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AMERICAN MILITARY JUSTICE: RESPONDING TO THE SIREN SONGS FOR REFORM

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Siren Song: an alluring utterance or appeal; *especially*: one that is seductive or deceptive.[1]

I. INTRODUCTION

In Greek mythology, a "siren" was a creature—half bird and half woman—that would lure sailors to destruction with their sweet and enticing songs.[2] Today, the American military justice system is being subjected to sweet and enticing calls for reform—siren songs.[3] At first hearing, the well-intentioned proposed reforms appeal to a sense of justice. On closer examination, however, those proposed reforms threaten the essence and functionality of an effective and efficient system of criminal justice that is applied in world-wide settings, in both peacetime and in war.

Proposals to change the American military justice system have generally come in waves, following major military actions, which tended to expose those elements or features of the system which had not worked well, or in the minds of the reformers, could be made better. For example, calls for reform followed World War I,[4] World War II,[5] and the Vietnam conflict.[6] Indeed, the Uniform Code of

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[1] *Siren Song Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/siren%20song (last visited Feb. 14, 2015).

[2] *Siren*, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/546538/Siren (last updated Apr. 24, 2014).

[3] *See, e.g.*, Don Christensen, *Commanders Flunk on Military Justice Reforms*, THE HUFFINGTON POST (updated Feb. 2, 2014, 5:59 AM), http://www.huffingtonpost.com/don-christensen/commanders-flunk-on-milit_b_6258554.html (criticizing the current military justice system and proposing reform); Arlette Saenz & Brian Thurow, *Sen. Kirsten Gillibrand Renews Push for Senate Vote on Military Sexual Assault*, ABC NEWS (Dec. 2, 2014, 1:28 PM), http://abcnews.go.com/Politics/sen-kirsten-gillibrand-renews-push-senate-vote-military/story?id=27308547 (reporting the push for reforms to the current military justice system).

[4] *See* David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 156–57 (1980) (discussing changes to the military justice system following World War I); Samuel T. Ansell, *Military Justice,* 5 CORNELL L.Q. 1, 1 (1919) (arguing that American military justice system was "un-American" and needed change); Samuel T. Ansell, *Some Reforms in Our System of Military Justice*, 32 YALE L.J. 146, 153–55 (1922) (discussing proposed amendments to the Articles of War); Frederick B. Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1989) (recounting the infamous "Crowder-Ansell" dispute over the appropriate role of military justice).

[5] *See generally* Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953) (discussing background of adoption of the UCMJ).

[6] *See generally* Birch Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9 (1971) (recommending changes to military justice system); Edward F. Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25 (1971) (discussing proposed legislative changes); Henry Rothblatt, *Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 455 (1971) (proposing changes to UCMJ); Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1400 n.10 (1973) [hereinafter Sherman (1973)] (noting proposed legislative reforms that included limiting a commander's role and limiting court-martial jurisdiction and that in span of a few years bills had been introduced by Senators Bayh and Ervin and by Congressman Bennett).

Military Justice was enacted in 1950 following calls for change by a wide cross-section of the American public, Congress, and legal communities[7] and amended in the 1980s with a move to bring court-martial practice in closer harmony with the federal rules of criminal procedure and evidence.[8]

In the last several decades, an increasing number of commentators have recommended reforms to virtually every component of the military system, including pretrial processing of charges,[9] court-martial jurisdiction,[10] the role of the

[7] *See* Morgan, *supra* note 5, at 174 (discussing how members of Congress and the American people called for full protection of rights for military personnel).

[8] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983). The Act modified the selection and appointment process for counsel and judges, permitted prosecution appeal of certain rulings by a military judge, and provided for certiorari review of the Court of Military Appeals, now the Unites States Court of Appeals for the Armed Forces, by the Supreme Court. *Id.* The Act also established a commission to consider the issue of tenure for military judges, Article III status for the Court of Military Appeals, and a retirement program for judges of that court. *Id.* In 1984, the Manual for Courts-Martial was completely revised. *See* George R. Smawley, *In Pursuit of Justice, A Life of Law and Public Service: United States District Judge and Brigadier General (Retired) Wayne Alley (U.S. Army 1952–1954, 1959–1981)*, 208 MIL. L. REV. 213, 277–78 (2011) (discussing changes in the 1980s to align the Military Rules of Evidence with the Federal Rules of Evidence).

