Armed Forces and Society, “a forum for the interchange and assessment of research and scholarship in the social and behavioral sciences dealing with the military establishment and civil-military relations.”¹²¹ Throughout his career, Janowitz published numerous works on the military profession, and sociologists

¹¹⁸ HUNTINGTON, *supra* note 87.

¹¹⁹ *Id.* at 7.

¹²⁰ MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT* (1960).

¹²¹ THE INTER-UNIVERSITY SEMINAR ON ARMED FORCES AND SOCIETY, <http://www.iusafs.org/about/AboutUs.asp> (last visited Apr. 7, 2015).

consider Janowitz as the founder of the study of the military and society as a subfield of sociology.¹²²

After Janowitz developed the study of the military as a subfield of sociology, a few other sociologists began including the military in their analysis of professions. For example, in 1964, Harold Wilensky studied the process of professionalization and identified that the military became a professional career after the Renaissance period.¹²³

From the 1960s to the 1980s, sociologists, historians, and political scientists began studying and writing extensively about military professionalism. In 1975, military sociologist Sam C. Sarkesian published *The Professional Army Officer in a Changing Society*.¹²⁴ Historian Allan Millet followed in 1977 with *Military Professionalism and Officership in America*.¹²⁵

Military leaders after 1960 also embraced the concept of the military as a profession. In his farewell speech at West Point in 1962, General Douglas MacArthur proclaimed, “[y]ours is the profession of arms, the will to win, the sure knowledge that in war there is no substitute for victory, that if you lose, the Nation will be destroyed, that the very obsession of your public service must be Duty, Honor,

¹²² *Morris Janowitz: A Professional Soldier*, THE INTER-UNIVERSITY SEMINAR ON ARMED FORCES AND SOCIETY, <http://www.iusafs.org/JanowitzBio.asp> (last visited Apr. 7, 2015).

¹²³ Wilensky, *supra* note 99, at 141.

¹²⁴ SARKESIAN, *supra* note 108.

¹²⁵ MILLETT, *supra* note 109.

Country.”¹²⁶ In 1983, General Sir John Hackett, a retired British officer, wrote *The Profession of Arms*, outlining the profession of arms through history.¹²⁷

Although scholars agree that the modern military is a profession, historians debate the date when the military became a profession. The military has possessed some characteristics of a profession for centuries, but most scholars identify the nineteenth century as the period of military professionalization.

Prior to the French Revolution

“From the beginning of man’s recorded history physical force, or the threat of it, has always been freely applied to the resolution of social problems.”¹²⁸ Historians believe that as far back as the 7th century B.C., societies organized militaries to defend their states.¹²⁹ In the 7th century B.C., a body of elders selected Spartan children for service as infantryman. These children began military education and training at age seven and served the state in the military from age twenty-one to age sixty.¹³⁰ While these early soldiers were “professional” in the sense that the military was their occupation and they were in the service of the state, the military did not

¹²⁶ General Douglas McArthur, Farewell Speech Given to the Corps of Cadets at West Point (May 12, 1962), *available at* <http://www.nationalcenter.org/MacArthurFarewell.html> (last visited Apr. 7, 2015).

¹²⁷ HACKETT, *supra* note 110.

¹²⁸ *Id.* at 9.

¹²⁹ Victor Davis Hanson, *Genesis of the Infantry*, in *THE CAMBRIDGE HISTORY OF WARFARE* 25 (Geoffrey Parker ed., 2005); HACKETT, *supra* note 110, at 10; SARKESIAN, *supra* note 108, at 8.

¹³⁰ HACKETT, *supra* note 110, at 10-13.

become a “profession” in the modern sense of the word until sometime after the nineteenth century.¹³¹

In Europe prior to the nineteenth century, nobility had the right to a military commission, or they could buy a commission for the right price.¹³² France and Prussia prohibited commoners from serving as military officers based on a belief “that only aristocrats possessed honor, loyalty, and courage.”¹³³ England required officers to purchase their commission in order to ensure officers had a financial interest in the government, thereby restricting officer commissions to wealthy individuals who could afford it.¹³⁴ Due to these commissioning practices, 85 percent of European military officers were aristocrats.¹³⁵ Mercenaries and technical experts generally made up the remaining part of the officer corps prior to the nineteenth century.¹³⁶

Because men of noble birth were entitled to military commissions, they received military training and education from an early age, but very few military schools or academies existed.¹³⁷ For example, King Frederick II of Prussia, also

¹³¹ HUNTINGTON, *supra* note 87, at 19; SARKESIAN, *supra* note 108, at 8; HACKETT, *supra* note 110, at 99.

¹³² HACKETT, *supra* note 110, at 104; R.R. Palmer, *Frederick the Great, Guibert, Bülow: From Dynastic to National War*, in MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE 91, 92 (Peter Paret ed., 1986).

¹³³ HUNTINGTON, *supra* note 87, at 22.

¹³⁴ *Id.* at 22-23.

¹³⁵ John A. Lynn, *Nations in Arms*, in THE CAMBRIDGE HISTORY OF WARFARE 196-197 (Geoffrey Parker ed. 2005).

¹³⁶ Palmer, *supra* note 132, at 92; Geoffrey Parker, *Dynastic War*, in THE CAMBRIDGE HISTORY OF WARFARE 150 (Geoffrey Parker ed., 2005); HUNTINGTON, *supra* note 86, at 20-23.

¹³⁷ HUNTINGTON, *supra* note 87, at 24-25; WILLIAM B. SKELTON, AN AMERICAN PROFESSION OF ARMS 1784-1861 88 (1992).

known as Frederick the Great, began his military training at the age of six, when his father assigned him a drill instructor and a company of six-year old cadets to train.¹³⁸

Beginning in the late seventeenth century, nations began establishing military schools for training in technical fields such as artillery and engineering. The establishment of military academies followed in the early eighteenth century when England, France, and Prussia established academies to train noble children for military service. However, these academies were rudimentary and only provided noble children with limited training before they took command of military units at around age twelve.¹³⁹ After assuming command, officers received no additional training or education.¹⁴⁰

Once commissioned, military officers received promotions based on their status, wealth, and noble birth. In England, officers could purchase a higher rank, and in other nations, the highest nobility served in the highest command positions.¹⁴¹ Frederick the Great was a captain by age fourteen, a colonel by age eighteen, and a major general by age twenty-two.¹⁴²

While military officers came from the highest classes of society, enlisted soldiers during this period came from the lowest classes. Forced into service, these soldiers had no commitment to the military or the nation they served. They lacked

¹³⁸ Jay Luvaas, *Frederick the Great: The Education of a Great Captain*, in H100: RISE OF THE WESTERN WAY OF WAR (U.S. Army Command and General Staff College ed., 2014).

¹³⁹ HUNTINGTON, *supra* note 87, at 24-25.

¹⁴⁰ *Id.* at 25.

¹⁴¹ *Id.* at 23-24.

¹⁴² Luvaas, *supra* note 138.

morale, expertise, and loyalty. Societies considered these soldiers the lowest class and treated them as social outcasts rather than experts in warfare.¹⁴³

The aristocratic influence on the military resulted in the military not being a profession prior to the nineteenth century. Officers lacked specialized knowledge or expertise of warfare and received limited military training or education. The military lacked discipline and the only ethical code was that of the aristocracy.¹⁴⁴ Officers were committed to their own honor and class status rather than to the military or the service of their country.¹⁴⁵ They abandoned their units when military service was inconvenient to them, or when they wanted to engage in the lavish lifestyle of an aristocrat.¹⁴⁶ The wealthy aristocrats who made up the officer corps viewed officership not as a profession, but an “incidental attribute of his station in society.”¹⁴⁷

After the French Revolution

The French Revolution brought about changes to militaries around the world and by the end of the nineteenth century, nearly all militaries possessed characteristics of a profession by modern standards.¹⁴⁸ In France, financial crisis in the late eighteenth century led to the social and political turmoil of the French Revolution. In

¹⁴³ Palmer, *supra* note 132, at 92-93; Macgregor Knox, *Mass politics and nationalism as military revolution: The French Revolution and after*, in THE DYNAMICS OF MILITARY REVOLUTION 1300-2050 57, 60 (Macgregor Knox and Williamson Murray ed., 2001).

¹⁴⁴ HUNTINGTON, *supra* note 87, at 26-28.

¹⁴⁵ Palmer, *supra* note 132, at 92.

¹⁴⁶ John A. Lynn, *States in Conflict*, in THE CAMBRIDGE HISTORY OF WARFARE 180-181 (Geoffrey Parker ed., 2005); HUNTINGTON, *supra* note 87, at 27.

¹⁴⁷ HUNTINGTON, *supra* note 87, at 27. *See also* SKELTON, *supra* note 137, at 88.

¹⁴⁸ HACKETT, *supra* note 110, at 99; HUNTINGTON, *supra* note 87, at 19.

1789, the National Constituent Assembly abolished feudalism in France, thereby removing special privileges from nobility and making all citizens equal under the law.¹⁴⁹ In 1792, the Legislative Assembly abolished the monarchy and France became a republic.¹⁵⁰ The changes in France triggered major social and political changes throughout Europe, but also served as a catalyst for change to the professionalism of the European militaries. After the French Revolution, characteristics of a profession began to emerge in militaries around the world.

The end of feudalism in France removed the privilege of military commissions from nobility, making all citizens eligible to serve in the military in any rank.¹⁵¹ Prussia followed France with a decree in 1808 removing class restrictions for officers.¹⁵² England established the Royal Military College in 1802 and graduates received a military commission without the traditional requirement to purchase a commission. However, with the exception of commissions granted by the Royal Military College, the practice of purchasing a military commission continued in England until 1871.¹⁵³ While service as a military officer was previously just one aspect of being a nobleman, opening the officer ranks to members of all classes of society allowed officers to develop specialized knowledge and expertise in the art and science of warfare.

¹⁴⁹ GWYNNE LEWIS, *THE FRENCH REVOLUTION: RETHINKING THE DEBATE* 27 (1993).

¹⁵⁰ *Id.* at 37.

¹⁵¹ Thomas M. Huber, *The Rise of Napoleon*, in *H100: Rise of the Western Way of War* (U.S. Army Command and General Staff College ed., 2014); HUNTINGTON, *supra* note 87, at 42.

¹⁵² HUNTINGTON, *supra* note 87, at 39.

¹⁵³ *Id.* at 43.

Officers' knowledge and expertise in warfare also increased as the systems for advancement and promotion changed. With the decline of feudalism, class status became irrelevant. Previously promoted based on class status or wealth, officers now received promotions based on performance.¹⁵⁴ Performance-based promotions gave officers the incentive to develop specialized knowledge and expertise.

The eradication of military commissions based on status or wealth also led to the improvement of military training and education. Under the old system, military training and education was not necessary because society believed that nobility were born with the honor and courage that was necessary for military command.¹⁵⁵ However, with all citizens now eligible for military commissions, military leaders recognized the need to develop standards or prerequisites for granting military commissions, and they developed formal military training and education to prepare officers for command. For example, in France, legislation after the French Revolution required one-third to two-thirds of officers to be graduates of military schools. Beginning in 1806, Prussia required officer candidates to graduate from the gymnasias or pass an entrance examination.¹⁵⁶

Although nations established some military academies and schools in the eighteenth century, military schools and academies took root in the nineteenth century. France established École Polytechnique, an engineering school, in 1794.¹⁵⁷ In 1804, Napoleon Bonaparte transformed the school into a military school for artillery

¹⁵⁴ Lynn, *Nations in Arms*, *supra* note 135, at 196.

¹⁵⁵ HUNTINGTON, *supra* note 87, at 24.

¹⁵⁶ HACKETT, *supra* note 110, at 103.

¹⁵⁷ HUNTINGTON, *supra* note 87, at 42; *1794-1804: Revolution and Napoleonic Period*, ÉCOLE POLYTECHNIC UNIVERSITÉ PARIS-SACLAY, <http://www.polytechnique.edu/en/revolutionnapeoleonicperiod> (last visited Apr. 6, 2015).

and engineer officers and the school remains part of the Ministry of Defense to this day.¹⁵⁸ France established their military academy, the Special Military School (École Spéciale Militaire de Saint-Cyr), in 1803.¹⁵⁹ The United States established the United States Military Academy at West Point in 1802.¹⁶⁰ In 1741, England established a military academy for the technical training of artillery and engineer officers, the Royal Military Academy at Woolwich.¹⁶¹ England later established the Royal Military College in 1800 in order to train officers to be staff officers, to train cadets to be officers, and to train non-commissioned officers.¹⁶² England reorganized and expanded the Royal Military Academy in 1806, and it remained open until its closure in 1939.¹⁶³ The Royal Military College has been closed and reorganized several times since it opened, but it remains open today as the Royal Military Academy Sandhurst.¹⁶⁴ Prussia founded their military academy in 1801 and General Sharnhorst re-established the Kriegsakademie in Berlin in 1810.¹⁶⁵

¹⁵⁸ *19th century: thrust into the upheaval of the times*, ÉCOLE POLYTECHNIC UNIVERSITÉ PARIS-SACLAY, <http://www.polytechnique.edu/en/19thcentury> (last visited Apr. 6, 2015).

¹⁵⁹ HUNTINGTON, *supra* note 87, at 42.

¹⁶⁰ HACKETT, *supra* note 110, at 128; HUNTINGTON, *supra* note 87, at 198.

¹⁶¹ HUNTINGTON, *supra* note 87, at 25.

¹⁶² HACKETT, *supra* note 110, at 104; *The History of RMA Sandhurst*, THE BRITISH ARMY, http://www.army.mod.uk/documents/general/history_of_rmas.pdf (last visited Apr. 6, 2015).

¹⁶³ *The History of RMA Sandhurst*, THE BRITISH ARMY, http://www.army.mod.uk/documents/general/history_of_rmas.pdf (last visited Apr. 6, 2015).

¹⁶⁴ *Id.*

¹⁶⁵ HACKETT, *supra* note 110, at 103.

The end of the monarchy in France transformed the French military from a king's army to a citizen's army.¹⁶⁶ The new form of government gave citizens motivation to serve in the military because it was now their nation rather than the king's nation.¹⁶⁷ Therefore, military officers now served in the military due to a calling or commitment to serve their country and identified themselves as members of the profession of arms. Because the military now served society as a whole rather than the king, the military gained more respect from the society they served.¹⁶⁸ As the military education of officers increased and officers had more specialized knowledge and expertise in warfare, societies began to accept military officers as experts in the field of warfare, and granted the military profession more autonomy.¹⁶⁹

Based on these changes after the French Revolution, most scholars would agree that modern militaries around the world possess the characteristics of being a profession.¹⁷⁰ After the French Revolution, military officers began to possess specialized knowledge or expertise in the art and science of warfare. Militaries developed extensive training and education programs. Rather than serving for the monarchy, after the French Revolution, military officers served based on a calling or commitment to serve the people. Military structure changed and officers began to

¹⁶⁶ Williamson Murray and Macgregor Knox, *Thinking About Revolutions in Warfare*, in *THE DYNAMICS OF MILITARY REVOLUTION 1300-2050* 1, 8 (Macgregor Knox & Williamson Murray eds., 2001); CARL VON CLAUSEWITZ, *ON WAR* 592 (Michael Howard & Peter Paret eds. and trans., 1976); Palmer, *supra* note 132, at 91-92.

¹⁶⁷ Knox, *supra* note 143, at 65.

¹⁶⁸ *Id.* at 68.

¹⁶⁹ *Id.* at 71.

¹⁷⁰ According to Samuel P. Huntington, “[p]rior to 1800 there was no such thing as a professional officer corps. In 1900 such bodies existed in virtually all major countries.” HUNTINGTON, *supra* note 87, at 19.

identify themselves as military officers rather than nobles. As a result of these changes, the military obtained more prestige and received more autonomy and authority from the society they served. Chapter 4 discusses the final characteristic, self-regulation of an ethical code, in detail as it relates to the involvement of commanders in the military justice process.

Although the military as a whole became a profession after the French Revolution, individual militaries developed and professionalized at different rates. In most countries, the process of professionalization continues to this day. Chapter 4 reviews the history of professionalization in the United States in order to determine the effect that removing commanders from the military justice process will have on the military profession in the United States.

Arguments Related to Commander's Involvement in Courts-Martial

Now that it has been determined that the military is a profession, this research can move on to the issue of removing commanders from the military justice process and how it would affect the military's status as a profession. With Congress calling for change to the UCMJ to address the problem of sexual assault in the military, academic scholars, members of Congress, judge advocates, and military leaders have all expressed their opinions on whether commanders should be involved in the military justice process. The SASC received testimony from the service chiefs, service judge advocates, commanders, victims, and other individuals. The Response Systems to Adult Sexual Assault Crimes Panel, established by the Secretary of Defense at the direction of Congress, studied the issue for a year. As part of their study, the panel received testimony from "military leaders, both officer and enlisted, active duty and retired; foreign military leaders; sexual assault survivors; sexual

assault advocacy groups; [Department of Defense (DoD)] and civilian victim services personnel; military and civilian prosecutors and defense counsel; military and civilian victim counsel; academics and subject matter experts; Senators; and private citizens.”¹⁷¹ As a result, there is no shortage of literature and testimony available highlighting the arguments for and against removing commanders from the military justice process.

Arguments for Removing Commanders from the Military Justice Process

Advocates for removing commanders from the military justice process cite five primary arguments. First, they argue that commander involvement in the military justice process discourages victims from reporting sexual assaults due to fears of retaliation, retribution, damage to reputation, and disciplinary action for collateral misconduct.¹⁷² According to Ms. Anu Bhagwati, Executive Director of Service Women’s Action Network, service members “do not report [sexual assault] for two reasons primarily. They fear retaliation, and they are convinced that nothing will happen to their perpetrator.”¹⁷³ Others expand on the argument by stating that “[i]n the military justice system, victims might suspect that their superiors will not take their complaints seriously, and ultimately, the concern might be that the commander

¹⁷¹ REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL cover letter (2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf (last visited Apr. 6, 2015) [hereinafter RSP REPORT].

¹⁷² Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 144 (2014); REPORT OF THE ROC SUBCOMM., *supra* note 79, at 93-95.

¹⁷³ *June 4, 2013 Hearing*, *supra* note 36, at 181.

of the accused would not only take no action against the assailant, but would take action against the victim herself.”¹⁷⁴

The argument that the involvement of commanders in the military justice process decreases reporting leads directly into the next argument, that commanders have conflicting duties between the accused and the victim, and that this conflict impedes the commanders ability to respond to sexual assault in their units.¹⁷⁵

Commanders are “required to balance servicemembers’ due process rights with serving military justice and maintaining good order and discipline in their units.”¹⁷⁶ Thus, when both the accused and the victim are members of the commander’s unit, the commander has a duty to protect the due process rights of the accused, but must also consider the well-being of the victim. This conflict may affect decisions whether to transfer the accused or the victim to another unit and may result in re-victimization.

Third, advocates argue that the involvement of commanders in the military justice process “undermines the rights of both victims and accused service members, all of whom deserve an independent and impartial tribunal.”¹⁷⁷ When considering the appropriate disposition of a particular case, proponents argue that commanders factor in their knowledge of the accused and/or victim, and that this results in unfair

¹⁷⁴ Murphy, *supra* note 172, at 144; REPORT OF THE ROC SUBCOMM., *supra* note 79, at 93-95.

¹⁷⁵ Murphy, *supra* note 172, at 141-143; RSP REPORT, *supra* note 171, at 171-172 (statement of Hillman and Bryant); REPORT OF THE ROC SUBCOMM., *supra* note 79, at 98.

¹⁷⁶ Murphy, *supra* note 172, at 142.

¹⁷⁷ RSP REPORT, *supra* note 171, at 171-172 (statement of Hillman and Bryant).

decisions. They argue that “the decisions to prosecute or not should be based on evidence, independent of preexisting command relationships.”¹⁷⁸

Fourth, many argue that “[b]y establishing such a dominant role for the convening authority, the military justice system presents the potential problem of a commander using his power and influence in such a way as to thwart the fairness, impartiality, and integrity of disciplinary proceedings.”¹⁷⁹ This argument alludes to the issue of unlawful command influence. Unlawful command influence can occur when a commander attempts to deter sexual assault through messaging and the messaging has the effect of influencing the opinion of the court-martial panel members or witnesses. Article 37 of the UCMJ prohibits unlawful command influence.¹⁸⁰ Thus, a commander’s role as the court-martial convening authority precludes the commander from deterring sexual assault in their units through messaging.¹⁸¹

Finally, advocates for removing commanders from the military justice process argue that commanders lack the legal training that is necessary to make prosecutorial decisions. Therefore, they argue that “lawyers are better suited to make charging

¹⁷⁸ Transcript of Response Systems to Adult Sexual Assault Crimes Panel: The Role of the Commander in the Military Justice System: Perspectives of Retired Senior Commanders and Former Officers 11-12 (Jan. 30, 2014) (testimony of Major General (Retired) Martha Rainville), *available at* <http://responsesystemspanel.whs.mil/> (last visited Apr. 6, 2015). *See also* Murphy, *supra* note 172, at 167.

¹⁷⁹ Lindsay N. Alleman, *Who is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT’L L. 169, 171 (2006).

¹⁸⁰ UCMJ art. 37 (2014).

¹⁸¹ Murphy, *supra* note 172, at 144-152.

decisions and determine which cases should go to trial because they have the necessary legal training and background.”¹⁸²

Arguments in Favor of Commander Involvement in the Military Justice Process

Proponents for commander involvement in the military justice process focus their arguments around the idea that commanders must be involved in the military justice process because they are responsible for the good order and discipline of their unit. Although most proponents for keeping commanders involved in the military justice process agree that changes to the UCMJ are necessary, they are adamant that commanders must remain involved in the military justice process.

At the SASC hearing on sexual assault in the military in June 2013, the CJCS and all of the service chiefs fervently argued that commanders must be involved in the military justice process in order to maintain good order and discipline in their units.

General Martin E. Dempsey, CJCS commented that:

[t]he commander’s responsibility to preserve order and discipline is essential to effecting change. They punish criminals, and they protect victims when and where no other jurisdiction is capable of doing so or lawfully able to do so. Commanders are accountable for all that goes on in a unit, and ultimately, they are responsible for the success of the missions assigned to them.¹⁸³

In his prepared statement to the SASC, General Raymond T. Odierno, Chief of Staff of the Army argued that:

[d]iscipline is built, shaped and reinforced over a Soldier’s career by commanders with authority. The commander is necessarily vested with ultimate authority because he or she is responsible for all that goes on in a unit

¹⁸² *Id.* at 168-169. See also *Law Professors’ Statement on Reform of Military Justice*, COMPREHENSIVE RESOURCE CENTER FOR THE MILITARY JUSTICE IMPROVEMENT ACT, <http://www.gillibrand.senate.gov/mjia> (last visited Apr. 6, 2015); RSP REPORT, *supra* note 166, at 43 (statement of Colonel McHale).

¹⁸³ *June 4, 2013 Hearing, supra* note 36, at 11.

– health, welfare, safety, morale, discipline, training, and readiness to execute a mission in wartime and in times of peace. The commander’s ability to punish quickly, visibly, and locally is essential to maintaining discipline in all its forms within a unit. The [UCMJ] is the vehicle by which commanders can maintain good order and discipline in the force.¹⁸⁴

Noting that commanders are “responsible and accountable for everything that happens in his or her ship, squadron, or unit,” Admiral Jonathan Greenert, Chief of Naval Operations, recommended that “the unit commander’s authority and role as the singular individual accountable for the welfare of his or her sailors should be preserved such that the commander is able to carry out his or her mission.”¹⁸⁵

Similarly, General James F. Amos, Commandant of the Marine Corps, commented on the responsibility of commanders when he testified that “[c]ommanding officers are charged with establishing and training to standards and uniformly enforcing those standards. A unit will rise or fall as a direct result of the leadership of its commanding officer. Commanding officers never delegate responsibility. They should never be forced to delegate their authority.”¹⁸⁶

General Mark A. Welsh, III, Chief of Staff of the Air Force, mirrored the sentiments of his peers with his testimony,

Airmen should have no doubt about who will hold them accountable for mission performance and adherence to standards. Airmen expect their commander to define the mission, ensure readiness, and hold accountable other Airmen who fail to meet their responsibilities or live up to our standards of conduct. The commander must have both the responsibility and the authority to address issues that affect the good order and discipline of their unit.¹⁸⁷

¹⁸⁴ *Id.* at 16.

¹⁸⁵ *Id.* at 25.

¹⁸⁶ *Id.* at 32.

¹⁸⁷ *Id.* at 47-48.

Finally, Admiral Robert J. Rapp, Jr., Commandant of the Coast Guard, stated that he has “serious concerns about legislation that would fundamentally alter the role of commanders without full consideration of the second- and third-order effects on command authority and the ability to maintain unit discipline.”¹⁸⁸

A panel of commanders from all of the services shared similar sentiments with the SASC. For example, Colonel Donna W. Martin, an Army commander testified that:

The commander is responsible for all that happens or fails to happen in his or her unit. They set the standard, and we enforce them. The UCMJ provides me with all the tools I need to deal with misconduct in my unit from low-level offenses to the most serious, including murder and rape. I cannot and should not relegate my responsibility to maintain discipline to a staff officer or someone else outside of the chain of command.¹⁸⁹

In addition to the argument that UCMJ authority is necessary for commanders to maintain good order and discipline, Senator Carl Levin (D-MI) and Senator Claire McCaskill (D-MO) argue that commanders must retain authority so society can hold them responsible if the military culture does not change.¹⁹⁰ According to some proponents of commander involvement in the military justice process, commanders

¹⁸⁸ *June 4, 2013 Hearing, supra* note 36, at 50.

¹⁸⁹ *Id.* at 128.

¹⁹⁰ According to Senator Levin, “[i]t is the chain of command that can and must be held accountable if it fails to change an unacceptable military culture. It is harder to hold someone accountable for their failure to act if you reduce their power to act.” Bill Briggs, *Gillibrand loses bid to strip military sex assault cases from chain of command*, NBC NEWS, June 12, 2013, http://usnews.nbcnews.com/_news/2013/06/12/18920746-gillibrand-loses-bid-to-strip-military-sex-assault-cases-from-chain-of-command?lite (last visited Apr. 6, 2015). Senator McCaskill argues that “keeping commanders involved in the prosecution of sexual assaults would ensure command emphasis and command responsibility are the causes behind a reduction in sexual assaults.” Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60*, UCMJ, ARMY LAW., July 2014.

will feel less responsibility to change the culture regarding sexual assault if they do not have authority in the military justice process.¹⁹¹

Lastly, proponents for retaining the authority of commanders in the military justice process point to the differences between the military and civilian systems of justice and the necessity for the military to have an effective system of justice while deployed. Quoting the Defense Legal Policy Board's report, Senator James M. Inhofe (R-IA) argued that "[w]hile good order and discipline is important and essential in any military environment, it is especially vital in the deployed environment. The military justice system is the definitive commanders' tool to preserve good order and discipline, and nowhere is this more important than in a combat zone."¹⁹²

Conclusion

A review of existing literature shows that sociologists, historians, political scientists, and military leaders all agree that the modern military is a profession. Military leaders and advocates for the involvement of commanders in the military justice process claim that "[r]educing command responsibility [in the military justice process] could adversely affect the ability of the commander to enforce professional standards and ultimately, to accomplish the mission."¹⁹³ However, research and literature does not address the impact that such a change would have on the military's status as a profession. This study will fill that gap by analyzing whether proposals to remove commanders from the military justice process will affect the United States military's status as a profession.

¹⁹¹ REPORT OF THE ROC SUBCOMM., *supra* note 79, at 105.

¹⁹² *June 4, 2013 Hearing*, *supra* note 36, at 9.

¹⁹³ *Id.* at 12 (prepared statement of General Martin E. Dempsey).

CHAPTER 3

RESEARCH METHODOLOGY

Introduction

The issue of whether commanders should be involved in the military justice process has been a topic of discussion and debate since before Congress enacted the UCMJ in 1951.¹⁹⁴ The issue re-emerged in 2012 in response to the problem of sexual assault in the military and continues to be hotly debated nationwide – by military leadership, Congress, bar associations and legal organizations, academic scholars, and the American people in general.¹⁹⁵ Although scholars have written many articles on the topic, arguments for and against commander's involvement in the military justice process generally focus on whether the military justice system is a system of justice or a system of discipline and thus, whether lawyers or commanders should be responsible for the system. While scholars present valid arguments for and against the involvement of commanders in the military justice system, the arguments ignore the fact that the military justice system is the means to enforce the military's ethical code, and enforcement of the code through self-regulation is one characteristic that contributes to the military's status as a profession. Thus, it is unclear whether removing commanders from the military justice process will affect the military's status as a profession.

Qualitative Research

This study uses qualitative research to determine whether removing commanders from the military justice process will affect the military's status as a

¹⁹⁴ See *infra* chapter 4.

¹⁹⁵ See *infra* chapter 4.

profession. Although, as discussed in chapter 2, many sociologists define a profession using specific traits or characteristics, one important aspect of a profession is that in order to be a profession, it must be recognized as a profession by society.¹⁹⁶

Therefore, in order to determine whether the military's status as a profession will change if Congress removes commanders from the military justice system, one must determine how society would view such change.

Qualitative research is a way of “understanding the meaning people have constructed, that is, how people make sense of their world and the experiences they have in the world.”¹⁹⁷ Some writers compare qualitative research to a quilter who “stitches, edits, and puts slices of reality together.”¹⁹⁸ Since studies already exist regarding the military as a profession and regarding command authority in the military justice process, this study uses qualitative research to piece together both concepts.

Qualitative research has four major characteristics. First, qualitative research focuses on “understanding the phenomenon of interest from the participants’ perspectives, not the researcher’s.”¹⁹⁹ Thus, in this study, research focuses on understanding the military's status as a profession from society's perspective rather than from the perspective of a military officer. Second, in qualitative research the researcher is responsible for collecting and analyzing the data.²⁰⁰ For this study, the

¹⁹⁶ Snider, *supra* note 1, at 4.

¹⁹⁷ SHARAN B. MERRIAM, *QUALITATIVE RESEARCH* 13 (2009).

¹⁹⁸ NORMAN K. DENZIN AND YVONNA S. LINCOLN, *THE SAGE HANDBOOK OF QUALITATIVE RESEARCH* 5 (4th ed. 2011).

¹⁹⁹ MERRIAM, *supra* note 197, at 14.

²⁰⁰ *Id.* at 15.

researcher did not conduct any interviews or surveys, because congressionally mandated and DoD directed boards have already conducted extensive interviews and surveys as part of their reviews of the military justice system. However, the researcher reviewed literature and drew from previously conducted interviews and testimony in order to analyze the data related to this study. Third, because adequate theories do not exist or fail to explain the particular phenomenon, qualitative research is inductive in that “researchers gather data to build concepts, hypotheses, or theories rather than deductively testing hypotheses.”²⁰¹ This study derives data from concepts regarding the military justice system and the military as a profession in order to form a hypothesis regarding the impact that removing commanders from the military justice process will have on the military’s status as a profession. Finally, qualitative research is “richly descriptive,” describing the issue using words rather than numbers.²⁰²

Method

This study uses a historical case study methodology to determine whether removing commanders from the military justice process will impact the military’s status as a profession. A historical case study “is a study of the development of a particular organization over time.”²⁰³ Using a historical case study approach, the researcher “presents a holistic description and analysis of a specific phenomenon (the case) but presents it from a historical perspective.”²⁰⁴

²⁰¹ *Id.*

²⁰² *Id.* at 16.

²⁰³ *Id.* at 47.

²⁰⁴ MERRIAM, *supra* note 197, at 47.

This study begins with the history of the military as a profession in the United States, looking specifically at when and why the United States military developed characteristics of a profession and the relationship between the different characteristics of a profession. The study next presents research on the history of the military justice system in the United States, focusing on the role of commanders in the military justice process over time and the debates over whether the military justice system is a system of discipline or a system of justice.

Using the history of the military profession in the United States and the history of military justice in the United States, this study compares the two in order to determine whether the evolution of the military profession coincided with the development of the military justice system. Finally, this study analyzes the historical case study to ascertain whether removing commanders from the military justice system will impact the military's status as a profession.

CHAPTER 4

HISTORICAL CASE STUDIES

As discussed in chapter 2, most scholars agree that the military as a whole became a profession after the French Revolution and that modern militaries possess the characteristics of a profession. However, in order to understand whether removing commanders from the military justice process in the United States will affect the United States military's status as a profession, one must first understand the relationship between the United States military profession and the military justice system in the United States. A review the history of the military profession in the United States and the history of the military justice system in the United States helps determine the relationship between the two in order to ascertain whether removing commanders from the military justice process will affect the military's status as a profession.

The Military Profession in the United States

As European militaries transitioned to become more professional in the nineteenth century, the newly established military in the United States was also going through changes that would result in a professional military. The Continental Congress established the Continental Army on June 14, 1775 and structured it like the British military.²⁰⁵ Since the British military had not yet transformed into a professional military, the Continental Army also lacked the traits of a profession.

After the American Revolutionary War, the American people were apprehensive about the existence of a permanent military because the British military

²⁰⁵ SKELTON, *supra* note 137, at 4.

had been a threat to their political freedom.²⁰⁶ As a result, Congress disbanded the Continental Army shortly after the Treaty of Paris went into effect on May 12, 1784.²⁰⁷ However, on June 3, 1784, Congress ordered the establishment of an army of 700 men, and the United States Army has been in existence as a permanent army since that day.²⁰⁸ Although Congress established the permanent military on June 3, 1784, debate over its existence, size, and organization continued for several decades.²⁰⁹

On September 17, 1787, the delegates to the Constitutional Convention signed the United States Constitution.²¹⁰ On July 2, 1788, the United States Constitution went into effect after nine of the original thirteen colonies ratified the document.²¹¹ The newly adopted Constitution gave Congress the power “[t]o raise and support Armies” and “[t]o provide and maintain a Navy.”²¹² However, as a concession to the people’s distrust of a permanent army, the Constitution restricted the appropriation of money for the army to two years, thereby giving Congress the ability not to fund the army if necessary.²¹³

²⁰⁶ *Id.* at 3-4.

²⁰⁷ *Id.* at 4; Treaty of Paris, Sept. 3, 1783, *available at* <http://www.loc.gov/rr/program/bib/ourdocs/paris.html> (last visited Apr. 7, 2015) (ratified Jan. 14, 1784).

²⁰⁸ SKELTON, *supra* note 137, at 4.

²⁰⁹ *Id.* at 4-5.

²¹⁰ *A More Perfect Union: The Creation of the U.S. Constitution*, THE U.S. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, http://www.archives.gov/exhibits/charters/constitution_history.html (last visited Apr. 6, 2015).

²¹¹ *Id.*

²¹² U.S. CONST. art. I, § 8.

²¹³ *Id.*

After adoption of the Constitution in 1788, Congress expanded the army and established the War Department. The expansion did not last long, because in 1796, Congress reduced the size of the army. In fact, during the period between 1784 and 1812, the size of the army increased and decreased frequently as political leaders changed and disputes arose in the United States.²¹⁴ Due to the instability, “[r]elatively few officers made a long-term commitment to military service, and military leaders failed to develop effective procedures to instill group values, build internal cohesion, or develop and transmit professional knowledge.”²¹⁵ Thus, while the aristocratic influence on the militaries in Europe held those militaries back from professionalization until the nineteenth century, instability in the United States was the primary cause of the lack of professionalism in the United States military.²¹⁶

Scholars disagree as to the date the United States Army became a “profession.”²¹⁷ However, it is clear that the War of 1812 resulted in major changes to the professionalization of the United States Army. In the fifty years between the War of 1812 and the American Civil War, the United States Army began to develop officers with distinct knowledge and expertise, military training and education evolved, and the army established rules to restrict entrance into the officer corps.

²¹⁴ SKELTON, *supra* note 137, at xv, 4-9.

²¹⁵ *Id.* at xv.

²¹⁶ *Id.* at 89.

²¹⁷ Samuel P. Huntington believes that “[t]he American professional military ethic is peculiarly a product of the years between the Civil War and the First World War. HUNTINGTON, *supra* note 87, at 254. William B. Skelton believes that the change occurred between the end of the War of 1812 and the Civil War. *See generally* SKELTON, *supra* note 137, at 107. General Sir John Hackett agrees with Huntington and says that “[t]he years between 1860 and the First World War saw the emergence of a distinctive American professional military ethic. . . .” HACKETT, *supra* note 110, at 129.

At the beginning of the War of 1812, a majority of the army general officers had previously served in the American Revolutionary War, but only two of those fourteen general officers had served in the military in the period between the American Revolutionary War and the War of 1812. Rather, most general officers in the War of 1812 had served in the American Revolutionary War, left the service to pursue other occupations after the war ended, and subsequently received political appointments to their general officer positions during the War of 1812. Much like the aristocrat officers in Europe, these general officers viewed their military service as an extension of their political role in the country rather than a profession in itself.²¹⁸

By the last year of the War of 1812, a group of new, younger officers had taken leadership positions in the army. After the war ended, seven general officers remained in the service. Of those seven general officers, none had served in the American Revolutionary War and four had risen from the officer ranks rather than receiving a direct appointment as a general officer.²¹⁹ Because these officers rose through the ranks rather than receiving a direct appointment, they developed knowledge and expertise specific to military warfare and saw the military as their occupation rather than a temporary duty.

After the War of 1812, the officer corps began to transform like the general officer corps. Once composed of political figures and men who viewed the military as a temporary job, the officer corps after the War of 1812 began to resemble a more permanent, professional group of officers. By 1815, officers with other civilian careers had left the service to return to their civilian careers, leaving only those

²¹⁸ SKELTON, *supra* note 137, at 110.

²¹⁹ *Id.*

officers who desired a military career.²²⁰ Most of these officers had entered military service during the war. While a few graduated from the United States Military Academy, most had been educated through their war experiences.²²¹ These officers were unique in that they experienced the military failures at the beginning of the war, but they also saw the changes that led to success at the end of the war. As a result, these officers were proud of their accomplishments during the war and understood the benefits of discipline, experience, and organization.²²²

Military training and education, and officer accessions also began to change after the War of 1812. Established in 1802 by Thomas Jefferson, the United States Military Academy did not produce very many officers in its first decade of existence.²²³ Between 1802 and 1813, the average number of graduates from the United States Military Academy per year was only 7.5.²²⁴ However, after the War of 1812 ended, “more professors, assistant professors, and young officer instructors were authorized; a maximum of 250 cadets was fixed, and age and mental requirements for admission were prescribed.”²²⁵ By 1850, the average number of graduates per year rose to thirty-eight.²²⁶ Although this number was still only a small percentage of the

²²⁰ *Id.* at 115.

²²¹ *Id.* at 114.

²²² *Id.* at 114-115.

²²³ HACKETT, *supra* note 110, at 128; HUNTINGTON, *supra* note 87, at 198.

²²⁴ The number of graduates per year from 1802 through 1813 was: 2 (1802), 3 (1803), 2 (1804), 3 (1805), 15 (1806), 7 (1807), 5 (1808), 15 (1809), 0 (1810), 19 (1811), 18 (1812), 1 (1813). Charles W. Larned, *The Genius of West Point, in THE CENTENNIAL OF THE UNITED STATES MILITARY ACADEMY AT WEST POINT, NEW YORK 1802-1902* 505-506 (1904).

²²⁵ LESTER A. WEBB, CAPTAIN ALDEN PARTRIDGE AND THE UNITED STATES MILITARY ACADEMY 1806-1833 22 (1965).

total number of army officers, the increase represents the increasing importance that military leadership placed on military education.²²⁷

As military leadership placed more emphasis on military education, the leadership also made major changes to the United States Military Academy to improve the quality of military education. In 1813, Captain Alden Partridge became the Acting Superintendent of the United States Military Academy.²²⁸ During his tenure, Captain Partridge wrote the first set of regulations for the academy, “specified the course of studies to be completed before a cadet could be considered for a commission,” and “announced a method for handling infractions of the rules.”²²⁹ Upon leaving the United States Military Academy, Captain Partridge went on to establish Norwich University in 1819, one of the first private military colleges in the United States.²³⁰

In 1817, President Monroe appointed Captain Sylvanus Thayer as the superintendent and gave him the authority to change the curriculum. Thayer had studied at the United States Military Academy in 1807 prior to entering the Corps of Engineers. However, his inspiration for change came from the two years he spent after the War of 1812 studying the French engineering academy, École Polytechnique.

²²⁶ Larned, *supra* note 224, at 505-506.

²²⁷ Between 1815 and 1830, the army had between 500 and 600 officers. SKELTON, *supra* note 136, at 136. In 1821, Congress reduced the officer strength from 680 to 540. AMERICAN MILITARY HISTORY VOLUME 1 164 (Richard W. Stewart ed., 2009), *available at* http://www.history.army.mil/html/books/030/3021/CMH_Pub_30-21.pdf (last visited Apr. 6, 2015).

²²⁸ WEBB, *supra* note 225, at 23.

²²⁹ *Id.* at 25.

²³⁰ *The Legacy of Norwich*, NORWICH UNIVERSITY, <http://about.norwich.edu/legacy> (last visited May 5, 2015).

During the sixteen years that Thayer served as the superintendent, he built upon the structure established by Captain Partridge and instituted major changes that made the United States Military Academy into what it is today.²³¹

In 1818, Thayer drafted new regulations to govern academy procedures. Under the new rules, the academy administered an entrance examination at the same time every year and established one unified class per year, beginning every fall.²³²

Thayer's rules required cadets to take two examinations per year as an evaluation for advancement, and cadets could not receive a commission unless they completed all four years of instruction at the academy.²³³ The academy also established disciplinary standards, instituted strict inspection procedures, and dismissed any cadet who failed to meet the standards.²³⁴

By the 1830s, the Army instituted stricter policies for accession into the officer corps. Recognizing the quality of instruction at the United States Military Academy, the Army preferred officers to graduate from the academy and offered commissions to all graduates of the academy. Officers not commissioned through the academy had to go through military training and pass a competency examination.²³⁵ Thus, by 1830, 63.8 percent of officers received their commission from the United States Military Academy and by 1860, the number had risen to 75.8 percent.²³⁶

²³¹ SKELTON, *supra* note 137, at 123.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 123-125.