[9] *See, e.g.*, John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 23 (1998) (recommending that all Article 32 investigating officers be lawyers); Jeffrey Corn & Victor M. Hansen, *Even If It Ain't Broke, Why Not Fix It? Three Proposed Amendments to the Uniform Code of Military Justice*, 6 J. NAT'L SECURITY L. & POL'Y 447, 469–73 (2013) (proposing that an Article 32 proceeding be made into a preliminary hearing); Brian C. Hayes, *Strengthening Article 32 to Prevent Politically Motivated Prosecution: Moving Military Justice Back to the Cutting Edge*, 19 REGENT U. L. REV. 173, 196–98 (2006) (recommending that Congress amend Article 32 UCMJ to require an independent determination of probable cause to try an accused); Ryan W. Leary, *Serious Offense: Considering the Severity of the Charged Offense When Applying the Military Pre-Trial Confinement Rules*, 221 MIL. L. REV. 131, 143–51 (2014) (recommending changes in pretrial confinement procedures); Michal Buchhandler-Raphael, *Breaking the Chain of Command Culture: A Call for an Independent and Impartial Investigative Body to Curb Sexual Assaults in the Military*, 29 WIS. J. L. GENDER & SOC'Y 341, 371-75 (2014) (recommending that DoD strip military commanders of authority to dispose of sexual assault complaints and arguing that authority to handle cases should rest with independent and impartial body after a comprehensive investigation).

[10] *See, e.g.*, David L. Snyder, *Civilian Military Contracts on Trial: The Case for Upholding the Amended Exceptional Jurisdiction Clause of the Uniform Code of Military Justice*, 44 TEX. INT'L L.J. 65, 68, 96 (2008) (proposing model for contractor accountability and arguing that subjecting civilian contractors to court-martial is the only pragmatic way to ensure discipline and accountability on the battlefield); Alan F. Williams, *The Case for Overseas Article III Courts: The Blackwater Effect and Criminal Accountability in the Age of Privatization*, 44 U. MICH. J. L. REFORM 45, 60–64, 72–77 (2010) (noting jurisdictional gap created by the Military Extraterritorial Jurisdiction Act (MEJA) and amendments to Article 2, UCMJ, which expanded courts-martial jurisdiction to civilian contractors, and proposing that Congress create an Article III court overseas to try such cases).

commander,[11] the selection of court members,[12] the role of military lawyers,[13] the evidence rules,[14] sentencing,[15] post-trial processing,[16] summary courts-martial,[17] and appellate review of court-martial convictions.[18] There have also been recommenda-

[11] *See, e.g.*, Lindsy Nicole Alleman, Note, *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, 170–81 (2006) (comparing American military justice system with those of Canada and Israel); Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is It Time for a Change?*, 19 AM. J. CRIM. L. 395, 408–09 (1992) (recommending changes in how court-martial charges are handled).

[12] *See, e.g.*, Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 68 (1998) (recommending use of computer-based system for randomly selecting members); Victor Hansen, Symposium, *Avoiding the Extremes: A Proposal for Modifying Court Member Selection in the Military*, 44 CREIGHTON L. REV. 911, 940–44 (2011) (criticizing court member selection process codified under Article 25, UCMJ and proposing change to military's panel selection system by using the accused's peremptory challenges to address the unfairness of stacking a court-martial panel); James T. Hill, *Achieving Transparency in the Military Panel Selection Process with the Preselection Method*, 205 MIL. L. REV. 117, 131 (2010) (recommending that convening authority could use the Electronic Personnel Office (eMILPO) to preselect panel's qualifications); Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 159–62 (1992) (recommending elimination of variable number of members who sit, repeal of accused's right to have an enlisted panel, establishment of neutral panel commissioner and random selection, and the use of alternate members on the panel); David A. Schlueter, *Military Justice in the 1990s: A Legal System in Search of Respect*, 133 MIL. L. REV. 1, 20 (1991) (recommending that military reduce or remove roles of prosecutors and commanders in selection of court members).