²³⁵ *Id.* at 137.

²³⁶ SKELTON, *supra* note 137, at 138.

The process for selecting cadets to attend the United States Military Academy also changed in the 1830s. Prior to 1812, the Secretary of War selected cadets for attendance at the United States Military Academy, which led to favoring of applicants from the northeast.²³⁷ In the 1830s, Congress began to control appointments to the United States Military Academy, with each congressional district allocated one appointment.²³⁸ As appointments to the United States Military Academy became more representative of all states, the officer corps became a “cross-section of middle-class America.”²³⁹

As military training, education, and accessions improved in the early nineteenth century, the American Civil War had a negative effect on society’s view of the military.²⁴⁰ The Civil War left American society hostile toward the military and “[t]he blanket hostility of American society isolated the armed forces politically, intellectually, socially, and even physically from the community which they served.”²⁴¹ However, according to Samuel Huntington, this period of isolation “made these same years the most fertile, creative, and formative in the history of the American armed forces” such that the military was able “to develop a distinctive military character.”²⁴²

During this period in the late nineteenth century, military leaders began to understand the complexity of war and the need for “a lifetime of study, practice, and

²³⁷ *Id.* at 139.

²³⁸ *Id.*

²³⁹ HUNTINGTON, *supra* note 87, at 227.

²⁴⁰ HACKETT, *supra* note 110, at 128.

²⁴¹ HUNTINGTON, *supra* note 87, at 226-27.

²⁴² *Id.* at 227.

application.”²⁴³ As a result, the idea emerged that “[w]ar must be waged not simply by career soldiers but by professionals.”²⁴⁴ One officer, General William T. Sherman, strongly believed in this principle and greatly contributed to the professionalization of the Army after the Civil War. Although most Americans know General Sherman for his involvement in the Civil War, he also served as Commanding General of the Army from 1869 to 1883.²⁴⁵

During his fourteen years as Commanding General, General Sherman was an advocate for professional military education, founding the School of Application for Infantry and Cavalry at Fort Leavenworth in 1881.²⁴⁶ After 1881, the military created additional schools for professional military education, such as the Naval War College, established in 1884, and the Army War College, established in 1901.²⁴⁷ By 1915, the United States had a comprehensive system of professional military education, much like what exists today.²⁴⁸ Professional military education provides officers with advanced military education that contributes to the development of specialized knowledge and expertise that is required of a profession.

²⁴³ Jerry M. Cooper, *The Army’s Search for a Mission, 1865-1890*, in *AGAINST ALL ENEMIES: INTERPRETATIONS OF AMERICAN MILITARY HISTORY FROM COLONIAL TIMES TO THE PRESENT* 184 (Kenneth J. Hagan & William R. Roberts eds., 1986).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 230.

²⁴⁶ Jonathan M. House, *The Fort and the New School, 1881-1916*, in *A BRIEF HISTORY OF FORT LEAVENWORTH 1827-1983* 34 (John W. Partin ed., 1983). The School of Application for Infantry and Cavalry later became the Command and General Staff College. *Id.*

²⁴⁷ HUNTINGTON, *supra* note 87, at 241.

²⁴⁸ *Id.* at 237.

The advance of professional military education in the United States also led to the formation of professional associations and journals, such as the United States Naval Institute in 1873, the Cavalry Association in 1885, and the *Cavalry Journal* in 1888.²⁴⁹ General Sherman supported these professional associations and journals and encouraged officers to participate in intellectually stimulating activities.²⁵⁰ Other branches followed suit with *The Journal of the United States Artillery* in 1892, the Infantry Society in 1893, and the *Infantry Journal* in 1904.²⁵¹ The emergence of these professional associations and journals provides further evidence of the professionalization of the United States military after the Civil War.

In addition to his contribution to professional military education, General Sherman was also one of the first general officers who truly personified a professional officer. From his motto of “[i]t is enough for the world to know that I am a soldier” to his dedication to “maintaining the honor and dignity of the nation,” General Sherman considered himself a professional soldier and his attitude eventually filtered down throughout the Army.²⁵²

While some scholars such as William B. Skelton believe that the United States military became a profession as early as the Civil War,²⁵³ it is clear that by World War I, the United States military, particularly the officer corps, was a profession under the modern definition of a profession. Strict policies existed for accession into the officer corps and cadets attended military academies based on a calling or

²⁴⁹ HUNTINGTON, *supra* note 87, at 243.

²⁵⁰ Cooper, *supra* note 243, at 184.

²⁵¹ HUNTINGTON, *supra* note 87, at 243.

²⁵² *Id.* at 231.

²⁵³ *See generally* SKELTON, *supra* note 137, at 107.

commitment to public service. Upon accession into the officer corps, officers received specialized knowledge and education in warfare at advanced military schools.

Professional associations emerged and officers began to identify themselves with the profession of arms. Although American society had a hostile attitude toward the military after the Civil War, by the end of World War I, civil-military relations had improved and society accepted the military as experts in their field, worthy of respect and prestige.

Even though the military possessed the characteristics of a profession after World War I, the United States military continued to evolve as a profession throughout the twentieth century. The end of World War II brought about a period of major change for the United States military profession as it adapted to a changing security environment. During World War II, the United States military had expanded in order to fight a large-scale conventional war on two fronts.²⁵⁴

The end of World War II triggered a period of major military reorganization. Because the United States military had grown to over twelve million personnel during World War II, a period of personnel drawdown followed the end of the war.²⁵⁵ More significant, however, were the reorganization of the war department and the creation of the United States Air Force. On December 19, 1945, just four months after Japan surrendered, President Truman wrote a letter to Congress “recommend[ing] that the Congress adopt legislation combining the War and Navy Departments into one single

²⁵⁴ Andrew S. Effron, *The Fiftieth Anniversary of the UCMJ: The Legacy of the 1948 Amendments*, in *EVOLVING MILITARY JUSTICE* 169 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002).

²⁵⁵ *Id.*; Williamson A. Murray & Geoffrey Parker, *The Post-War World*, in *THE CAMBRIDGE HISTORY OF WARFARE* 362, 364 (Geoffrey Parker ed., 2005).

Department of National Defense.”²⁵⁶ The reorganization took eighteen months to enact, but in July 1947, the National Security Act of 1947 created the “National Military Establishment” and a few months later, Congress confirmed James V. Forrestal as the first Secretary of Defense.²⁵⁷ In addition to reorganizing the War Department, the National Security Act of 1947 created the United States Air Force and eliminated the Army Air Corps.²⁵⁸ In August 1949, Congress renamed the National Military Establishment as the Department of Defense.²⁵⁹

In this period after the war, the United States and the Soviet Union emerged as the two world superpowers.²⁶⁰ Although the goal of newly established international organizations such as the United Nations and the North Atlantic Treaty Organization was to settle disputes without having to resort to warfare, tensions between the United States and the Soviet Union were high.²⁶¹ Tensions between the two superpowers, combined with the existence of nuclear capability by the United States and eventually

²⁵⁶ 218. SPECIAL MESSAGE TO THE CONGRESS RECOMMENDING THE ESTABLISHMENT OF A DEPARTMENT OF NATIONAL DEFENSE, HARRY S. TRUMAN LIBRARY AND MUSEUM, <http://trumanlibrary.org/publicpapers/index.php?pid=508&st=&st1=> (last visited Apr. 6, 2015).

²⁵⁷ National Security Act of 1947, Pub. L. 80-253, 61 Stat. 495 (1947); *James V. Forrestal, 1st Secretary of Defense*, U.S. DEPARTMENT OF DEFENSE, http://www.defense.gov/specials/secdef_histories/SecDef_01.aspx (last visited Apr. 6, 2015).

²⁵⁸ National Security Act of 1947, Pub. L. 80-253, 61 Stat. 495 (1947).

²⁵⁹ National Security Act Amendments of 1949, Pub. L. 81-216, § 4, 63 Stat. 578, 579 (1949).

²⁶⁰ Murray & Parker, *supra* note 255, at 362.

²⁶¹ *Id.* at 364; *What is NATO?*, NORTH ATLANTIC TREATY ORGANIZATION, <http://www.nato.int/nato-welcome/index.html>; U.N. Charter art. 1.

the Soviet Union characterized the forty-five year period after World War II commonly known as the Cold War.²⁶²

As the international security environment changed, the United States saw the need for a large, permanently established professional military force.²⁶³ For several decades after World War II, the United States demonstrated the need for a large force as United States forces conducted operations in countries such as Greece, China, the Philippines, Korea, Iran, French Indochina, Germany, Taiwan, Lebanon, Laos, Congo, Latin America, Cuba, Thailand, and the Dominican Republic.²⁶⁴

Within a few years, however, the Vietnam War changed the political and social environment in the United States and affected the professionalism of the military. By the 1960s, public support for the Vietnam War declined and most Americans did not support sending troops to Vietnam. The draft, which had support from a majority of Americans for prior conflicts, was strongly opposed during the Vietnam War.²⁶⁵ Therefore, Soldiers drafted during the Vietnam War lacked desire to serve in the military and military professionalism suffered. The quality of Soldiers, combined with apathy of the American public resulted in increased discipline problems in the Army. Drug use in the Army increased, which led to more crime in

²⁶² Murray & Parker, *supra* note 255, at 362.

²⁶³ *Id.* at 364; Leonard Wong & Douglas V. Johnson II, *Serving the American People: A Historical View of the Army Profession*, in *THE FUTURE OF THE ARMY PROFESSION* 93, 101 (Lloyd J. Matthews ed., 2005).

²⁶⁴ *See generally* ANDREW J. BIRTLE, U.S. ARMY COUNTERINSURGENCY AND CONTINGENCY OPERATIONS DOCTRINE 1942-1976 (2006), *available at* http://www.history.army.mil/html/books/us_army_counterinsurgency/CMH_70-98-1_US%20Army_Counterinsurgency_WQ.pdf (last visited Apr. 9, 2015); *Milestones*, U.S. DEPARTMENT OF STATE OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones> (last visited Apr. 9, 2015).

²⁶⁵ Charles H. Wilson, Jr., *The Selective Service System: An Administrative Obstacle Course*, 54 CAL. L. REV. 2123, 2125 (1966).

general.²⁶⁶ The lack of popular support for the Vietnam War empowered Soldiers to be insubordinate, disobey orders, and desert the Army.²⁶⁷ Racial tension was also high and racial violence wreaked havoc at many Army installations.²⁶⁸ These increased disciplinary problems and war crimes such as the My Lai massacre showed clear evidence of the lack of military professionalism during the Vietnam War.²⁶⁹

Seeing the decline in professionalism, in 1970, General William C. Westmoreland, the Chief of Staff of the Army, directed a study on military professionalism.²⁷⁰ Reporting on the results of the study, Major General G.S. Eckhardt, Commandant of the Army War College wrote that “[m]easures can and must be found to ensure that a climate of professionalism exists in the Army. The attainment of such a climate is the essential prerequisite for genuine effectiveness.”²⁷¹ This study is particularly important because it is the first study conducted by the Army that recognizes the importance of military professionalism.

²⁶⁶ Robert D. Heinl, Jr., *The Collapse of the Armed Forces*, ARMED FORCES JOURNAL, June 1971, at 30-38 (reprinted in H300: ROOTS OF TODAY’S OPERATIONAL ENVIRONMENT 262-263 (U.S. Army Command and General Staff College ed., 2014)).

²⁶⁷ *Id.* at 263-265.

²⁶⁸ *Id.* at 260-262.

²⁶⁹ For a description of the My Lai massacre, see William G. Eckhardt, *My Lai: An American Tragedy* (2000), available at <http://law2.umkc.edu/faculty/projects/ftrials/mylai/ecktragedy.html> (last visited Apr. 9, 2015). Colonel (Retired) Eckhardt served as the Chief Prosecutor for the My Lai prosecutions and now serves as Professor of Law, University of Missouri-Kansas City School of Law. For a description of other war crimes during the Vietnam War, see FREDERIC L. BORCH III, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959-1975 34-36 (2003).

²⁷⁰ U.S. ARMY WAR COLLEGE, STUDY ON MILITARY PROFESSIONALISM 53-54 (1970), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA063748> (last visited Apr. 9, 2015).

²⁷¹ *Id.* at ii.

Three years later, recognizing the lack of support for the draft, Congress eliminated the draft on July 1, 1973.²⁷² This change signifies a major change in the Army profession, as the Army became the all-volunteer Army that it is today.

However, despite the elimination of the draft, the Army continued to struggle with professionalism in the period following the Vietnam War. Because public support for the military was low after the Vietnam War, most Americans did not want to join the military voluntarily, which made personnel recruiting difficult. As a result, the Army lowered its standards to meet recruiting goals and thus, new recruits were of a lower quality.²⁷³ Drug use was rampant, crime was at an all-time high, and racial tension continued.²⁷⁴

Despite the severity of problems following the Vietnam War, military senior leaders remained committed to the profession. General Creighton Abrams, Chief of Staff of the Army from 1972 to 1974 “constantly reminded dispirited leaders of the ideals that had brought them into the Army: patriotism, integrity, honesty, and devotion to duty.”²⁷⁵ Army Commanders took a hard-stance on discipline and began to restore order throughout the 1970s.²⁷⁶ In 1973, the Army established Training and

²⁷² On September 28, 1971, President Richard Nixon signed H.R. 6531 into law, thus authorizing personnel to be inducted into military service via the draft through June 30, 1973. Amendments to the Military Selective Service Act of 1967, Pub. L. 92-129, 85 Stat. 348 (1971). Congress did not extend the Act and therefore, the draft expired on July 1, 1973.

²⁷³ Robert H. Scales, *Forging a New Army*, in CERTAIN VICTORY: THE US ARMY IN THE GULF WAR 6-38 (U.S. Army Command and General Staff College Press, 1993) (reprinted in H300: ROOTS OF TODAY’S OPERATIONAL ENVIRONMENT 270 (U.S. Army Command and General Staff College ed., 2014)).

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 271.

²⁷⁶ *Id.*

Doctrine Command (TRADOC) and General William DuPuy, the first TRADOC Commander “began a fundamental reformation of Army training.”²⁷⁷

While the Army made changes to regain professionalism, funding cuts in the late 1970s limited training, resources, and Soldier pay and entitlements.²⁷⁸ As a result, the quality of Soldiers continued to decrease. In the late 1970s, the problem was so bad that the Army separated forty percent of Soldiers for discipline problems or unsuitability during their first enlistment.²⁷⁹

The downward spiral of unprofessionalism began to turn around in the 1980s. After the military failed to rescue American hostages in Iran in 1980, the American people began to realize the plight of the Army. Recruiting efforts increased under the direction of Major General Maxwell Thurman and the “Be All You Can Be” advertising campaign improved the Army’s image. Congress increased military salaries by twenty-five percent and reinstated the college benefits of the GI Bill.²⁸⁰ Slowly, the quality of Soldiers increased and military professionalism returned.

As the quality of Soldiers increased, the Army made other changes throughout the 1980s to solidify the professionalism of the military. The Army established the National Training Center at Fort Irwin, California so units could train for combat in a simulated combat environment.²⁸¹ A few years later, the Army established the Battle Command Training Program at Fort Leavenworth to train division and corps level

²⁷⁷ *Id.* at 273-274.

²⁷⁸ Scales, *supra* note 273, at 276.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 277.

²⁸¹ *Id.* at 279-280.

commanders and staffs for combat.²⁸² Recognizing the importance of education, the Army also instituted the non-commissioned officer education system to mirror the officer education system established decades prior.²⁸³ TRADOC continued to develop and revise doctrine to adapt to the changing environment.²⁸⁴ The creation of the School of Advanced Military Studies (SAMS) offered select officers the opportunity for advanced study of military history and the art of war.²⁸⁵

Through all of these changes, the Army demonstrated its commitment to regaining status as a profession. As the Army regained professionalism, they also experienced success in numerous operations including Operation Urgent Fury in Grenada in 1983, Operation Just Cause in Panama in 1989, and Operation Desert Storm in Kuwait in 1990-1991.²⁸⁶

However, with its success came new challenges. The fall of the Berlin Wall in 1989 and the dissolution of the Soviet Union in 1991 signified the end of the Cold War.²⁸⁷ As the Cold War ended, the United States no longer needed a military of the magnitude previously needed. Therefore, in the 1990s, the Army began to draw down forces at an unprecedented rate.²⁸⁸ As the military began to transform for the twenty-

²⁸² *Id.* at 280-281.

²⁸³ Scales, *supra* note 273, at 281-282.

²⁸⁴ *Id.* at 282-283.

²⁸⁵ *Id.* at 284.

²⁸⁶ *Id.* at 285-289.

²⁸⁷ *Milestones*, *supra* note 264.

²⁸⁸ Bernard Rostker, *Right-Sizing the Force: Lessons for the Current Drawdown of American Military Personnel* 13 (Center for a New American Security, 2013), available at http://www.cnas.org/sites/default/files/publications-pdf/CNAS_RightSizingTheForce_Rostker_0.pdf (last visited Apr. 10, 2015).

first century, the topic of the military as a profession re-emerged. As General (Retired) Frederick M. Franks, Jr. noted in 2002, “we are at the end of one period of professionalism begun in the U.S. Army late in the 19th century, and are now, in the first decade of the 21st century, beginning another period.”²⁸⁹ Dr. Don Snider and Dr. Gayle Watkins, both serving as faculty members at the United States Military Academy, recognized that “the most critical challenge the Army now faces in its planned transition is to reinforce the professional nature of the institution and to provide the opportunity for its soldiers to be members of a profession – the Army profession.”²⁹⁰ Throughout the 2000s, Dr. Snider, Dr. Watkins, and a number of other scholars began studying the Army profession in depth.²⁹¹ Meanwhile, after the terrorist attacks in the United States on September 11, 2001, the Army went to war in both Iraq and Afghanistan and discussion of the Army profession faded except in academic circles.

In 2010, after nine years at war in Iraq and Afghanistan, Army leadership recognized the need to look at the Army profession and to adapt to the twenty-first century. On December 8, 2010, while serving as the Commander of U.S. Army Training and Doctrine Command, General Martin E. Dempsey approved an Army White Paper on “The Profession of Arms.”²⁹² In that White Paper, General Dempsey defined the United States Army as “an American Profession of Arms, a vocation comprised of experts certified in the ethical application of land combat power, serving

²⁸⁹ THE FUTURE OF THE ARMY PROFESSION, *supra* note 115, at xviii.

²⁹⁰ Snider, *supra* note 1, at 3.

²⁹¹ See generally THE FUTURE OF THE ARMY PROFESSION, *supra* note 115.

²⁹² Martin E. Dempsey, *An Army White Paper: The Profession of Arms* (2010), available at <http://www.benning.army.mil/armor/content/PDF/Profession%20of%20Arms%20White%20Paper%208%20Dec%2010.pdf> (last visited Apr. 6, 2015).

under civilian authority, entrusted to defend the Constitution and the rights and interests of the American people.”²⁹³ In April 2011, General Dempsey became the Army Chief of Staff and shortly thereafter, on October 1, 2011, he became the Chairman of the Joint Chiefs of Staff (CJCS). In 2012, General Dempsey published a CJCS White Paper on the profession of arms, thereby extending his ideas on the profession of arms to all of the military services.²⁹⁴ According to General Dempsey, “[w]e must renew our commitment to the Profession of Arms. We’re not a profession simply because we say we’re a profession. We must continue to learn, to understand, and to promote the knowledge, skills, attributes, and behaviors that define us as a profession.”²⁹⁵

What is interesting, however, is that while military leadership recognizes the need to “renew our commitment to the Profession of Arms,” members of Congress have proposed legislation to amend the military justice process that could impact the military’s status as a profession. Although military leadership has fervently argued against the proposed legislation, military leaders have not raised the issue of how the proposed legislation might affect the military’s status as a profession. A review of the history of the military justice system in the United States will provide insight into how the military justice system evolved as the United States military professionalized and thus, whether the involvement of commanders in the military justice system is a necessary aspect of the United States military’s status as a profession.

²⁹³ *Id.*

²⁹⁴ Martin E. Dempsey, *America’s Military – A Profession of Arms White Paper*, available at http://www.dtic.mil/doctrine/concepts/white_papers/cjcs_wp_profession.pdf (last visited Apr. 6, 2015).

²⁹⁵ *Id.*

Military Justice in the United States

One critical characteristic of professions is the existence of an ethical code and enforcement of that code through self-regulation. According to Army Doctrine Reference Publication (ADRP) 1, “[t]he [UCMJ], Army regulations, and policies set the minimum standard for behavior.”²⁹⁶ The military justice system further provides the mechanism for self-regulation.

Rules have existed to govern the conduct and discipline of soldiers for centuries, even before the emergence of the military as a profession. The earliest known rules date back to the Roman Empire.²⁹⁷ In England, King Richard I used the rules of the Roman Empire to issue ordinances to his armies during his rule from 1189-1199.²⁹⁸ Four hundred years later, in 1621, Gustavus Adolphus issued rules to govern the conduct of his army in Sweden.²⁹⁹ British soldiers who had served in Sweden brought the rules back to Britain with them, which led to the issuance of the British Articles of War by James I in 1686.³⁰⁰ These Articles of War formed the basis for military law in England for nearly 200 years.³⁰¹ In the eighteenth century, the

²⁹⁶ ADRP 1, *supra* note 116, at para. 1-14.

²⁹⁷ HARRY M. WARD, *GEORGE WASHINGTON’S ENFORCERS: POLICING THE CONTINENTAL ARMY* 31 (2006); THE JUDGE ADVOCATE GENERAL’S SCHOOL, *THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE* 2 (1959) [hereinafter *BACKGROUND OF THE UCMJ*]; H. COMM. ON MILITARY AFFAIRS, 79TH CONG., *INVESTIGATIONS OF THE NATIONAL WAR EFFORT* (Comm. Print 1946), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/investigations.pdf (last visited Apr. 6, 2015) [hereinafter *INVESTIGATIONS OF THE NATIONAL WAR EFFORT*].

²⁹⁸ Timothy C. Dunwoody, *Articles of War*, in *HISTORICAL DICTIONARY OF THE U.S. ARMY* 45-46 (Jerold E. Brown ed., 2001); WARD, *supra* note 297, at 31; *BACKGROUND OF THE UCMJ*, *supra* note 297, at 2.

²⁹⁹ *INVESTIGATIONS OF THE NATIONAL WAR EFFORT*, *supra* note 297, at 4.

³⁰⁰ *Id.* at 4; Dunwoody, *supra* note 298, at 45-46.

³⁰¹ Dunwoody, *supra* note 298, at 45-46.

British adapted the Articles of War for use in the American colonies and these Articles of War served as the foundation for the original Articles of War in the United States. Over the years, the Articles of War evolved into the UCMJ, which continues to govern the conduct and discipline of service members in the United States to this day.

Articles of War

Prior to the American Revolutionary War, the British Articles of War governed the discipline of militia in the American colonies.³⁰² However, as the colonies rebelled against Britain and declared themselves independent, the British Articles of War no longer applied to the state militias. On April 5, 1775, Massachusetts established the “Rules and Regulations for the Massachusetts Army,” which was very similar to the British Articles of War of 1765.³⁰³ In the next few months, the other twelve colonies followed the lead of Massachusetts, establishing military codes similar to the British Articles of War.³⁰⁴

On June 14, 1775, the Second Continental Congress formed the Continental Army and simultaneously appointed a committee to draft articles of war for the Continental Army.³⁰⁵ The Articles of War, enacted on June 30, 1775 by the Second Continental Congress, were nearly identical to the “Rules and Regulations for the Massachusetts Army” and included sixty-nine provisions.³⁰⁶ Believing that “discipline is the soul of an Army,” George Washington was a strong advocate of

³⁰² WARD, *supra* note 297, at 31.

³⁰³ *Id.*; BACKGROUND OF THE UCMJ, *supra* note 297, at 2.

³⁰⁴ WARD, *supra* note 297, at 31.

³⁰⁵ *Id.* at 32.

³⁰⁶ *Id.*; BACKGROUND OF THE UCMJ, *supra* note 297, at 2.

disciplinary rules to govern the military.³⁰⁷ Although George Washington served on the committee that drafted the Articles of War, he believed that the punishments prescribed in the Articles of War were not harsh enough. As a result, by November 1775, Congress amended the Articles of War to add certain capital offenses.³⁰⁸

After only a year, the Second Continental Congress decided to re-draft the Articles of War. The new Articles of War, drafted by John Adams and Thomas Jefferson and approved on September 20, 1776, contained one hundred and two provisions and were more similar to the British Articles of War than the previous version.³⁰⁹ Following this revision, the Continental Congress made no additional changes to the Articles of War until after the end of the war.³¹⁰

Since their issuance in the United States, the Articles of War gave commanders the authority and responsibility to control good order and discipline. The phrase “good order and discipline” was not defined. However, Section IX, article 1 of the 1776 Articles of War provided that “[e]very officer, commanding in quarters, garrisons, or on a march, shall keep good order, and, to the utmost of his power, redress all abuses or disorders which may be committed by any officer or soldier under his command.”³¹¹ Under these early Articles of War, forty-nine of the articles defined the offenses unique to the military for which a court-martial could adjudge

³⁰⁷ Heintz, *supra* note 266, at 265.

³⁰⁸ WARD, *supra* note 297, at 33.

³⁰⁹ *Id.* at 35; BACKGROUND OF THE UCMJ, *supra* note 297, at 2.

³¹⁰ WARD, *supra* note 297, at 36.

³¹¹ *Journals of the Continental Congress – Articles of War; September 20, 1776*, YALE LAW SCHOOL, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/contcong_09-20-76.asp (last visited Apr. 6, 2015) [hereinafter *1776 Articles of War*].

punishment. These offenses included desertion, absence without leave, use of profanity, traitorous or disrespectful words, contempt or disrespect, mutiny, fighting a duel, refusing to obey an order, being drunk on duty, and misbehavior before the enemy.³¹² The remaining articles outlined the authority and procedures of courts-martial.³¹³ Commanders convened courts-martial, appointed officers to serve on the court-martial, reviewed court-martial verdicts, and had the authority to grant pardons to convicted persons.³¹⁴ Thirteen general or field grade officers appointed by the convening authority served on a general court-martial and five officers served on a regimental court-martial.³¹⁵ At this time, the only lawyer involved in the court-martial process was the judge advocate general, whose role was to “prosecute in the name of the United States of America.”³¹⁶

After the war ended in 1783, the Continental Congress did not change the Articles of War until they made minor changes in May 1786.³¹⁷ The United States Constitution, drafted in 1787, gave Congress the power “[t]o make Rules for the Government and Regulation of the land and naval Forces” and “[t]o provide for

³¹² See generally *id.* at Sections I, II, IV, V, VI, VII, VIII, XII, and XIII.

³¹³ *Id.*

³¹⁴ *Id.*; WARD, *supra* note 297, at 32, 39.

³¹⁵ WARD, *supra* note 297, at 40; 1776 *Articles of War*, *supra* note 311, at Section XIV, articles 1 and 11.

³¹⁶ WARD, *supra* note 292, at 41; 1776 *Articles of War*, *supra* note 311, at Section XIV, article 3.

³¹⁷ WARD, *supra* note 297, at 43.

organizing, arming, and disciplining, the Militia.”³¹⁸ Pursuant to its new authority under the Constitution, Congress confirmed the 1786 Articles of War in 1789.³¹⁹

After confirming the Articles of War in 1789, Congress did not revise the Articles of War until 1806. In this revision, Congress made mostly administrative changes, such as renumbering the articles. The substance of the 1806 Articles of War remained nearly identical to the 1786 Articles of War.³²⁰

The 1806 Articles of War remained in effect unchanged for nearly sixty years.³²¹ Minor changes were made during the Civil War and, in 1874, Congress made the first major revisions to the Articles of War.³²² The 1874 changes included the removal of certain punishments, such as flogging and branding, and authorized the President to establish maximum punishments for offenses during times of peace.³²³ Although Congress completely revised the Articles of War, Congress did not make any changes with respect to the authority and responsibility of commanders over the discipline of soldiers.³²⁴

³¹⁸ US. CONST. art. I, § 8.

³¹⁹ Act of Sept. 29, 1789, ch. 25, 1 Stat. 95 (1789); BACKGROUND OF THE UCMJ, *supra* note 297, at 2.

³²⁰ ADJUTANT AND INSPECTOR GENERAL’S OFFICE, ARTICLES OF WAR, MILITARY LAWS, AND RULES AND REGULATIONS FOR THE ARMY OF THE UNITED STATES (1816), *available at* <https://ia701203.us.archive.org/5/items/articlesofwarmil00adam/articlesofwarmil00adam.pdf> (last visited Apr. 6, 2015).

³²¹ BACKGROUND OF THE UCMJ, *supra* note 297, at 3.

³²² 18 Stat. 229 (1878), *available at* <http://www.loc.gov/law/help/statutes-at-large/43rd-congress.php> (last visited Apr. 6, 2015) [hereinafter 1874 Articles of War]; BACKGROUND OF THE UCMJ, *supra* note 297, at 3.

³²³ BACKGROUND OF THE UCMJ, *supra* note 297, at 3.

³²⁴ 1874 Articles of War, *supra* note 322.

World War I brought about the next major revisions to the Articles of War. In 1916, Congress completely revised the 1874 Articles of War when they enacted the 1916 Articles of War.³²⁵ These new Articles of War re-arranged the articles, eliminated outdated provisions, provided for one or more judge advocates to be detailed to each general court-martial, gave authority to the President to determine court-martial procedures, changed the statute of limitations, and gave convening authorities the authority to approve lesser included offenses, but did not affect the authority or responsibility of commanders.³²⁶

Several courts-martial in 1917 under the 1916 Articles of War triggered a great deal of debate over the military justice system and eventually led to changes to the Articles of War in 1920.³²⁷ During the summer of 1917, a group of African-American soldiers from Fort Sam Houston, Texas caused a riot that resulted in the death of several people.³²⁸ General courts-martial convicted fifty-five soldiers of murder, mutiny, and riot, and sentenced thirteen of the soldiers to death.³²⁹ At the

³²⁵ Act of 29 Aug. 1916, ch. 418, 39 Stat. 650-70 (1916) [hereinafter 1916 Articles of War].

³²⁶ BACKGROUND OF THE UCMJ, *supra* note 297, at 3-4.

³²⁷ Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 15 (1970), available at <https://www.law.upenn.edu/live/files/2846-shermanthe-civilianization-of-military-law> (last visited Apr. 6, 2015); Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1-3 (1967).

³²⁸ Sherman, *supra* note 327, at 15; Brown, *supra* note 327, at 3; *Hearings Before the Committee on Military Affairs, United States Senate, on S. 5320, A Bill to Promote the Administration of Military Justice by Amending Existing Laws Regulating Trial by Courts-Martial, and for Other Purposes*, 65th Cong. 39 (3d Sess. 1919) (statement of Brig. Gen. Samuel T. Ansell), available at http://www.loc.gov/rr/frd/Military_Law/pdf/RAW-vol1.pdf (last visited Apr. 6, 2015) [hereinafter *Hearings on S. 5320*].

³²⁹ Sherman, *supra* note 327, at 15; Brown, *supra* note 327, at 3; *Hearings on S. 5320*, *supra* note 328, at 39.

conclusion of the trial, the convening authority reviewed the trial proceedings and ordered the sentences executed. Southern Command executed the thirteen soldiers within two days of the end of the trial, without any appellate or other review.³³⁰

A few months later, in September 1917, a general court-martial convened for fourteen soldiers charged with mutiny at Fort Bliss, Texas for refusing to attend a drill formation. The general court-martial found ten of the soldiers guilty of mutiny and sentenced them to three to seven years confinement and dishonorable discharges.³³¹ In accordance with the 1916 Articles of War, after approving the sentences, the convening authority forwarded the records of trial to the Judge Advocate General for review.³³² Upon review of the records of trial in November 1917, Brigadier General Samuel T. Ansell, the Acting Judge Advocate General, directed that the findings be set aside.³³³

Brigadier General Ansell's direction to set aside the findings resulted in a disagreement between Brigadier General Ansell and Major General Enoch H. Crowder, The Judge Advocate General, over the authority to set aside findings.³³⁴

³³⁰ Sherman, *supra* note 327, at 15; Brown, *supra* note 327, at 3; *Hearings on S. 5320*, *supra* note 328, at 39.

³³¹ *Hearings Before a Subcommittee of the Committee on Military Affairs, United States Senate, on S. 64, A Bill to Establish Military Justice*, 66th Cong. (1st Sess. 1919) 772-73 (reprinting General Court-Martial Order No. 1174), available at http://books.google.com/books?id=Ixgnl48aq6sC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (last visited Apr. 6, 2015) [hereinafter *Hearings on S. 64*].

³³² Brown, *supra* note 327, at 1.

³³³ *Id.* at 2.

³³⁴ Brown, *supra* note 327, at 2. For a more detailed discussion of the disagreement between Brigadier General Ansell and Major General Crowder, see generally, Brown, *supra* note 327, and JOHNATHAN LURIE, *MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980* 43-75 (1998).

Eventually, this disagreement sparked additional debate, led by Brigadier General Ansell, over the fairness of the military justice system. By December 1918, the debate reached Congress and within a few days, the American Bar Association and the War Department appointed a committee to review the military justice system.³³⁵

On January 13, 1919, Senator George E. Chamberlain (D-OR) introduced a bill to revise the Articles of War in order to improve the administration of military justice.³³⁶ The bill did not pass the Senate. However, if approved, the bill would have increased the authority of judge advocates to change or set aside findings of courts-martial.³³⁷

As Senator Chamberlain's bill was pending, Brigadier General Ansell continued to provoke debate about the military justice system. Through numerous written articles and speeches, Brigadier General Ansell argued "that the existing system of Military Justice is un-American" and that the Articles of War needed to undergo a complete revision.³³⁸ Although Major General Crowder acknowledged that the Articles of War did need some changes, he argued against Brigadier General Ansell and defended the Articles of War.³³⁹

After Senator Chamberlain's original bill, S. 5320, failed, Brigadier General Ansell proposed new legislation to overhaul the military justice system. In November 1919, Senator Chamberlain sponsored Brigadier General Ansell's legislation and a

³³⁵ Brown, *supra* note 327, at 9; BACKGROUND OF THE UCMJ, *supra* note 297, at 4.

³³⁶ *Hearings on S. 5320*, *supra* note 328, at 3; Brown, *supra* note 327, at 9.

³³⁷ *Hearings on S. 5320*, *supra* note 328, at 3-4; Brown, *supra* note 327, at 9.

³³⁸ Brown, *supra* note 327, at 11; Sherman, *supra* note 327, at 5 (citing Samuel T. Ansell, *Military Justice*, 5 Cornell L.Q. 1 (1919)).

³³⁹ Brown, *supra* note 327, at 11.

subcommittee of the Senate Committee on Military Affairs held hearings on the new bill, S. 64.³⁴⁰ Brigadier General Ansell's proposal sought to make major changes to the system of military justice, transforming it into a more civilian-like legal system.³⁴¹ As Major (Retired) J.E. Runcie summarized in his testimony before the Senate Subcommittee of the Committee on Military Affairs during the hearings on Brigadier Ansell's proposal, "the real underlying question which the bill raises is a question as to whether military discipline shall be enforced by law or by the exercise of arbitrary and often capricious authority of military commanders."³⁴² Thus, Brigadier Ansell's proposals to limit the authority of commanders and make the military justice system more like the civilian legal system marks the beginning of nearly a century of debate over the authority of commanders in the military justice process.

After holding hearings on the bill, the Subcommittee failed to report on Brigadier General Ansell's bill. Instead, the Army Reorganization Act of 1920 included revisions to the Articles of War for which the War Department and Major General Crowder had previously agreed.³⁴³ The 1920 Articles of War included some

³⁴⁰ *Id.* at 14; *Hearings on S. 64*, *supra* note 331.

³⁴¹ For example, Brigadier Ansell's proposal included provisions to delineate the elements of each punitive crime; establish maximum punishments for each crime; assimilate the civilian criminal statutes; require a preliminary investigation and legal sufficiency determination before referral of charges; limit the authority of commanders to convene courts-martial and appoint members; require counsel to be lawyers, allow accused to choose their military counsel, and require a military judge to preside over courts-martial; add enlisted members, change the court membership requirements, and add peremptory challenges; apply the rules of evidence; announce acquittals in open court; and create a military appeals court. Sherman, *supra* note 327, at 19-24; Brown, *supra* note 327, at 15-36; *Hearings on S. 64*, *supra* note 331, at 5-23.

³⁴² *Hearings on S. 64* (statement of Major J. E. Runcie), *supra* note 331, at 23.

³⁴³ Brown, *supra* note 327, at 14; Act of June 4, 1920, ch. 2, 41 Stat. 759, 787 (1920).

of Brigadier General Ansell's proposals, but the most drastic changes were not included and the authority of commanders in the military justice system remained intact.³⁴⁴

The 1920 Articles of War remained in place until after World War II, with only minor changes made in 1937, 1942, and 1947.³⁴⁵ However, the end of World War II brought about another period of major reform in the military justice system. During the war, the military conducted over 1,700,000 courts-martial, and over 45,000 service men remained in prison when the war ended in 1945.³⁴⁶ Service members coming home from World War II complained that the military justice system was not fair or impartial.³⁴⁷ As a result, Congress and the War Department appointed several boards and committees in 1946 to study the complaints and the military justice system.

³⁴⁴ Significant changes that were included in the 1920 Articles of War included: authorization for the President to prescribe maximum punishments during times of war and peace, authorization for enlisted men to prefer charges, expansion of the preliminary investigation, the right for the accused to cross-examine witnesses, a requirement for the convening authority to receive pretrial advice from his judge advocate, a requirement for the appointment of defense counsel, a requirement for the appointment of a law member for every general court-martial, authorization for challenges for cause and peremptory challenges of court members, authorization for the President to establish rules of evidence, a requirement for findings and sentences to be announced in open court, a requirement for a post-trial review of every general court-martial prior to action by the convening authority, prohibition of the reconsideration of an acquittal or finding of not guilty, and a requirement for the establishment of a board of review. *Revision of the Articles of War 1912-1920*, volume 2, LIBRARY OF CONGRESS, http://www.loc.gov/rr/frd/Military_Law/pdf/RAW/vol2.pdf (last visited Apr. 6, 2015) [hereinafter 1920 Articles of War]; Brown, *supra* note 327, at 15-36; BACKGROUND OF THE UCMJ, *supra* note 297, at 4-6.

³⁴⁵ BACKGROUND OF THE UCMJ, *supra* note 297, at 6.

³⁴⁶ Sherman, *supra* note 327, at 28; LURIE, *supra* note 334, at 77; INVESTIGATIONS OF THE NATIONAL WAR EFFORT, *supra* note 297, at 3.

³⁴⁷ Sherman, *supra* note 327, at 28-29.

On March 18, 1946, Secretary of War Robert P. Patterson appointed a board “to study officer-enlisted man relationships and to make recommendations . . . in order to improve relations between commissioned and enlisted personnel.”³⁴⁸

Although the board’s purpose was not to examine military justice, one of the largest criticisms the board found in the officer-enlisted relationships “was in the field of military justice and courts-martial procedure which permitted inequities and injustices to enlisted personnel.”³⁴⁹ As a result, the board’s report recommended more equality in the administration of military justice.³⁵⁰

On March 25, 1946, Secretary of War Patterson appointed the War Department Advisory Committee on Military Justice “to study the administration of military justice within the Army . . . and to make recommendations to the Secretary of War as to changes in existing laws, regulations, and practices . . . to improve the administration of military justice in the Army.”³⁵¹ After eleven months of studying the military justice system, the committee determined that “there was often a disquieting absence of respect for the operation of the [military justice] system” and frequent breakdowns in the system. The committee found that these problems were due in part to “the denial to the courts of independence of action in many instances by the commanding officers who appointed the courts and reviewed their judgements, and who conceived it the duty of the command to interfere for disciplinary

³⁴⁸ THE REPORT OF THE SECRETARY OF WAR’S BOARD ON OFFICER-ENLISTED RELATIONSHIPS 7 (1946). This report became known as the “Doolittle Report” because the board was led by Lieutenant General Jimmy Doolittle.

³⁴⁹ *Id.* at 18.

³⁵⁰ *Id.* at 29.

³⁵¹ REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 1 (1946), *available at* http://www.loc.gov/rp/frd/Military_Law/pdf/report-war-dept-advisory-committee.pdf (last visited Apr. 6, 2015).

purposes.”³⁵² The committee went on to make numerous recommendations to improve the military justice system, including ten specific recommendations regarding the independence of courts-martial and elimination of commander’s influence over the court-martial process.³⁵³

Upon receipt of the report of the War Department Advisory Committee on Military Justice, Secretary of War Patterson approved most of the recommendations of the committee and made a proposal to Congress to amend the Articles of War in accordance with the committee recommendations.³⁵⁴ These changes included increasing the size of the Judge Advocate General’s Corps, prohibiting the convening authority from reprimanding court members, requiring legal training for the law member of the court, and expanding appellate authority.³⁵⁵ While Secretary of War Patterson approved most of the recommendations, he did not approve several key recommendations, such as the recommendation that a judge advocate appoint court members rather than commanders.³⁵⁶

Meanwhile, members of Congress conducted their own study of the military justice system. In June 1946, the House of Representatives Committee on Military Affairs issued a report on their investigations of the national war effort.³⁵⁷ Centered

³⁵² *Id.* at 3.

³⁵³ *Id.* at 6-10.