[13] *See, e.g.*, Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 177 (2014) (proposing that military lawyers be given prosecutorial discretion over disposition of offenses).

[14] *See, e.g.*, Elizabeth Hillman, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879, 900 (1999) (recommending that use of good military character evidence be limited at findings).

[15] *See, e.g.*, Colin A. Kisor, *The Need for Sentencing Reform in the Military Courts-Martial*, 58 NAVAL L. REV. 39, 57–59 (2009) (recommending statutory changes to reforming court-martial sentencing procedures).

[16] *See, e.g.*, David E. Grogan, *Stop the Madness! It's Time to Simplify Court-Martial Post-Trial Processing*, 62 NAVAL L. REV. 1, 17–28 (2013) (exploring complexity involved in post-trial procedures and concluding that those procedures are outdated and ultimately inure no real benefit to a military accused; recommending several reforms, including abandonment of the staff judge advocate's review and making court-martial sentences self-executing).

[17] Cooke, *supra* note 9, at 23 (recommending that summary courts-martial be abolished).

[18] *See, e.g.*, John F. O'Connor, *Foolish Consistencies and the Appellate Review of Courts-Martial*, 41 AKRON L. REV. 175 (2008) (recommending that convicted service members decide whether to appeal their convictions and to permit them to waive appellate review as part of a pretrial agreement with the convening authority).

tions regarding the role of the military in making changes to the military justice system[19] and how changes should be made.[20]

What seems unique about the most recent wave of proposed changes is that they arise from the intractable problem of sexual offenses within the military, primarily sexual assaults. While the congressional focus and task forces have concentrated on reforms to address that problem, there seems to be a groundswell of "well, while you are at, please consider the following changes...." One gets the distinct impression that there is a sort of piling on of ideas, criticisms, and suggestions. Some of the suggested reforms have been raised before and are now being recycled in the hopes that a more attuned Congress and Pentagon will consider the proposals.

One would think that the calls for reform would come primarily from a civilian community that is distrustful of anything military. That is not always the case, however. Many of the commentators calling for reform are current or former armed forces lawyers who have worked within the system and know its strengths and it shortcomings.[21]

This article divides the proposed reforms into three categories and analyzes why the proposed changes to the military justice system should be rejected, in whole or in part.

Part II of this article provides a brief overview of the American military justice system, from pretrial investigation through appellate review. It also addresses the question of what is, or should be, the primary role of the military justice system. Part III of the article focuses on the proposed reforms which would either limit a commander's prosecutorial discretion in the system, or at least severely limit that authority. It also argues that these would undermine the effectiveness of the system.

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[19] John W. Brooker, *Improving Uniform Code of Military Justice Reform*, 222 MIL. L. REV. 1, 97 (2014) (recommending four-step process that the military itself should use in identifying and considering proposed reforms to military justice); Schlueter, *supra* note 12, at 30 (noting that anyone participating in military justice system has a professional and moral responsibility for policing the system).

[20] *See* Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237, 264 (2000) (offering suggestions for modernizing the procedures for amending the *Manual for Courts-Martial* (*MCM*)); Kevin J. Barry, *A Reply to Captain Gregory E. Maggs's 'Cautious Skepticism' Regarding Recommendations to Modernize the Manual for Courts-Martial Rule-Making Process*, 166 MIL. L. REV. 37, 61–64 (2000) (recommending changes to the how the rules are promulgates and addressing criticism to those recommendations); Gregory E. Maggs, *Cautious Skepticism About the Benefit of Adding More Formalities to the Manual for Courts-Martial Rule-Making Process: A Response to Captain Kevin J. Barry*, 166 MIL. L. REV. 1, 11–16 (2000) (criticizing proposed reforms to the MCM rule-making process).

[21] *See generally* James P. Young, *Court-Martial Procedure: A Proposal*, 41 REPORTER 20, 20-24 (2014), *available at* http://www.afjag.af.mil/shared/media/document/AFD-141126-035.pdf#page=23 (suggesting numerous changes to the UCMJ); Christensen, *supra* note 3 (former Air Force chief prosecutor proposing prosecutorial discretion be taken out of the hands of commanders).