³⁵⁴ LURIE, *supra* note 334, at 82. The report of the War Department Advisory Committee on Military Justice is commonly known as the “Vanderbilt Report,” because the committee was led by Arthur Vanderbilt, a former president of the American Bar Association.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ INVESTIGATIONS OF THE NATIONAL WAR EFFORT, *supra* note 297.

on a debate over whether the military justice system is a “system of justice” or a “system of discipline,”³⁵⁸ the report concluded, “[t]here is no question that discipline must be preserved. Discipline, however, must not be named as a cloak to cover arbitrariness and injustice.”³⁵⁹ The sixty-page report examined the Army’s military justice system and made sixteen recommendations for changing the system.³⁶⁰ The first recommendation, “that the Judge Advocate General’s Department be invested with judicial power it does not now possess,” was the most significant recommendation because it would remove all post-trial authority from commanders and increase the responsibilities of judge advocates in the court-martial system.³⁶¹

Following the recommendations of the committees and the receipt of Army and Navy proposals to amend the Articles of War, the House of Representatives Committee on Armed Services held hearings in April and July 1947 on the improvement of military justice.³⁶² In January 1948, the House of Representatives passed the Army’s bill, H.R. 2575, known as the Elston Act, and forwarded it to the Senate for consideration.³⁶³ The bill languished in the Senate for six months due to opposition regarding the fact that the legislation kept commanders in control of

³⁵⁸ *Id.* at 10-13.

³⁵⁹ *Id.* at 48.

³⁶⁰ *Id.* at 49-60.

³⁶¹ *Id.* at 49-50.

³⁶² *Hearings before Committee on Armed Services of the House of Representatives on Sundry Legislation Affecting the Naval and Military Establishments*, 80th Cong. (1st Sess. 1947), available at http://www.loc.gov/rr/frd/Military_Law/pdf/hearings_No125.pdf (last visited Apr. 6, 2015).

³⁶³ WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 24 (1973).

courts-martial.³⁶⁴ However, in June 1948, Senator James P. Kem (R-MO) moved to attach the bill to the Selective Service Act of 1948. Once attached, the bill passed with ease and the 1948 Articles of War became law.³⁶⁵

The 1948 Articles of War made sweeping reforms of the military justice system that are widely regarded as a precursor to the UCMJ.³⁶⁶ While the 1948 changes increased the responsibilities of judge advocates in the court-martial process, commanders retained their authority in the court-martial process.

The UCMJ

Although the Elston Act made major changes to the system of military justice for the Army, the Navy maintained its own system of military justice and thus, the Elston Act did not apply to the Navy. Similar to the Articles of War, the Navy derived their rules from the British naval rules in 1775 and the rules remained nearly

³⁶⁴ Sherman, *supra* note 327, at 31.

³⁶⁵ GENEROUS, *supra* note 363, at 29; Military Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604, 627-44 (1948) (commonly known as the “Elston Act”).

³⁶⁶ Major changes included: authorizing warrant officers and enlisted men to serve as members of courts-martial, requiring a judge advocate to serve as the law member and increasing the authority of the law member, requiring a judge advocate to serve as the trial judge advocate and defense counsel, prohibiting officers from serving in conflicting capacities, authorizing the imposition of a bad conduct discharge, limiting the ability to try noncommissioned officers by summary court-martial, requiring confined American Soldiers to be separated from enemy prisoners, increasing the right of the accused for witnesses and documents, increasing the compulsory self-incrimination protections, giving The Judge Advocate General control over the assignment of judge advocates, increasing the authorities of appellate review bodies, repeal of the authority of wartime commanders to order the execution of a death sentence, prohibiting convening authorities from censoring, reprimanding, or admonishing court members, and increasing the authority of commanders to impose nonjudicial punishment on officers. BACKGROUND OF THE UCMJ, *supra* note 297, at 6-9.

unchanged until 1862.³⁶⁷ After 1862, Congress made only minor changes to the Articles for the Government of the Navy until 1950.³⁶⁸ As the Army sought changes to the Articles of War, the Navy also proposed changes to the Articles for the Government of the Navy. However, when the Army bill experienced delays in the Senate, Congress put the Navy bill on hold as well.³⁶⁹

While the Elston Act was still pending in Congress in 1948, the newly formed and unified National Military Establishment / DoD sought to unify the military justice systems of the Army, the Navy, and the newly formed Air Force.³⁷⁰ Secretary Forrestal appointed a committee to draft rules for the unified military justice system and on February 7, 1949, Secretary Forrestal forwarded the proposed UCMJ to Congress.³⁷¹

Although the committee report accompanying the proposed UCMJ claimed that the proposal placed restrictions on command, most of the restrictions were similar to the changes that made by the Elston Act.³⁷² However, the proposal did include a few major changes from the Elston Act: the requirement for a “law officer,” the

³⁶⁷ GENEROUS, *supra* note 363, at 11; *Rules for the Regulation of the Navy of the United Colonies of North-America*, NAVAL HISTORICAL CENTER, <http://www.navyhistory.org/rules-for-the-regulation-of-the-navy-of-the-united-colonies-of-north-america/> (last visited Apr. 6, 2015).

³⁶⁸ GENEROUS, *supra* note 363, at 11.

³⁶⁹ *Id.* at 28-29.

³⁷⁰ *Id.* at 34, LURIE, *supra* note 334, at 89-100. The National Security Act of 1947 established the United States Air Force on September 18, 1947. National Security Act of 1947, Pub. L. 80-253, 61 Stat. 495 (1947).

³⁷¹ GENEROUS, *supra* note 363, at 34, 42.

³⁷² *Id.* at 42-43.

creation of a civilian court of appeals, and the right to appellate defense counsel.³⁷³ Regardless of the changes, the issue of commander involvement in the court-martial process was at the forefront of Congressional debate over the proposed UCMJ.³⁷⁴ Representatives from civilian bar associations encouraged Congress not to pass the UCMJ because the proposal included commanders in the process and thus, the proposal did not satisfy the interests of justice. Other advocates, such as Frederick Bernays Wiener, a colonel in the judge advocate general's corps, argued that the military justice system is a system of discipline, which differs from the civilian system of justice because "[t]he object of civilian society is to make people live together in peace and in reasonable happiness. The object of the armed forces is to win wars, not just fight them [but] win them, because they do not pay off on place in a war."³⁷⁵

Despite the objections, Congress approved the UCMJ and on May 5, 1950, President Truman signed the UCMJ into law with an effective date of May 31, 1951.³⁷⁶ While Congress did make changes to the UCMJ proposal before passing it, the changes did not affect the role of commanders in the court-martial process and "the compromise between command and justice was left intact."³⁷⁷ Under the approved UCMJ,

³⁷³ *Id.* at 43-44.

³⁷⁴ *Id.* at 42, 51.

³⁷⁵ *Id.* at 47-48 (quoting *Hearings before a Subcommittee . . . on H.R. 2498: A Bill to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice*, 81st Congress 778-779 (1st Sess. 1949)).

³⁷⁶ Uniform Code of Military Justice, Pub. L. 81-506, 64 Stat. 107 (1950).

³⁷⁷ GENEROUS, *supra* note 363, at 51.

[t]he commander would appoint counsel, law officer, and court members, and he would be the first reviewer. But the presence of a lawyer at the pretrial investigation . . . was intended to guarantee that a man would not be tried on spurious charges, perhaps filed by a vindictive commander. The law officer would ensure that the trial itself was conducted according to law and not the general's whim. Lawyers at the trial and in the review system would use every possible defense argument that could be squeezed out of the fact situation. And perhaps most importantly, the all-civilian Court of Military Appeals would reverse every case where there was evidence of command tampering.³⁷⁸

In addition to the changes made in the UCMJ itself, the UCMJ established a procedure for recommending future changes. Article 67(g) of the 1951 UCMJ required the newly established Court of Military Appeals and the Judge Advocates General of each service to “meet annually to make a comprehensive survey of the operation of this code and report to [Congress] . . . the number and status of pending cases and any recommendations relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate.”³⁷⁹ This group, commonly known as the “Code Committee,” submitted the first annual report in May 1952 and continues to submit annual reports to this day.³⁸⁰

The first annual report, submitted on May 31, 1952, acknowledged “[m]any important questions and controversial matters concerning the administration of military justice.”³⁸¹ Specifically, the 1952 annual report noted that the Code Committee was aware of suggestions regarding “the convening of courts by others

³⁷⁸ *Id.*

³⁷⁹ UCMJ art. 67(g) (1951).

³⁸⁰ GENEROUS, *supra* note 363, at 86-87; ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES (May 31, 1951 – May 31, 1952), *available at* <http://www.armfor.uscourts.gov/newcaaf/annual/1952AnnualReport.pdf> (last visited Apr. 6, 2015) [hereinafter 1952 ANNUAL REPORT]; ANNUAL REPORTS, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm (last visited Apr. 6, 2015).

³⁸¹ 1952 ANNUAL REPORT, *supra* note 380, at 3.

[sic] than commanding officers [and] a further limitation on command control over the administration of military justice.”³⁸² However, the Code Committee declined to make any recommendations at that time regarding commander involvement in the court-martial process.³⁸³

In subsequent years between 1952 and 1968, the annual reports included recommendations for changes to the UCMJ, but the annual reports did not mention or recommend any further limitation on the involvement of commanders in the military justice system.³⁸⁴ Rather, several annual reports actually recommended increasing the authority of commanders to administer non-judicial punishment under Article 15, UCMJ. In 1954, The Judge Advocates General of the Army, Navy, and Air Force all recommended increasing the non-judicial punishment authority of commanders. Discussing the deficiencies of the existing non-judicial punishment rules, The Army Judge Advocate General commented that the UCMJ, “with its heavy accent on formalities and its restrictions on commanders, has done much to destroy this highly desirable and effective method of maintaining discipline.”³⁸⁵ The Navy Judge Advocate General similarly noted that “[t]he power of the commanding officer . . . is now so slight and so ineffective that he must make more frequent use of the court-martial.”³⁸⁶

³⁸² *Id.* at 3.

³⁸³ *Id.* at 4.

³⁸⁴ ANNUAL REPORTS, *supra* note 380.

³⁸⁵ ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF THE TREASURY 22 (Jan. 1, 1954 – Dec. 31, 1954), *available at* <http://www.armfor.uscourts.gov/newcaaf/annual/1954AnnualReport.pdf> (last visited Apr. 6, 2015).

³⁸⁶ *Id.* at 29.

The recommendation to increase the non-judicial punishment authority of commanders, as well as the other recommendations of the Code Committee eventually made it into a bill that the DoD presented to Congress in 1956.³⁸⁷ However, the bill did not pass Congress, in part because of disagreement over command authority. While the services requested more command authority, other groups, such as the American Legion and the District of Columbia Bar Association, not only opposed the expansion of the authority of commanders, but some persisted in their attempts to remove all command authority.³⁸⁸

Debate over these issues continued for several years and the services presented the recommendations to Congress in various forms several more times between 1956 and 1959, to no avail.³⁸⁹ Simultaneously, the American Legion presented Congress with a proposal to change the UCMJ by moving all judge advocates under the Secretary of Defense and increasing the penalty for attempting to influence a court-martial.³⁹⁰ Congress did not support any of the recommended changes, but discussion over the balance between discipline and justice and the involvement of commanders in the process continued.³⁹¹

By 1959, The Judge Advocate General of the Army recommended that the Secretary of the Army solicit the opinion of line officers in order to determine the effectiveness of the UCMJ and make recommendations to improve it. In October 1959, the Secretary of the Army established the “Committee on the [UCMJ], Good

³⁸⁷ H.R. 6583, 84th Congress (2d Sess. 1956).

³⁸⁸ GENEROUS, *supra* note 363, at 94-95.

³⁸⁹ *Id.* at 137.

³⁹⁰ *Id.* at 138.

³⁹¹ *Id.*

Order and Discipline in the Army.” Commonly known as the “Powell Committee” after the Committee Chairman, Lieutenant General Herbert B. Powell, the Committee consisted of The Army Judge Advocate General,³⁹² the Assistant Judge Advocate General for Military Justice,³⁹³ and seven senior line officers.³⁹⁴ After three months, the committee submitted its 287-page report on 18 January 1960.³⁹⁵ The committee presented findings and recommendations in ten general areas, two of which were “command responsibility” and “commanders’ corrective powers.”³⁹⁶ As a supplement to the report, the Powell Committee submitted an extensive legislative proposal consistent with their findings and recommendations. Among other things, the proposal

³⁹² Major General George W. Hickman, Jr. was The Judge Advocate General for the Army from 1957 to 1960. *TJAGs, THE JUDGE ADVOCATE GENERAL’S CORPS REGIMENTAL HISTORY*, <https://www.jagcnet.army.mil/8525736A005BE1BE/0/2CFAAD8ED887A9E385257B1100624B1B?opendocument> (last visited Apr. 10, 2015).

³⁹³ Charles L. Decker, a graduate of the United States Military and former infantry officer, served as one of the primary drafters of the UCMJ. When appointed as a member of the Powell Committee, Brigadier General Decker was serving as The Assistant Judge Advocate General for Military Justice under Major General Hickman from 1957 to 1961. He became The Judge Advocate General in 1961 and served in that position until his retirement in 1963. *Col. Charles L. Decker’s Collection of Records Relating to Military Justice and the Revision of Military Law 1948-1956*, NATIONAL ARCHIVES MICROFILM PUBLICATIONS M1739, 1-2 (1992), http://www.loc.gov/rr/frd/Military_law/pdf/Decker-collection.pdf (last visited Apr. 10, 2015).

³⁹⁴ Lieutenant General Herbert B. Powell, Deputy Commanding General, United States Continental Command Army for Reserve Forces; Major General George E. Bush, Commanding General of VI Corps; Major General Hugh P. Harris, Deputy Chief of Staff for Operations, Plans and Training, United States Continental Army Command; Major General Rush B. Lincoln, Jr., Deputy Chief of Transportation; Major General William C. Westmoreland, Commanding General, 101st Airborne Division; Major General Bruce Easley, Deputy Adjutant General; and Brigadier General Howard M. Hobson, Commanding General, The Provost Marshal Center. REPORT TO HONORABLE WILBER M. BRUKER SECRETARY OF THE ARMY BY THE COMMITTEE ON THE UNIFORM CODE OF MILITARY AND JUSTICE GOOD ORDER AND DISCIPLINE IN THE ARMY (1960), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Powell_report.pdf (last visited Apr. 6, 2015) [hereinafter POWELL REPORT].

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 3-4.

recommended simplifying the court-martial process by eliminating summary and special courts-martial, and increasing the authority of commanders to administer non-judicial punishment under Article 15, UCMJ.³⁹⁷

Although the Secretary of the Army approved the Powell Report and all the services believed in the necessity of an increase in non-judicial punishment authority, the proposal was not widely supported outside the Army.³⁹⁸ By 1961, all of the services came to an agreement regarding an increase of non-judicial punishment authority and eliminating the summary court-martial. The 1961 Annual Report to Congress included two separate legislative proposals regarding non-judicial punishment and the summary court-martial.³⁹⁹ Congress approved the proposed bill regarding non-judicial punishment in 1962 and the changes went into effect on February 1, 1963.⁴⁰⁰ Congress did not consider the proposed bill to eliminate the summary court-martial.⁴⁰¹

Increasing the non-judicial punishment authority of commanders did not solve all of the alleged problems with the UCMJ and debate continued. In 1967, Congress received numerous bills to amend the UCMJ.⁴⁰² In 1968, Congress consolidated the

³⁹⁷ GENEROUS, *supra* note 363, at 139-140.

³⁹⁸ POWELL REPORT, *supra* note 394, at i; GENEROUS, *supra* note 363, at 144-145.

³⁹⁹ ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF THE TREASURY 7-27 (Jan. 1, 1961 – Dec. 31, 1961), *available at* <http://www.armfor.uscourts.gov/newcaaf/annual/1961AnnualReport.pdf> (last visited Apr. 6, 2015).

⁴⁰⁰ GENEROUS, *supra* note 363, at 149; Act of Sept. 7, 1962, Pub. L. 87-648, 76 Stat. 447 (1962).

⁴⁰¹ GENEROUS, *supra* note 363, at 149-150.

⁴⁰² *Id.* at 197.

various bills into one bill, “The Military Justice Act of 1968,” which passed Congress on October 24, 1968 and went into effect on August 1, 1969.⁴⁰³ This act, the first major reform of the UCMJ since its establishment in 1951, eliminated the law officer and created the requirement for military judges, required representation for the accused at special courts-martial, made changes to post-trial proceedings and reviews, and made two minor changes regarding improper command influence.⁴⁰⁴

At the same time as Congress was making changes to the UCMJ in 1968, a decision of the United States Supreme Court changed the landscape of the military justice system. In June 1969, in the case of *O’Callaghan v. Parker*, the United States Supreme Court held that courts-martial could only try offenses with some sort of service-connection.⁴⁰⁵ Quoting their earlier decision in *Toth v. Quarles*, the Court commented on the fairness of the military justice system:

Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been, and probably never can be, constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.⁴⁰⁶

⁴⁰³ Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

⁴⁰⁴ *Id.*; Sherman, *supra* note 327, at 54-59.

⁴⁰⁵ *O’Callaghan v. Parker*, 395 U.S. 258, 274 (1969). According to some scholars, the decision in *O’Callaghan v. Parker* “hampered and impeded the traditional operations of military justice and dealt body blows to discipline.” Heinl, *supra* note 266, at 260. This change in the military justice system was a contributing factor to the declining professionalism of the military in the decade following the Vietnam War.

⁴⁰⁶ *Id.* at 262-63.

Adding fuel to the debate over whether the military justice system should be a system of discipline or a system of justice, this Supreme Court decision highlighted the fact that the military justice system does not include all of the due process and fairness that is inherent in the civilian legal system.⁴⁰⁷ For the next eighteen years, the holding in *O’Callaghan v. Parker* limited the jurisdiction of courts-martial to only service-connected crimes and civilian courts had to prosecute all other crimes.⁴⁰⁸

Recognizing the impact that the Vietnam War, the increased size of the Army, and the “substantial and vocal opposition to the war” was having on discipline in the Army, in 1971, General Westmoreland, a former member of the Powell Committee and now serving as the Chief of Staff of the Army, established the “Committee for Evaluation of the Effectiveness of the Administration of Military Justice.” The purpose of this committee was to “assess the role of the administration of the military justice system as it pertains to the maintenance of morale and discipline at the small unit level.”⁴⁰⁹ Unlike prior committees and reviews of military justice, this committee looked solely at the effectiveness of the military justice system on discipline, as observed by commanders and non-commissioned officers.⁴¹⁰ The committee report made numerous recommendations but when it came to the contentious issue of the

⁴⁰⁷ *Id.*

⁴⁰⁸ *O’Callaghan v. Parker* was overturned in 1987 by *U.S. v. Solario*, 483 U.S. 435 (1987).

⁴⁰⁹ THE COMMITTEE FOR EVALUATION OF THE EFFECTIVENESS OF THE ADMINISTRATION OF MILITARY JUSTICE, REPORT TO GENERAL WILLIAM C. WESTMORELAND, CHIEF OF STAFF, U.S. ARMY 3 (1971), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Report_General-Westmoreland.pdf (last visited Apr. 6, 2015).

⁴¹⁰ *Id.* at 5.

authority of commanders, the Westmoreland Committee merely quoted the Powell Report.⁴¹¹

After the Westmoreland Committee concluded, there was very little legislation with respect to the UCMJ for several years. However, as the military recovered from the Vietnam War, a revival of the debate over the authority of commanders in the court-martial process began in Congress. Although it did not pass, on January 15, 1979, Representative Charles Bennett (D-FL) introduced a bill that would have established a “Courts-Martial Command” within the Office of the Judge Advocate General for the purpose of convening courts-martial and detailing personnel to courts-martial.⁴¹² Representative Bennett reintroduced the bill in 1981 but it did not pass Congress after receiving negative comments from the DoD.⁴¹³ Instead, in 1981 Congress passed the Military Justice Amendments of 1981, which made minor changes to the UCMJ regarding excess leave and the timeline for petitions to the Court of Military Appeals.⁴¹⁴

In 1982, The Judge Advocate General of the Army established the Wartime Legislation Team to evaluate the Army’s military justice system in order to ensure that it “would be able to function fairly and efficiently [in an armed conflict], without unduly burdening commanders, or unnecessarily utilizing resources.”⁴¹⁵ After a year of study, the team presented The Judge Advocate General of the Army with

⁴¹¹ *Id.* at 7-8.

⁴¹² Military Justice Act of 1979, H.R. 68, 96th Congress (1979).

⁴¹³ Military Justice Act of 1979, H.R. 17, 97th Congress (1981).

⁴¹⁴ Military Justice Amendments of 1981, Pub. L. 97-81, 95 Stat. 1085 (1981).

⁴¹⁵ Lieutenant Colonel E.A. Gates & Major Gary V. Casida, *Report to the Judge Advocate General by the Wartime Legislation Team*, 104 MIL. L. REV. 139, 141 (1984).

recommendations that would simplify and improve the administration of military justice during hostilities. Among those recommendations, the team suggested that during hostilities, “convening authorities at all levels should be allowed to delegate some functions which are not outcome determinative.”⁴¹⁶

Congress adopted some of the Wartime Legislation Team’s recommendations when they passed the Military Justice Act of 1983.⁴¹⁷ Military law practitioners consider The Military Justice Act of 1983 as the first major change to the UCMJ since 1968. Changes included permitting convening authorities to delegate the authority to excuse court members, removing the requirement that convening authorities detail military judges and counsel, and requiring convening authorities to receive advice from their staff judge advocate prior to referring a case to a court-martial.⁴¹⁸ While pre-trial advice became a requirement, Congress did not obligate convening authorities to follow the advice of their staff judge advocate. Rather, Congress expressly acknowledged the authority of commanders in the court-martial process and did not change that authority. In the Senate Report to accompany the Military Justice Act of 1983, Congress noted that:

[t]he primary responsibility for the administration of military justice rests with the military commander. This reflects the fact that the commander is responsible for discipline within his command. The commander determines which cases should go to trial, what level of trial is appropriate, who should serve as members of the court-martial, and what action should be taken on the results of trial. The bill does not change the basic responsibilities of the commander, but makes a number of changes to facilitate the administration of military justice without undercutting the fundamental fairness of the system.⁴¹⁹

⁴¹⁶ *Id.* at 155.

⁴¹⁷ Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983).

⁴¹⁸ *Id.* at § 3.

⁴¹⁹ S. REP. NO. 98-53, at 4 (1983).

Sexual Assault Scandals and Recent Legislation

After 1983, Congress continued to make minor changes to the UCMJ, usually through legislation included in the annual NDAA's, but none of the changes affected the authority of commanders in the court-martial process. However, the Tailhook scandal in 1991 triggered Congressional debate over the military's ability to handle sexual assault cases. Furthermore, a series of sexual assault scandals since the 1990s has continued to fuel the debate and has led to recent legislation changing the UCMJ.

The first scandal, Tailhook, arose from events that occurred at the Tailhook Association convention in Las Vegas, Nevada in September 1991.⁴²⁰ The Tailhook Association is a private, non-profit organization of naval aviators established in 1956.⁴²¹ In accordance with tradition, during the annual conventions, various flight squadrons hosted hospitality suites in the convention hotel. In the evenings, the hospitality suites would turn into party rooms, where participants would consume massive quantities of alcohol.⁴²² One evening during the convention, male aviators conducted a ritual known as "the gauntlet," where the males lined both sides of the hallway. The men fondled and groped any women who passed through "the gauntlet" as they tried to get to the hospitality suites.⁴²³

⁴²⁰ DEP'T OF DEFENSE INSPECTOR GEN., TAILHOOK 91, PART 2: EVENTS AT THE 35TH ANNUAL TAILHOOK SYMPOSIUM (1993), *available at* <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ada269008> (last visited Apr. 6, 2015) [hereinafter TAILHOOK REPORT].

⁴²¹ THE TAILHOOK ASSOCIATION, <http://www.tailhook.net> (last visited Apr. 6, 2015).

⁴²² TAILHOOK REPORT, *supra* note 420, at V-1-V-10.

⁴²³ Kingsley R. Browne, *Military Sex Scandals from Tailhook to the Present: the Cure can be Worse than the Disease*, 14 DUKE J. GENDER L. & POL'Y 750, 751 (2007); TAILHOOK REPORT, *supra* note 420, at VI-1-VI-13.

After one female aviator, Paula Coughlin, complained of assault, an investigation began. When the investigation failed to uncover any facts, the media and victims accused the Navy of covering up the incident, which led to the resignation of the Secretary of the Navy, H. Lawrence Garrett, III.⁴²⁴ However, a series of subsequent Inspector General investigations revealed that eighty-three women and seven men were assaulted during the Tailhook 1991 convention. The Inspector General referred the files of 140 officers to the Acting Secretary of the Navy for appropriate action regarding their involvement in the Tailhook scandal.⁴²⁵ Although many of the officers received reprimands, were relieved, or not promoted due to their involvement in the Tailhook scandal, the Navy did not prosecute anyone for misconduct associated with their actions at the Tailhook convention.⁴²⁶ The failure of the Navy to prosecute any individuals involved in the Tailhook scandal led to Congressional scrutiny over the military's ability to handle sexual assault cases. While Congress cut 10,000 jobs in the Navy and placed approximately 4,500 promotions on hold as a result of the Tailhook scandal, Congress made no changes to the UCMJ as a direct result of the scandal.⁴²⁷

Several years after Tailhook, another sexual assault scandal in the military got the attention of Congress and the public. In 1996, the Army charged twelve male officers and non-commissioned officers with sexual assault of female trainees at Aberdeen Proving Ground, Maryland. Courts-martial convicted one officer and three non-commissioned officers, and the Army took administrative action against the other

⁴²⁴ Browne, *supra* note 423, at 752.

⁴²⁵ TAILHOOK REPORT, *supra* note 420.

⁴²⁶ Browne, *supra* note 423, at 754-762.

⁴²⁷ Browne, *supra* note 423, at 752.

eight.⁴²⁸ As a result of this scandal, the Army made internal changes to prevent sexual assault in training units, Congress held several hearings regarding the investigation, and the NDAA for Fiscal Year 1998 required changes to the selection and training of drill sergeants.⁴²⁹ However, again, Congress made no changes to the UCMJ.

By 2000, Congressional concern regarding the prosecution of sexual assault cases in the military had grown. Senator Paul Sarbanes (D-MD) requested that the Army recommend improvement for the prosecution of sexual offenses. As a result, the Secretary of the Army established a “Process Action Team (PAT) Joint Council for Sexual Misconduct Initiatives to recommend improvements for investigating and prosecuting sexual offenses and for providing services to sexual offense victims.”⁴³⁰ The team made many recommendations to improve the investigation of sexual offenses and provide better services to victims, but none of the recommendations required congressional action.⁴³¹

In 2001, the National Institute of Military Justice sponsored a commission to conduct a review of the UCMJ. The commission, known as the “Cox Commission,”⁴³² recommended “immediate action to address four problem areas of

⁴²⁸ Jackie Spinner, *In Wake of Sex Scandal, Caution is the Rule at Aberdeen*, WASH. POST, Nov. 7, 1997, <http://www.washingtonpost.com/wp-srv/local/longterm/library/aberdeen/caution.htm> (last visited Apr. 6, 2015).

⁴²⁹ National Defense Authorization Act for Fiscal Year 1998, Pub. L. 105-85, §§ 556-566, 111 Stat. 1629 (1997); Maria R. Gervais, *Violating the Sacred Trust: Sexual Misconduct in Initial Entry Training* (2008), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a479653.pdf> (last visited Apr. 6, 2015).

⁴³⁰ ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, § 3, 4 (Oct. 1, 1999 – Sept. 30, 2000), available at <http://www.armfor.uscourts.gov/newcaaf/annual/fy00/FY00ArmyReport.pdf> (last visited Apr. 6, 2015).

⁴³¹ *Id.*

⁴³² The Honorable Walter T. Cox, III, retired Chief Judge of the Court of Appeals for the Armed Forces, served as the Chair of the Commission.

court-martial practice and procedure.”⁴³³ Of the four “problem areas,” the commission noted that “the far-reaching role of commanding officers in the court-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces.” The commission therefore recommended that Congress “modify the pretrial role of the convening authority in both selecting court-martial members and making other pre-trial legal decisions that best rest within the purview of a sitting military judge.”⁴³⁴

In 2003, another sexual assault scandal came into the spotlight. On January 2, 2003, an Air Force Academy cadet sent an e-mail to the Secretary of the Air Force, Chief of Staff of the Air Force, several members of Congress, and the media alleging a sexual assault problem at the Air Force Academy.⁴³⁵ The Secretary of the Air Force immediately established a working group to examine the complaints.⁴³⁶ Despite the efforts of the Secretary of the Air Force, on April 16, 2003, as part of the Emergency Wartime Appropriations Act, the President “established a panel to review sexual misconduct allegations at the United States Air Force Academy.”⁴³⁷ The panel found

⁴³³ REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 5 (2001), http://www.loc.gov/rr/frd/Military_Law/pdf/Cox-Commission-Report-2001.pdf (last visited Apr. 6, 2015).

⁴³⁴ *Id.* at 6-7.

⁴³⁵ Inspector Gen., U.S. Dep’t of Air Force, Air Force Inspector General Summary Report Concerning the Handling of Sexual Assault Cases at the United States Air Force Academy 1 (Sept. 14, 2004), *available at* <http://www.afhso.af.mil/shared/media/document/AFD-060726-033.pdf> (last visited Apr. 6, 2015).

⁴³⁶ *Id.*

⁴³⁷ Emergency Wartime Appropriations Act of 2003, Pub. L. 108-11, § 501, 117 Stat. 559, 609 (2003).

that leadership of the Air Force had been aware of sexual assault and sexual harassment problems at the Air Force Academy since 1993.⁴³⁸

The next year, in 2004, The Judge Advocate General of the Army appointed a committee, known as the Military Justice Review Committee, to “determine how the military justice system might be transformed to better serve the needs of soldiers and commanders in a transformed Army.”⁴³⁹ Acknowledging the dual-role of the UCMJ as a criminal code and a system of discipline, the committee determined that “[t]he commander must retain a high level of control over what charges a service member faces, how those charges are to be disposed of, and how and when clemency must be granted.”⁴⁴⁰ However, the committee made recommendations to “reduce the administrative burden on commanders,” such as giving military judges more oversight during the pretrial phases of courts-martial, randomly selecting court-martial panel members, making sentences effective upon announcement, and completely changing the post-trial process.⁴⁴¹ In light of the recent sexual assault scandals in the other services, the committee also recommended a revision of the punitive sexual offense articles.⁴⁴²

⁴³⁸ REPORT OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY 13 (2003), *available at* <http://www.defense.gov/news/Sep2003/d20030922usafareport.pdf> (last visited Apr. 6, 2015).

⁴³⁹ RESPONSE SYSTEMS PANEL, EXECUTIVE SUMMARY MILITARY JUSTICE REVIEW 1, *available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140312_ROC/Materials/02_Army_MilJusticeReview2004_ExecutiveSummary.pdf (last visited Apr. 6, 2015).

⁴⁴⁰ *Id.* at 2.

⁴⁴¹ *Id.* at 3-6.

⁴⁴² *Id.* at 4.

The following year, in the 2005 NDAA, Congress directed the DoD to “review the [UCMJ] and the Manual for Courts-Martial with the objective of determining what changes are required to improve the ability of the military justice system to address issues relating to sexual assault.”⁴⁴³ In response, the Joint Service Committee on Military Justice formed a subcommittee to comply with the direction of the 2005 NDAA. Although “[t]he subcommittee concluded that they were unable to identify any sexual misconduct that cannot be prosecuted under the current UCMJ and MCM,” the subcommittee made recommendations to improve the military justice system.⁴⁴⁴

Despite the fact that the subcommittee to the Joint Service Committee on Military Justice believed that no change was necessary, the DoD proposed amendments to the UCMJ to “restructure and expand upon the treatment of sexual assault and other sex-related offenses.”⁴⁴⁵ In the 2006 NDAA, Congress partially adopted the recommendations of the DoD and completely re-wrote Article 120 of the

⁴⁴³ National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571(a), 118 Stat. 1920-1921 (2004).

⁴⁴⁴ Memorandum from Colonel (COL) Michael J. Child, Exec. Chair, Joint Serv. Comm. on Military Justice, to Office of General Counsel, DoD, ATTN: Mr. Robert E. Reed, subject: Review of Sexual Assault Offenses (Feb. 18, 2005), *available at* http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf (last visited Apr. 6, 2015).

⁴⁴⁵ Letter from Daniel J. Dell’Orto, Principal Deputy Gen. Counsel, U.S. Dep’t of Def., to The Honorable John W. Warner, Chairman, Comm. on Armed Services, U.S. Senate (Apr. 7, 2005), *available at* http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf (last visited Apr. 6, 2015); Letter from Daniel J. Dell’Orto, Principal Deputy Gen. Counsel, U.S. Dep’t of Def., to The Honorable Duncan Hunter, Chairman, Comm. on Armed Services, U.S. House of Representatives (Apr. 7, 2005), *available at* http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf (last visited Apr. 6, 2015).

UCMJ to align more closely with the federal definitions of sexual assault.⁴⁴⁶

However, the new statute shifted the burden to the accused to prove consent and was extremely complicated. These problems led to several years of litigation and uncertainty regarding the statute.⁴⁴⁷ Recognizing the problems with the new version of Article 120, Congress re-wrote Article 120 again in 2011 and included the revision in the 2012 NDAA.⁴⁴⁸

Within a few weeks of Congress re-writing Article 120 of the UCMJ, *The Invisible War* premiered at the 2012 Sundance Film Festival and Congress shifted their focus from the statutory language of Article 120 to the military's handling of sexual assault cases.⁴⁴⁹ On April 20, 2012, Secretary of Defense Leon Panetta withheld disposition authority for sex-related offenses to commanders in the grade of O-6 or higher.⁴⁵⁰ By January 2013, Congress' concern about the military's handling of sexual assault cases had increased, causing Congress to direct the Secretary of Defense to "establish a panel to conduct an independent review and assessment of the

⁴⁴⁶ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256-63 (2006). The new version of Article 120 took effect on 1 October 2007. *Id.* at § 552(f).

⁴⁴⁷ Patrick D. Pflaum, *The Continuous Evolution of Military Sexual Assault Law*, A.B.A. L. & TRENDS PRACTICE AREA NEWSLETTER, vol. 7, no. 2 (Winter 2011), available at https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/2011_winter/military_sexual_assault_law.html (last visited Apr. 6, 2015).

⁴⁴⁸ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1299, 1404-11 (2011).

⁴⁴⁹ See *infra* chapter 1.

⁴⁵⁰ Memorandum from Secretary of Defense, for Secretaries of the Military Departments, Subject: Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012), available at http://www.dod.gov/dodgc/images/withhold_authority.pdf (last visited Apr. 6, 2015).

systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under [Article 120 of the UCMJ].”⁴⁵¹

However, before Secretary of Defense Panetta was able to establish the panel as directed by Congress, the situation became worse. On February 26, 2013, Air Force Lieutenant General Craig Franklin, disapproved the findings and sentence and dismissed the sexual assault charges against Lieutenant Colonel Wilkerson.⁴⁵² This action opened a flurry of activity in Congress. Within two weeks, a subcommittee of the SASC held a hearing on the issue and members of Congress introduced bills to amend the UCMJ in both the House of Representatives and the Senate.⁴⁵³

In May 2013, as previously directed by Congress, the new Secretary of Defense, Chuck Hagel, established the “Response Systems to Adult Sexual Assault Crimes Panel” (hereinafter “Response Systems Panel”).⁴⁵⁴ The Response Systems Panel held its first public meeting on June 27, 2013.⁴⁵⁵ After three months of work by the panel, Secretary of Defense Hagel further established three subcommittees to the Response Systems Panel, including the Role of the Commander Subcommittee.⁴⁵⁶ In addition to the congressionally mandated panel, in October 2013, Secretary of

⁴⁵¹ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632, 1758 (2013).

⁴⁵² *Wilkerson Record of Trial*, *supra* note 14.

⁴⁵³ *March 13, 2013 Hearing*, *supra* note 62.

⁴⁵⁴ RSP REPORT, *supra* note 171, at 55.

⁴⁵⁵ Transcript of the June 27, 2013 Public Session of the Response Systems to Adult Sexual Assault Crimes Panel, *available at* http://responsesystemspanel.whs.mil/public/docs/meetings/20130627/Transcript_20130627.pdf (last visited Apr. 6, 2015).

⁴⁵⁶ REPORT OF THE ROC SUBCOMM., *supra* note 79.

Defense Hagel established the “Military Justice Review Group” to “conduct a comprehensive review of the [UCMJ].”⁴⁵⁷

The fact that the Response Systems Panel had begun working did not halt activity within Congress regarding the issue of sexual assault in the military. Rather, debate within Congress over sexual assault in the military and the need to amend the UCMJ increased. During the 113th Congress, members of Congress introduced over sixty bills in the Senate and House of Representatives to amend the UCMJ or make other changes related to the military’s handling of sexual assault cases.⁴⁵⁸

Debate over the issue crossed party lines, with both Republicans and Democrats agreeing that changes to the UCMJ were necessary. However, Congress was divided on what changes were necessary, making it difficult to pass any legislation.⁴⁵⁹ Senator Kirsten Gillibrand (D-NY) had secured considerable support for her proposal, the Military Justice Improvement Act, but the proposed legislation fell five votes short of going to a vote on the Senate floor.⁴⁶⁰ After several months of heated debates, with Congress still divided on the issue, it appeared as though

⁴⁵⁷ Memorandum from Chuck Hagel, Secretary of Defense, to Secretaries of the Military Departments, subject: Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013), *available at* http://www.dod.mil/dodgc/images/mjrg_secdef_memo.pdf (last visited Apr. 6, 2015).

⁴⁵⁸ The 1st Session of the 113th Congress was in session from January 3, 2013 to 26 December 2013. The 2nd Session of the 113th Congress was in session from 3 January 3, 2014 to December 16, 2014. LIBRARY OF CONGRESS, <https://www.congress.gov> (last visited Apr. 6, 2015). See appendix A for a summary of the legislation proposed during the 113th Congress.

⁴⁵⁹ Lauren Fox, *Gillibrand Versus McCaskill and Levin: The War to Solve Military Sexual Assaults Heats Up*, U.S. NEWS AND WORLD REPORT, July 29, 2013, <http://www.usnews.com/news/articles/2013/07/29/gillibrand-versus-mccaskill-and-levin-the-war-to-solve-military-sexual-assaults-heats-up> (last visited Apr. 6, 2015).

⁴⁶⁰ 160 CONG. REC. S1349-38 (daily ed. Mar. 6, 2014).

legislation to amend the UCMJ would not pass before Congress adjourned.⁴⁶¹

However, on December 26, 2013, Congress came to an agreement in the NDAA for Fiscal Year 2014. Known as the “Levin Amendment,” after Senator Carl Levin (D-MI) who was Chairman of the SASC, the amendment to the NDAA for Fiscal Year 2014 was a compromise that included substantial changes to the UCMJ without removing commanders from the court-martial process as proposed by Senator Kirsten Gillibrand (D-NY) and Representative Jackie Speier (D-CA). The approved changes included things such as: improving the rights of victims, changing how preliminary hearings are conducted, limiting the action convening authorities can take on a sentence, eliminating the statute of limitations for sex-related offenses, requiring discharge of service members convicted of certain sex-related offenses, and establishing review procedures for decisions not to refer sex-related offenses to a court-martial.⁴⁶² Appendix B contains a complete list of the changes to the UCMJ made by the FY14 NDAA.

As Congress debated the issue of changing the UCMJ to address the sexual assault problem in the military, the Response Systems Committee continued its work conducting a “review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses.”⁴⁶³ The

⁴⁶¹ Jacqueline Klimas, *Political quagmire stymies military sex-assault solutions*, WASH. TIMES, Dec. 8, 2013, <http://www.washingtontimes.com/news/2013/dec/8/congress-creates-a-legislative-fortress-for-milita/?page=all> (last visited Apr. 6, 2015).

⁴⁶² National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1701-1753, 127 Stat. 672 (2013). A complete summary of the changes made to the UCMJ by the 2014 NDAA is included at Appendix B.

⁴⁶³ National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, §576, 126 Stat. 1632 (2013).

Role of the Commander Subcommittee completed work and submitted their report to the Response Systems Panel in May 2014.⁴⁶⁴ After completing a twelve-month review, the Response Systems to Adult Sexual Assault Crimes Panel submitted their report to Congress and the Secretary of Defense on June 27, 2014.⁴⁶⁵ The comprehensive report included 125 recommendations, which included eight recommendations related to the role of commanders in the military justice system and the convening authorities' ability to grant clemency.⁴⁶⁶ The panel "determined and concluded (with two members dissenting) that Congress should not further limit the authority of convening authorities under the UCMJ to refer charges for sexual assault crimes to trial by court-martial beyond the recent amendments to the UCMJ and DoD policy" and recommended that "congress repeal Section 1744 of the FY14 NDAA, and Congress not enact Section 2 of the Victims Protection Act of 2014."⁴⁶⁷ The specific recommendations of the Response Systems Panel are included at Appendix C.

On November 25, 2014, Secretary of Defense Hagel submitted a report to the President on sexual assault prevention and response within the DoD.⁴⁶⁸ The report detailed that since 2012, the prevalence of sexual assault and unwanted sexual contact

⁴⁶⁴ REPORT OF THE ROC SUBCOMM., *supra* note 79.

⁴⁶⁵ RSP REPORT, *supra* note 171, at 22-25.

⁴⁶⁶ *Id.* at 11-53.

⁴⁶⁷ *Id.* at 6-7.

⁴⁶⁸ DEP'T OF DEFENSE, REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE (2014), *available at* http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Full_Report.pdf (last visited Apr. 6, 2015) [hereinafter DOD REPORT TO PRESIDENT].

has decreased, while the number of reports of sexual assault has increased.⁴⁶⁹

According to the report, this trend indicates “growing trust of command and confidence in the response system.”⁴⁷⁰ While the report indicates positive changes with respect to sexual assault prevention and response in the military, it also acknowledges that additional change is necessary. However, Secretary of Defense Hagel cautioned in the report that “future reforms should not include transferring prosecutorial discretion from commanders to judge advocates” because it “would like not only degrade mission readiness, but also diminish commanders’ effectiveness in the fight against sexual assault in the military.”⁴⁷¹

Just prior to adjournment in December 2014, the 113th Congress passed the NDAA for Fiscal Year 2015.⁴⁷² With respect to the UCMJ and sexual assault, the FY15 NDAA made a few minor changes to the UCMJ and revised several provisions of the FY14 NDAA, but did not make any changes regarding the role of commanders in the military justice process.