Part IV addresses the proposed reforms that would restrict court-martial jurisdiction overall or for certain offenses committed by American service members. Some commentators have suggested the court-martial jurisdiction should be limited to military offenses or offenses that are service-connected. Part V focuses on adopted changes that have reduced a commander's authority to grant post-trial clemency to an accused, or limit the information that a commander may consider in deciding whether to approve court-martial findings and the sentence.

Finally, Part VI offers concluding thoughts and a framework for considering the proposed reforms to the military justice system.

II. AN OVERVIEW OF HOW AMERICAN MILITARY JUSTICE WORKS

Before addressing the proposed reforms for the military justice system, it is important to discuss briefly how the current system works, and the various participants within the system.

A. In General

The statutory framework for military justice is the Uniform Code of Military Justice.[22] Article 36 states that the President may promulgate procedures for conducting courts-martial.[23] Those procedures are spelled out in the Manual for Courts-Martial[24] and in the Rules for Courts-Martial (RCM).[25] The Department of Defense, the service secretaries, and commanders may promulgate regulations to provide additional guidance.[26] Courts-martial, which are temporary tribunals,[27] are convened to decide the guilt or innocence of persons accused of committing offenses while subject to the jurisdiction of the Armed Forces.[28] Some argue that they are designed to enforce discipline[29] while others claim it's to ensure justice is done.[30]

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[22] 10 U.S.C. §§ 801–946 (2012) [hereinafter UCMJ].

[23] UCMJ art. 36 (2012).

[24] MANUAL FOR COURTS-MARTIAL, United States [hereinafter MCM].

[25] MCM, Part II, Rules for Courts-Martial [hereinafter R.C.M.].

[26] *See generally* UCMJ art. 36.

[27] McClaughry v. Deming, 186 U.S. 49, 63 (1902).

[28] *See* R.C.M. 504.

[29] David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 77 (2013).

[30] *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE, § 1-1 (8th ed. 2012) (addressing the dichotomy between justice and discipline within the military's legal system).

A commander convenes a court-martial to hear a specific case.[31] Although courts-martial are not part of the federal judiciary, the Supreme Court of the United States may ultimately review a military conviction.[32]

B. Pretrial Procedures

Commanders are responsible for conducting a thorough and impartial inquiry into alleged offenses[33] and in doing so, they regularly obtain legal advice from a judge advocate.[34] During that pretrial investigation, an accused is entitled to the protections of the privilege against self-incrimination as guaranteed by the Fifth Amendment and Article 31 of the UCMJ,[35] Fourth Amendment protections regarding searches and seizures,[36] and the Sixth Amendment right to counsel.[37]

The Uniform Code of Military Justice[38] includes punitive articles which proscribe both strictly military offenses,[39] such as disobedience of an order[40] and

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[31] *See* UCMJ arts. 22–24 (designating those with power to convene general, special, and summary courts-martial); R.C.M. 504 (setting out procedure for convening court-martial). The UCMJ provides that the President of the United States and a service Secretary may convene a general court-martial. UCMJ art. 24(a).

[32] UCMJ art. 67a (establishing that decisions by the Court of Appeals for the Armed Forces are subject to review by the United States Supreme Court; 28 U.S.C. § 1259 (2012) (establishing that the appeals from the Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari). *See generally* Andrew S. Effron, *Supreme Court of Review of Decisions by the Court of Military Appeals: The Legislative Background*, ARMY LAW., Jan. 1985, at 59 (reviewing the Military Justice Act, which placed the Court of Military Appeals directly under the U.S. Supreme Court's review).

[33] R.C.M. 1205.

[34] *See* UCMJ art. 37 (listing the requirement that before convening a general court-martial the convening authority must consider the advice of the staff judge advocate). This is sometimes referred to as the "pretrial advice." SCHLUETER, *supra* note 30, at § 7-3(A) .

[35] UCMJ art. 31; Mil. R. Evid. 301–05.

[36] Mil. R. Evid. 311–21.