The reforms made by the 113th Congress have been the most comprehensive changes to the UCMJ since 1968.⁴⁷³ While commander’s discretion has decreased, the UCMJ remains “a command-directed system of justice.”⁴⁷⁴ Commanders determine

⁴⁶⁹ *Id.* at 15.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* at 23.

⁴⁷² Carl Levin and Howard “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291 (2014).

⁴⁷³ DOD REPORT TO PRESIDENT, *supra* note 468, at 23.

⁴⁷⁴ *Id.* at Annex 4, page 5.

the appropriate disposition for offenses, impose non-judicial punishment,⁴⁷⁵ convene courts-martial,⁴⁷⁶ detail members of the court-martial,⁴⁷⁷ and conduct post-trial reviews of courts-martial.⁴⁷⁸ Commanders also have the authority to accept plea-bargains,⁴⁷⁹ set aside certain convictions,⁴⁸⁰ and approve, disapprove, commute, or suspend a court-martial sentence for certain offenses.⁴⁸¹

Conclusion

The military justice system in the United States has been in existence since the Continental Congress established the Continental Army on June 14, 1775. At that time, the United States military was not a professional organization. Over the years, the United States military gradually developed characteristics of a profession and today's military is a profession. As the United States military professionalized, the military justice system also developed to adapt to the professionalization of the military. As a mechanism for enforcing the military's ethical code, the military justice system was a critical component in the professionalization of the military.

Initially created as a "system of discipline" with commanders responsible for the good order and discipline of their units, the military justice system gradually evolved, adding elements of a "system of justice." With the evolution, Congress

⁴⁷⁵ UCMJ art. 15 (2014).

⁴⁷⁶ UCMJ arts. 22, 23, 24 (2014).

⁴⁷⁷ UCMJ art. 25 (2014).

⁴⁷⁸ UCMJ art. 60 (2014).

⁴⁷⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(d)(3) (2012).

⁴⁸⁰ UCMJ art. 60 (2014).

⁴⁸¹ *Id.*

added lawyers to the process and the responsibility of lawyers in the military justice system gradually has increased. However, commanders remain responsible for the military justice system and the current military justice system is a delicate balance between a “system of discipline” and a “system of justice.” Using the history of the United States military as a profession and the history of the military justice system in the United States, the next chapter will analyze the impact that removing commanders from the military justice system would have on the United States military’s status as a profession.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

Introduction

As discussed in chapter 2, militaries around the world began professionalizing after the French Revolution and now, most scholars agree that the military is a profession. Following its European military counterparts, the United States military began professionalizing sometime after the War of 1812 and by the end of World War I in 1918, the United States military was a profession. Since 1918, the United States military has gone through several periods of professional turmoil, each leading to increased emphasis on professionalism. Now, after fourteen years of conflict in Iraq and Afghanistan, the United States military faces yet another period of turmoil. As a result, military leaders have initiated dialogue and renewed emphasis on the military profession.

As military leaders renew their commitment to the military profession, debate over sexual assault and senior leader misconduct in the military has caused several members of Congress to seek military justice reform. Senator Kirsten Gillibrand (D-NY) and Representative Jackie Speier (D-CA) have proposed legislation that would remove commanders from the military justice process and replace them with lawyers. However, because the involvement of commanders in the military justice process has been an integral part of the professionalization of the United States military, removing commanders from the military justice process will impact on the United States military's status as a profession.

Evolution of the Military Justice System
for a Professional Military

As noted in the previous chapter, rules have existed to govern the conduct and discipline of soldiers for centuries, even before the emergence of the military as a profession.⁴⁸² The Continental Congress appointed a committee to draft Articles of War for the Continental Army on the same day they established the Continental Army, and they enacted the Articles of War sixteen days later.⁴⁸³ Since the Articles of War existed prior to the professionalization of the United States Army, some might argue that the military justice system had no impact on the military becoming a profession. However, as the United States military professionalized, the military justice system evolved to correspond with the professionalization of the military.

When Congress adopted the Articles of War in 1775, Congress created the military justice system to be a system of discipline. At that time, military leaders such as George Washington considered discipline to be “the soul of the Army.”⁴⁸⁴ Because of the importance of discipline, the Articles of War provided rules and punishments for disciplinary infractions, “with very slight attention given to creating a fair legal process.”⁴⁸⁵ In fact, discipline was so important that the Articles of War denied Soldiers the basic civil liberties for which they were fighting.⁴⁸⁶

⁴⁸² WARD, *supra* note 297, at 31; BACKGROUND OF THE UCMJ, *supra* note 297, at 2; INVESTIGATIONS OF THE NATIONAL WAR EFFORT, *supra* note 297.

⁴⁸³ WARD, *supra* note 297, at 32; BACKGROUND OF THE UCMJ, *supra* note 297, at 2.

⁴⁸⁴ Heinl, *supra* note 266, at 265.

⁴⁸⁵ WARD, *supra* note 297, at 30.

⁴⁸⁶ *Id.* at 30, 35.

The importance of discipline remained after the American Revolutionary War and therefore, Congress made only minor changes to the Articles of War until after the American Civil War.⁴⁸⁷ Coincidentally, the first major changes Congress made to the Articles of War occurred as the military began to professionalize.

While the United States military began to professionalize after the War of 1812, most military historians consider the late nineteenth century, after the American Civil War, as the age of military professionalization in the United States.⁴⁸⁸ Serving as the Commanding General of the Army from 1869 to 1883, General William T. Sherman led the efforts to professionalize the military with the advances he made to professional military education.⁴⁸⁹ It was during General Sherman's tenure as Commanding General that Congress completely revised the Articles of War in 1874, the first major revision of the Articles of War since 1775.⁴⁹⁰ While this major revision to the Articles of War did not change the nature of the military justice system as a system of discipline, the revision was the first revision in which Congress began adding elements of fairness to the military justice system by removing harsh punishments such as flogging and branding.⁴⁹¹

Between the end of the American Civil War in 1865 and the end of World War I in 1918, the military continued to professionalize, and by the end of World War

⁴⁸⁷ BACKGROUND OF THE UCMJ, *supra* note 297, at 3.

⁴⁸⁸ Matthew Moten, *Who Is a Member of the Military Profession?* JOINT FORCES QUARTERLY, 3d Quarter 2011, 16.

⁴⁸⁹ HUNTINGTON, *supra* note 87, at 230; Cooper, *supra* note 243, at 184-185.

⁴⁹⁰ 1874 Articles of War, *supra* note 322; BACKGROUND OF THE UCMJ, *supra* note 297, at 3.

⁴⁹¹ BACKGROUND OF THE UCMJ, *supra* note 297, at 3.

I, the military was a profession.⁴⁹² It is no coincidence that the next major revision to the Articles of War occurred in 1916, almost simultaneously with the United States military becoming a profession.⁴⁹³ Still considered a system of discipline, commanders retained their authority and responsibility for the military justice system under the 1916 Articles of War. However, for the first time, the 1916 Articles of War increased the role of lawyers in the military justice process.⁴⁹⁴ While The Judge Advocate General had always been responsible for “prosecut[ing] in the name of the United States of America,” the 1916 Articles of War authorized The Judge Advocate General to detail judge advocates to act for him in general courts-martial, thus increasing the number of courts-martial for which judge advocates would be present.⁴⁹⁵

As the role of lawyers in the military justice system increased, the first debates over the authority of commanders began and these debates directly corresponded with the military’s professionalization at the end of World War I. In 1917, Brigadier General Samuel T. Ansell, the Acting Judge Advocate General for the Army, got into a disagreement with Major General Enoch H. Crowder, The Judge Advocate General, over the authority of The Judge Advocate General.⁴⁹⁶ The disagreement led to intense debates between 1917 and 1920 over the fairness of the military justice system.⁴⁹⁷

⁴⁹² See *supra* chapter 4.

⁴⁹³ 1916 Articles of War, *supra* note 325.

⁴⁹⁴ *Id.*

⁴⁹⁵ WARD, *supra* note 297, at 41; 1776 *Articles of War*, *supra* note 311, at Section XIV, articles 1 and 11; BACKGROUND OF THE UCMJ, *supra* note 297, at 3.

⁴⁹⁶ See generally Brown, *supra* note 327; LURIE, *supra* note 334, at 43-75.

⁴⁹⁷ See generally *supra* chapter 4; Brown, *supra* note 327; LURIE, *supra* note 334, at 43-75.

While Major General Crowder believed that the Articles of War needed some minor changes, Brigadier General Ansell wanted a complete revision of the Articles of War to transform it into a more civilian-like system of justice.⁴⁹⁸ This debate between Brigadier General Ansell and Major General Crowder marked the beginning of a long history of debates regarding the authority of commanders in the military justice system, the fairness of the military justice system, and whether the military justice system should be a system of discipline or a system of justice.

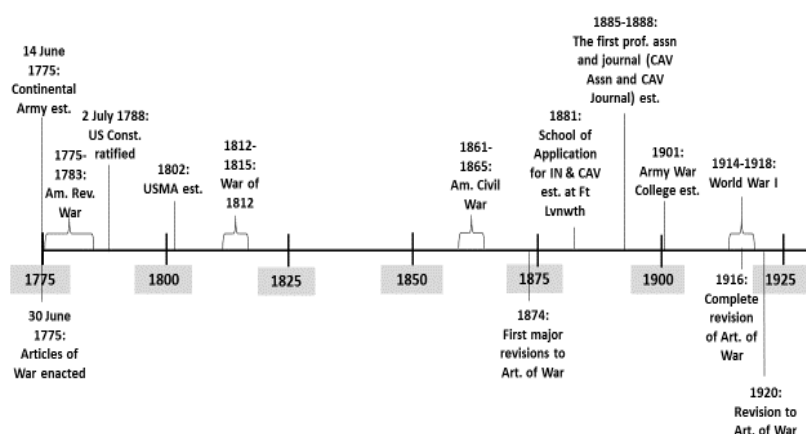
As a result of the Ansell-Crowder debate, Congress revised the Articles of War in 1920.⁴⁹⁹ Although the 1920 Articles of War included some of Brigadier General Ansell's proposals to make the system more fair, the revised Articles of War did not include the most drastic changes and commanders retained their authority over the military justice system.⁵⁰⁰ Thus, as depicted in Table 2 below, as the military became more professional, Congress gradually revised the Articles of War to become more fair and the military justice system became more of a balance between a system of discipline and a system of justice.

⁴⁹⁸ Sherman, *supra* note 327, at 19-24; Brown, *supra* note 327, at 15-36; *Hearings on S. 64, supra* note 331, at 5-23.

⁴⁹⁹ Act of June 4, 1920, ch. 2, 41 Stat. 759, 287 (1920).

⁵⁰⁰ 1920 Articles of War, *supra* note 344; Brown, *supra* note 327, at 15-36; BACKGROUND OF THE UCMJ, *supra* note 297, at 4-6.

Table 2. Timeline of Events from 1775 to 1925



Source: Created by author.

By the end of World War I in 1918, the United States military had become a profession.⁵⁰¹ However, throughout the twentieth century, military professionalism in the United States continued to evolve as the military adapted to changing circumstances both in the United States and internationally. As the military profession continued to evolve, Congress also made changes to the military justice system throughout the twentieth century. However, what is interesting is that every major change to the military justice system since 1918 corresponds with a significant change in the professionalism of the military.

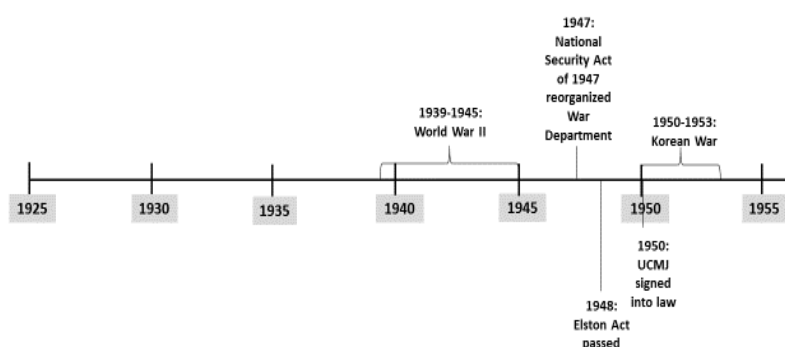
In 1950 when Congress enacted the UCMJ, the military was in a period of major reorganization and transformation following the end of World War II and the beginning of the Cold War. Although the military drew down forces for a few years immediately following World War II, the emergence of the Cold War and the changing international security environment necessitated a large, permanently established professional military force capable of engaging in simultaneous small-

⁵⁰¹ See *supra* note 217.

scale operations around the world.⁵⁰² World War II also demonstrated the need for reorganization of the United States military. As a result, the National Security Act of 1947 consolidated the War and Navy Departments into the DoD and created the United States Air Force.⁵⁰³

Under the newly unified DoD, it was no longer feasible for the services to operate under two separate military justice systems, the Articles of War and the Articles for the Government of the Navy. Therefore, the reorganization of the military in 1947 directly led to the creation of the UCMJ in 1950.⁵⁰⁴

Table 3. Timeline of Events from 1925 to 1955



Source: Created by author.

After it became effective in 1951, the first major change to the UCMJ was in 1968.⁵⁰⁵ The year 1968 was also a significant year for military operations and the military profession. On January 30, 1968, the Viet Cong and North Vietnamese

⁵⁰² Murray & Parker, *supra* note 255, at 364; Wong & Johnson, *supra* note 263, at 101.

⁵⁰³ National Security Act of 1947, Pub. L. 80-253, 61 Stat. 495 (1947).

⁵⁰⁴ Uniform Code of Military Justice, Pub. L. 81-506, 64 Stat. 107 (1950).

⁵⁰⁵ Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

People's Army launched the largest military campaign in the Vietnam War, a series of attacks known as the Tet Offensive. Initially caught off guard by the attacks, the South Vietnamese and the United States eventually defeated the North Vietnamese People's Army. However, the battles of the Tet Offensive resulted in heavy casualties and loss of credibility from the American public.⁵⁰⁶

Just one month after the Tet Offensive, on March 16, 1968, American Soldiers raped and massacred hundreds of unarmed civilians in My Lai, a village in South Vietnam.⁵⁰⁷ This one widely known incident is a representation of the lack of professionalism that some American Soldiers displayed throughout the Vietnam War.

As the operational environment in Vietnam changed due to the Tet Offensive, and incidents such as the My Lai massacre showed the lack of professionalism of the United States military, Congress worked on major changes to the UCMJ. Although the changes had been percolating for several years, Congress did not come to an agreement on the changes until 1968, the same year that the Vietnam War began to spark debate and consternation in the United States.⁵⁰⁸ The 1968 revisions, combined with the increased non-judicial punishment authority granted in 1962 gave commanders additional options for handling the lack of professionalism that became so apparent during the Vietnam War.⁵⁰⁹

The Vietnam War left the military in shambles. In 1970, the Army began to study military professionalism and in 1973, Congress eliminated the draft, creating an

⁵⁰⁶ *Milestones*, *supra* note 264.

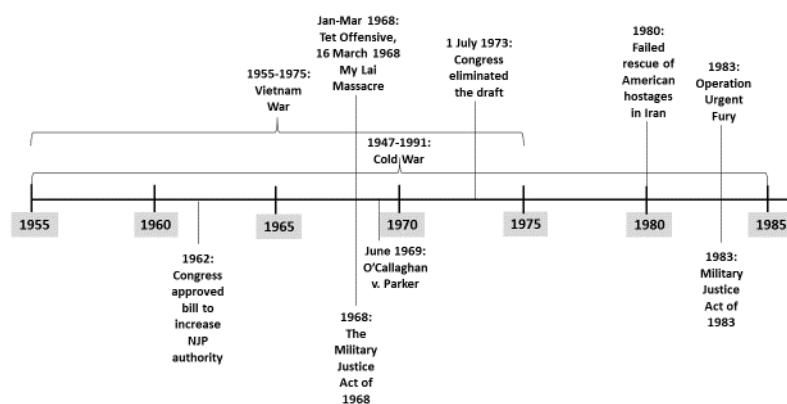
⁵⁰⁷ Eckhardt, *supra* note 269.

⁵⁰⁸ GENEROUS, *supra* note 363, at 197; Military Justice Act of 1968, Pub. L. 90-632, 82 Stat. 1335 (1968).

⁵⁰⁹ Generous, *supra* note 363, at 149; Act of Sept. 7, 1962, Pub. L. 87-648, 76 Stat. 447 (1962).

all-volunteer Army.⁵¹⁰ Throughout the 1970s, the military attempted to recover from the Vietnam War, but continued to struggle with discipline and professionalism. By 1983, professionalism had returned to the military and the renewed professionalism and effectiveness of the military necessitated a review of the military justice system. After a yearlong study evaluating the effectiveness of the UCMJ in wartime, Congress made the next major revisions to the UCMJ in 1983.⁵¹¹ By reducing the commander's burden of administering military justice during combat, the 1983 revisions increased the responsibility and authority of judge advocates.⁵¹² Thus, the military justice system became more of a balance between a system of justice and a system of discipline.

Table 4. Timeline of Events from 1955 to 1985



Source: Created by author.

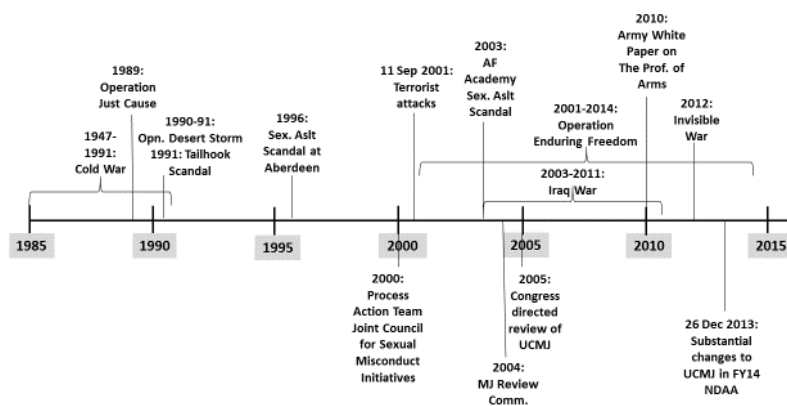
⁵¹⁰ See *supra* note 272.

⁵¹¹ Gates & Casida, *supra* note 415; Military Justice Act of 1983, Pub. L. 98-209, 97 Stat. 1393 (1983).

⁵¹² Military Justice Act of 1983, Pub. L. 98-209, 97 Stat. 1393 (1983).

For the next thirty years, the military continued to progress as a profession, but with no major changes. Likewise, Congress made only minor changes to the UCMJ from 1984 to 2013. However, after fourteen years of combat operations in Iraq and Afghanistan, the military is now facing another crisis in military professionalism. Incidents of sexual assault and general officer misconduct are receiving attention from Congress and the American public.⁵¹³ As a result, Congress made significant changes to the UCMJ in 2013 and 2014 and is considering additional changes.⁵¹⁴

Table 5. Timeline of Events from 1985 to 2015



Source: Created by author.

As Congress considers additional changes to the UCMJ, it is important to consider the effect that such changes could have on the military's status as a profession. As history shows, the military justice system and the professionalization

⁵¹³ See generally *supra* chapter 1.

⁵¹⁴ National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 576, 126 Stat. 1632, 1758 (2013); National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, 127 Stat. 672 (2013).

of the United States military are inextricably linked. As the military became more professional, Congress revised the military justice system to make it fairer to those under its jurisdiction. Therefore, what started as a system of discipline evolved to become a delicate balance between a system of discipline and a system of justice as the military became more professional.

The military justice system is a dynamic system that is constantly evolving. The significant changes made to the UCMJ in 2014 are an example of such evolution. However, it takes time for changes to take effect and to determine the effect that such changes have on the system and on the military profession. Therefore, before making additional changes to the military justice system, Congress must give the military time to implement and adjust to the Fiscal Year 2014 changes in order to determine their effect on the military justice system and on the military profession. Further changes to the military justice system without consideration of the other recent changes will affect the balance between discipline and justice, which will affect society's opinion on the professionalism of the military.

Society's Recognition of the Military Profession

To be a profession, American society must regard the military as a profession. Society must trust that members of the military have specialized knowledge or expertise separate from other members of society and that members of the military go through education or training programs to obtain the specialized knowledge or expertise. They must further believe that the military serves the interests of society rather than their own interests, that there is an organizational structure to the military, and that military members are committed to the integrity of the profession. Finally, society must trust that the military upholds high ethical standards and has an ethical

code that the military enforces through self-regulation. If all of these factors are in place, then society accepts members of the military as the authority in their field, treats them with the respect and prestige of a profession, and grants the military profession a certain degree of autonomy.

As the mechanism for enforcing ethical standards, the military justice system is an integral part of society's recognition of the military as a profession. As a result, society expects the military justice system to reflect the values of American society.

The United States was founded on the three democratic values of liberty, justice, and equality and those concepts form the basis for American values. From a very young age, the Pledge of Allegiance to the United States flag teaches United States citizens the democratic values: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."⁵¹⁵

Before the United States military became a profession, the military justice system was merely a system of discipline. However, as the United States military became more professional, many Americans found it preposterous to have a military justice system based merely on discipline, denying Soldiers many of the common elements of justice upon which the United States was founded. Therefore, as the military became more professional, Congress added elements of justice into the military justice system.

While society demands that the military justice system include elements of justice, the military justice system must also maintain its character as a system of discipline because "[t]he very nature of armies requires a strict military code for

⁵¹⁵ 4 U.S.C. § 4 (2014).

submission and obedience.”⁵¹⁶ Commanders must retain authority to administer discipline under the UCMJ in order to exercise their authority and maintain good order and discipline in their units. Without the ability of commanders to exercise their authority and maintain good order and discipline in their units, the military risks losing the trust of society in the ability to carry out military mission. As stated by General James F. Amos, former Commandant of the Marine Corps, “[w]e cannot ask our Marines to follow their Commanding Officer into combat if we create a system that tells Marines to not trust their Commanding Officer on an issue as important as sexual assault.”⁵¹⁷ Similarly, we cannot ask American society to trust military commanders in combat if we cannot trust commanders to administer discipline in their units.

Therefore, in order to retain the trust of society, both trust in executing the military mission of fighting and winning the nation’s wars, and trust in the military as a profession, the military justice system must maintain the delicate balance between a system of discipline and a system of justice. The Preamble to the *Manual for Courts-Martial* acknowledges this balance when it states that “[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”⁵¹⁸

In order for the military justice system to maintain balance between discipline and justice, commanders and judge advocates must work together to form the

⁵¹⁶ WARD, *supra* note 297, at 15.

⁵¹⁷ *June 4, 2013 Hearing*, *supra* note 36, at 34 (prepared statement by General James F. Amos, USMC).

⁵¹⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt I, para. 3 (2012).

necessary link between discipline and justice. While judge advocates must continue to play an active role in the military justice process to ensure that it serves justice, commanders must remain responsible for the military justice system in order to retain the authority over good order and discipline in their units. As explained by General Raymond T. Odierno, the Chief of Staff of the Army,

The relationship between the judge advocate legal advisor and the commander is unique. The commander has the authority, but that commander relies on his or her judge advocate for advice and recommendation. Commander do not make disposition decisions without judge advocate advice, and Article 34, UCMJ, requires that the judge advocate provide written advice before charges may be referred to a court-martial. In the event that a judge advocate encounters a commander unwilling to follow advice to take an allegation to trial, the judge advocate may take the same allegation to the superior commander, who can essentially pull the case up to the next level.⁵¹⁹

Removing commanders from the military justice system, as Senator Gillibrand and Representative Speier have proposed in the Military Justice Improvement Act⁵²⁰ and the Sexual Assault Training Oversight and Prevention Act,⁵²¹ even if only removed for sexual assault cases, damages the balance of the military justice system that has taken 240 years to achieve. Any major change to the balance between discipline and justice creates the risk that society will no longer trust the military as a profession. Therefore, as Congress considers further revisions to the UCMJ to address the sexual assault and general officer misconduct problems of the last decade, military senior leaders and Congress must remain vigilant to the repercussions that such changes would have on the balance between discipline and justice, and thus, on society's recognition of the military as a profession.

⁵¹⁹ *June 4, 2013 Hearing, supra* note 36, at 19 (prepared statement by General Raymond T Odierno, USA).

⁵²⁰ Military Justice Improvement Act of 2014, S. 2992, 113th Cong. (2013).

⁵²¹ Sexual Assault Training Oversight and Prevention (STOP) Act, H.R. 1593, 113th Cong. (2013).

GLOSSARY

Articles of War. The Articles of War was the military justice system in the United States from 1775 through 1951. The Articles of War were replaced by the Uniform Code of Military Justice in 1951.

Commander. A commander is “a commissioned or [warrant officer] who, by virtue of grade and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a ‘command.’”⁵²²

Court-Martial. A court-martial is a military court in which members of the armed forces are tried for violations of military law. In the United States, there are three types of court-martial: General Court-Martial, Special Court-Martial, and Summary Court-Martial.⁵²³

Court-Martial Convening Authority. A court-martial convening authority is the person authorized to convene a court-martial. Pursuant to the UCMJ, in the United States, the following individuals may convene a General Court-Martial: “(1) the President of the United States; (2) the Secretary of Defense; (3) the commanding officer of a unified or specified combatant command; (4) the Secretary concerned; (5) the commanding officer of an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps; (6) the commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the United States; (7) the commanding officer of an air command, an air force, and air division, or a separate wing of the Air Force or Marine Corps; (8) any other commanding officer designated by the Secretary concerned; or (9) any other commanding officer in any of the armed forces when empowered by the President.”⁵²⁴

Judge Advocate. As defined by the UCMJ, a judge advocate is “an officer of the Judge Advocate General’s Corps of the Army or the Navy; an officer of the Air Force or the Marine Corps who is designated as a judge advocate; or a commissioned officer of the Coast Guard designated for special duty (law).”⁵²⁵

⁵²² U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 1-5 (6 Nov. 2014).

⁵²³ UCMJ art. 16 (2014).

⁵²⁴ UCMJ art. 22 (2014).

⁵²⁵ UCMJ art. 1(13) (2014).

Military Justice. Military justice is the body of law that governs the conduct of members of the armed forces.

Military Justice System. A military justice system is the regulations and procedures that govern the enforcement of military justice.

Non-Judicial Punishment. Non-judicial punishment is punishment imposed upon a service member pursuant to Article 15, UCMJ.⁵²⁶

Profession. “A profession is a trusted self-policing and relatively autonomous vocation whose members develop and apply expert knowledge as human expertise to render an essential service to society in a particular field. This explanation of a profession has five aspects: Professions provide a unique and vital service to the society served, one it cannot provide itself. Professions provide this service by applying expert knowledge and practice. Professions earn the trust of the society because of effective and ethical application of their expertise. Professions self-regulate; they police the practice of their members to ensure it is effective and ethical. This includes the responsibility for educating and certifying professionals. Professions are therefore granted significant autonomy and discretion in their practice of expertise on behalf of the society.”⁵²⁷

Uniform Code of Military Justice (UCMJ). The UCMJ is the military justice system in the United States that has been in effect since 1951. The UCMJ is codified at 10 U.S.C. §§ 801-946.

⁵²⁶ UCMJ art. 15 (2014).

⁵²⁷ ADRP 1, *supra* note 116.

APPENDIX A

PROPOSALS TO AMEND THE UCMJ MADE BY THE 113TH CONGRESS

HOUSE OF REPRESENTATIVES				
Bill #	Date Introduced	Sponsor	Title	Related Bills
H.R. 430	Jan 25, 2013	Speier	Protect Our Military Trainees Act	
H.R. 840	Feb 26, 2013	Sablan	To improve services for victims of sexual assault and domestic violence	
H.R. 1079	Mar 26, 2013	Speier	Military Judicial Reform Act of 2013	
H.R. 1593	Apr 17, 2013	Speier	Sexual Assault Training Oversight and Prevention (STOP) Act	
H.R. 1864	May 7, 2013	Walorski	To amend title 10, U.S.C., to require an IG investigation of allegations of retaliatory personnel actions	S. 1092
H.R. 1867	May 8, 2013	Turner	Better Enforcement for Sexual Assault Free Environments (BE SAFE) Act of 2013	H.R. 2207 S. 1032
H.Res. 213	May 14, 2013	McCollum	Establishing the Special Committee on Sexual Assault and Sexual Abuse in the Armed Forces	
H.R. 1986	May 15, 2013	Lipinski	SANE Deployment Act	
H.R. 2002	May 15, 2013	Ryan	Combating Military Sexual Assault Act of 2013	S. 871
H.R. 2016	May 16, 2013	Benishek	Military Justice Improvement Act of 2014	S. 967 S. 1752 S. 2970 S. 2992
H.R. 2059	May 20, 2013	Tsongas	Coast Guard STRONG Act	S. 1050
H.R. 2206	May 23, 2013	Turner	No Tolerance Act	
H.R. 2207	May 23, 2013	Turner	Better Enforcement for Sexual Assault Free Environments (BE SAFE) Act of 2013	H.R. 1867 S. 1032
H.R. 2227	Jun 3, 2013	Noem	To improve the response to and prevention of sexual assaults involving members of the Armed Forces	
H.R. 2230	Jun 3, 2013	Sanchez	Track It to Prevent It Act	
H.R. 2777	Jun 22, 2013	Griffin	Stop Pay for Violent Offenders Act	
H.R. 3360	Oct 28, 2013	Turner	To reform Article 32 of the UCMJ to specify the burden of proof applicable at the investigative hearing, the required qualifications for the investigating officer, the permitted scope of the investigation to assist the convening authority, and the protection of witnesses, and for other purposes.	S. 1644 H.R. 3459
H.R. 3459	Nov 12, 2013	Speier	Article 32 Reform Act	S. 1644 H.R. 3360
H.R. 3767	Dec 12, 2013	Ryan	Shield Act	
H.R. 3775	Dec 16, 2013	Barr	Military SAVE Act	
H.R. 4485	Apr 10, 2014	Turner	Fair Military Act	
H.R. 4730	May 22, 2014	Grayson	To allow the return of personal property to victims of sexual assault incidents involving a member of the Armed Forces	
H.R. 5524	Sep 17, 2014	Speier	Access to Contraception for Women Servicemembers and Dependents Act of 2014	S. 2687

SENATE				
Bill #	Date Introduced	Sponsor	Title	Related Bills
S. 538	Mar 12, 2013	McCaskill	To amend title 10, USC, to modify the authorities and responsibilities of convening authorities in taking actions on the findings and sentences of courts-martial	H.R. 2016 S. 967
S. 548	Mar 12, 2013	McCaskill	Military Sexual Assault Prevention Act of 2013	
S. 871	May 7, 2013	Murray	Combating Military Sexual Assault Act of 2013	H.R. 2002
S. 964	May 15, 2013	McCaskill	To require a comprehensive review of the adequacy of the training, qualifications, and experience of the DoD personnel responsible for sexual assault prevention and response	
S. 967	May 16, 2013	Gillibrand	Military Justice Improvement of 2013	S. 1752 S. 2970 S. 2992 H.R. 2016
S. 992	May 21, 2013	Shaheen	To provide for offices on sexual assault prevention and response under the Chiefs of Staff of the Armed Forces.	
S. 1032	May 23, 2013	McCaskill	Better Enforcement for Sexual Assault Free Environments (BE SAFE) Act of 2013	H.R. 1867 H.R. 2207
S. 1041	May 23, 2013	Blumenthal	Military Crime Victims' Rights Act of 2013	
S. 1050	May 23, 2013	Collins	Coast Guard STRONG Act	H.R. 2059
S. 1081	May 23, 2013	Warner	Military Whistleblower Protection Enhancement Act of 2013	
S. 1092	Jun 4, 2013	Klobuchar	To amend title 10, USC, to require an Inspector General investigation of allegations of retaliatory personnel actions taken in response to making protected communications	H.R. 1864
S. 1581	Oct 28, 2013	Sanders	Survivors of Military Sexual Assault and Domestic Abuse Act of 2013	
S. 1644	Nov 5, 2013	Boxer	Article 32 Reform Act	H.R. 3360 H.R. 3459
S. 1752	Nov 20, 2013	Gillibrand	Military Justice Improvement Act of 2013	S. 967 S. 2970 S. 2992 H.R. 2016
S. 1775	Nov 21, 2013	McCaskill	Victims Protection Act of 2013	S. 1917
S. 1917	Jan 14, 2014	McCaskill	Victims Protection Act of 2014	S. 1775
S. 2222	Apr 8, 2014	Walsh	To require a Comptroller General of the U.S. report on the sexual assault prevention activities of the DoD and the Armed Forces	
S. 2687	Jul 30, 2014	Shaheen	Access to Contraception for Women Servicemembers and Dependents Act of 2014	H.R. 5524
S. 2703	Jul 30, 2014	Boxer	Military SAFE Standards Act	
S. 2970	Dec 2, 2014	Gillibrand	Military Justice Improvement Act of 2014	S. 967 S. 1752 S. 2992 H.R. 2016
S. 2992	Dec 9, 2014	Gillibrand	Military Justice Improvement Act of 2014	S. 967 S. 1752 S. 2970 H.R. 2016

* These charts exclude all bills related to the NDAAs and National Defense Appropriations Acts, which all included proposals to amend the UCMJ.

Source: Created by author. Data obtained from *Thomas*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/home/thomas.php> (last visited Apr. 10, 2015).

APPENDIX B

SUMMARY OF CHANGES TO THE UCMJ MADE BY THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

§ 1701 – Adds Article 6b to the UCMJ, which gives victims of an offense under the UCMJ certain rights. Specifically, Article 6b of the UCMJ provides:

A victim of an offense under this chapter has the following rights:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any of the following:
 - (A) A public hearing concerning the continuation of confinement prior to trial of the accused.
 - (B) A preliminary hearing under section 832 of this title (article 32) relating to the offense.
 - (C) A court-martial relating to the offense.
 - (D) A public proceeding of the service clemency and parole board relating to the offense.
 - (E) The release or escape of the accused, unless such notice may endanger the safety of any person.
- (3) The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or investigating officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.
- (4) The right to be reasonably heard at any of the following:
 - (A) A public hearing concerning the continuation of confinement prior to trial of the accused.
 - (B) A sentencing hearing relating to the offense.
 - (C) A public proceeding of the service clemency and parole board relating to the offense.
- (5) The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).
- (6) The right to receive restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.⁵²⁸

⁵²⁸ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013).

§1702a – Amends Article 32 of the UCMJ, changing Article 32 proceedings from an investigation to a preliminary hearing and limiting the purpose of the preliminary hearing to:

- (A) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense.
- (B) Determining whether the convening authority has courtmartial jurisdiction over the offense and the accused.
- (C) Considering the form of charges.
- (D) Recommending the disposition that should be made of the case.⁵²⁹

The amendment further requires that judge advocates conduct preliminary hearings whenever possible, provides that victims may not be required to testify at preliminary hearings, and provides that the accused has the right to be represented at the preliminary hearing, to cross-examine witnesses, and to present evidence in defense and mitigation.⁵³⁰

§ 1702b – Amends Article 60 of the UCMJ.

Requires convening authorities to provide a written explanation, to be included in the record of trial, of any action they take on the findings or any action to approve, disapprove, commute, or suspend a court-martial sentence.

Prohibits convening authorities from dismissing or setting aside findings of guilty, or reducing a finding of guilty to a lesser included offense when the offense has a maximum punishment of more than two years, the adjudged sentence includes a punitive

⁵²⁹ *Id.* at § 1702.

⁵³⁰ *Id.*

discharge or confinement for more than six months, or the offense is a violation of Article 120, 120b, or 125 of the UCMJ.

Prohibits convening authorities from disapproving, commuting, or suspending an adjudged sentence of confinement for more than six months or a punitive discharge unless the trial counsel recommends such action based on “substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense,” or the convening authority has entered into a pre-trial agreement with the accused pursuant to Rule for Courts-Martial 705 and such action is necessary pursuant to the terms of the pre-trial agreement.⁵³¹

§ 1703 - Amends Article 43a of the UCMJ by eliminating the five-year statute of limitations for rape, sexual assault, rape of a child, and sexual assault of a child.⁵³²

§ 1704 – Amends Article 46 of the UCMJ, requiring defense counsel to request to interview the victim of any sex-related offense through the trial counsel, and requiring the interview to take place in the presence of the trial counsel, counsel for the victim, or a Sexual Assault Victim Advocate, if requested by the victim.⁵³³

⁵³¹ *Id.*

⁵³² *Id.* at § 1703.

⁵³³ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1704, 127 Stat. 672 (2013).

§ 1705 – Amends Article 56 of the UCMJ by imposing a mandatory dismissal or dishonorable discharge for any person found guilty of an offense of rape or sexual assault in violation of Article 120(a) or (b), rape or sexual assault of a child in violation of Article 120a(a) or (b), forcible sodomy in violation of Article 125, or an attempt to commit any of these offenses in violation of Article 80.

Amends Article 18 of the UCMJ by limiting the jurisdiction of the offenses listed in the previous sentence to a general court-martial.⁵³⁴

§ 1706 – Amends Article 60 of the UCMJ by requiring convening authorities to provide the victim an “opportunity to submit matters for consideration by the convening authority or by another person authorized to act under this section before the convening authority or such other person takes action under this section,” and prohibiting convening authorities from considering any matters related to the character of the victim unless the matters were presented as evidence during the trial.⁵³⁵

§ 1707 – Rewrites Article 125 of the UCMJ to repeal the offense of consensual sodomy and delineate the offenses of forcible sodomy and bestiality.⁵³⁶

⁵³⁴ *Id.* at § 1705.

⁵³⁵ *Id.* at § 1706.

⁵³⁶ *Id.* at § 1707.

§ 1708 – Requires the discussion to Rule for Court-Martial 306 to be amended to remove “the character and military service of the accused” as a factor commanders should consider when for deciding how an offense should be disposed of.⁵³⁷

§ 1716 – Adds 10 U.S.C. § 1044e to “designate legal counsel (to be known as ‘Special Victims’ Counsel’) for the purpose of providing legal assistance to an individual eligible for military legal assistance . . . who is the victim of an alleged sex-related offense.”⁵³⁸

§ 1742 – Requires commanders to act immediately on reports of sex-related offenses by reporting it to the appropriate military criminal investigation organization.⁵³⁹

§ 1743 – Requires the submission of a written incident report to the installation commander, the first O-6 commander and general officer in the chain of command of the victim, and the first O-6 commander and general officer in the chain of command of the alleged offender, within eight days after an unrestricted report of sexual assault has been made.⁵⁴⁰

⁵³⁷ *Id.* at § 1708.

⁵³⁸ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1716, 127 Stat. 672 (2013).

⁵³⁹ *Id.* at § 1742.

⁵⁴⁰ *Id.* at § 1743.

§ 1744 – Requires the service secretary to review any case in which the staff judge advocate “recommends that charges of a sex-related offense be referred for trial by court-martial and the convening authority decides not to refer any charges to a court-martial.” Requires the next superior commander to review any case in which the staff judge advocate “recommends that charges of a sex-related offense should not be referred for trial by court-martial and the convening authority decides not to refer any charges to a court-martial.”⁵⁴¹

§§ 1709, 1711-1715, 1721-1726, 1731-1735, 1741, 1745-1747, 1751-1753 of the National Defense Authorization Act for Fiscal Year 2014 include provisions regarding other aspects of prevention, response, and investigation of sexual-related offenses, but these sections do not specifically relate to or amend the UCMJ, so they are not included in this summary.

⁵⁴¹ *Id.* at § 1744.

APPENDIX C

RECOMMENDATIONS OF THE RESPONSE SYSTEMS PANEL REGARDING THE ROLE OF COMMANDERS IN THE MILITARY JUSTICE SYSTEM

RSP Recommendation 36: Congress not adopt the proposals in the Sexual Assault Training Oversight and Prevention Act or the Military Justice Improvement Act to modify the authority vested in convening authorities to refer sexual assault charges to courts-martial

RSP Recommendation 37: Congress not further limit the authority under the UCMJ to refer charges for sexual assault crimes to trial by court-martial beyond the recent amendments to the UCMJ and DoD policy.

RSP Recommendation 38: The Secretary of Defense ensure all officers preparing to assume senior command positions at the grade of O-6 and above receive dedicated legal training that fully prepares them to exercise authorities assigned to them under the UCMJ.

RSP Recommendation 39: Congress repeal Section 1744 of the National Defense Authorization Act for Fiscal Year 2014, which requires a convening authority's decision not to refer certain sexual assault cases be reviewed by a higher general court-martial convening authority or the Service Secretary, depending on the circumstances, due to the real or perceived undue pressure it creates on staff judge advocates to recommend referral, and on convening authorities to refer, in situations where referral does not serve the interests of victims or justice.

RSP Recommendation 40: If Congress does not repeal Section 1744 of the National Defense Authorization Act for Fiscal Year 2014, and the requirement for elevated review of non-referred case files continues, the Secretary of Defense direct a standard format be developed for declining prosecution in a case, modeled after the contents of civilian jurisdiction declination statements or letters

RSP Recommendation 41: Congress not enact Section 2 of the Victim's Protection Act of 2014, which would require the next higher convening authority or Service Secretary to review a case if the senior trial counsel disagreed with the staff judge advocate's recommendation against referral or the convening authority's decision not to refer one of these sexual assault cases

RSP Recommendation 42: Congress not adopt additional amendments to Article 60 of the UCMJ beyond the significant limits on discretion already

adopted, and the President should not impose additional limits to the post-trial authority of convening authorities.

RSP Recommendation 43: Congress amend Section 1702(b) of the National Defense Authorization Act for Fiscal Year 2014 to allow convening authorities to grant clemency as formerly permitted under the UCMJ to protect dependents of convicted Service members by relieving them of the burden of automatic and adjudged forfeitures.⁵⁴²

⁵⁴² RSP REPORT, *supra* note 171, at 22-25.

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