[37] These constitutional protections are implemented by case law and by the Military Rules of Evidence (MRE), which are located in Part III of the MCM. *See, e.g.*, Mil. R. Evid. 301 (noting the privilege against self-incrimination); Mil. R. Evid. 304 (detailing procedures for determining admissibility of accused's statements); Mil. R. Evid. 305 (providing for Article 31(b), UCMJ warnings and right to counsel warnings); Mil. R. Evid. 311–16 (enumerating the rules addressing requirements for searches and seizures); Mil. R. Evid. 321 (defining admissibility of eyewitness identifications). *See generally* 1 STEPHEN A. SALTZBURG, LEE D. SCHINASI & DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL, §§ 301.01, et seq. (7th ed. 2011).

[38] UCMJ arts. 1-146.

[39] *See generally* DAVID A. SCHLUETER, CHARLES H. ROSE, VICTOR HANSEN, & CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES, § 3.2 (2d ed. 2012) (discussing punitive articles in UCMJ).

[40] UCMJ art. 90.

desertion,[41] as well as common law offenses, such as larceny[42] and murder.[43] If it appears that a service member has violated a punitive article, the commander has broad discretion to decide how to dispose of an accused's misconduct. The commander may simply counsel the service member or issue a reprimand,[44] begin proceedings to administratively discharge the service member,[45] or impose nonjudicial punishment.[46] Under this third option, the commander decides whether the service member is guilty and, if so, adjudges the punishment.[47] Finally, the commander may formally prefer court-martial charges against the service member.[48]

If a commander prefers court-martial charges, those charges are forwarded up the chain of command for recommendations and actions. If the commander believes that the charges are serious enough to justify a general court-martial—which are equivalent to a civilian felony trial—the commander orders an Article 32 hearing.[49] At that hearing, which approximates a preliminary hearing in civilian criminal justice trials, the service member is entitled to be present, to have the assistance of defense counsel, to cross-examine witnesses, and to have witnesses produced.[50]

If the decision is made to refer charges to a court-martial, the convening authority—a commander authorized by the UCMJ to "convene" a court-martial—selects the court members.[51] The convening authority does not select the counsel or the military judge.[52] Specific provisions in the UCMJ prohibit a convening authority from unlawfully influencing the participants in the court-martial or the outcome of the case.[53] In many cases, the accused and the convening authority engage in plea

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[41] UCMJ art. 85.

[42] UCMJ art. 121.

[43] UCMJ art. 118.

[44] *See* SCHLUETER, *supra* note 30, § 1-8 (listing various options available to the military commander).

[45] *See id.* § 1-8(B) (discussing nonpunitive measures such as administrative discharge).

[46] UCMJ art. 15. Unless the service member is assigned to a vessel, the service member may demand a court-martial in lieu of the nonjudicial punishment. *Id.* The term "vessel" is defined in 1 U.S.C. § 3 (2012). "The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3 (2012).

[47] *See* R.C.M. 306(c)(2).

[48] Although technically, any person subject to the UCMJ may prefer charges against another; the preferral is almost always done by the service member's immediate commander.

[49] UCMJ art. 32.

[50] UCMJ art. 32.

[51] UCMJ arts. 23–24 (authority to convene general courts-martial, special courts-martial, and summary courts-martial).

[52] SCHLUETER, *supra* note 30, § 8-3(D) (establishing the process for selecting individuals to sit as court members).

[53] *See* UCMJ art. 37. Unlawful command influence has been the subject of considerable commentary and case law. *See generally* Martha Huntley Bower, *Unlawful Command Influence: Preserving the Delicate Balance*, 28 A.F. L. REV. 65 (1988) (discussing unlawful command

bargaining and execute a pretrial agreement.[54] Typically, those agreements require the accused to plead guilty in exchange for a capped maximum sentence.[55]

C. Trial Procedures

At trial, the accused is entitled to virtually the same procedural protections he would have in a state or federal criminal court[56] For example, a military accused has the right to file pretrial motions in limine, motions to suppress, and motions to dismiss the charges on a wide range of grounds;[57] the right to extensive discovery, equal to that of the prosecution;[58] the right to a speedy trial, as provided in the UCMJ and the Manual for Courts-Martial;[59] the right to confront witnesses;[60] the right to decide whether to be tried by a judge alone or by members;[61] and the right to challenge the presiding military judge for cause.[62]

If an accused enters a guilty plea, the military judge must conduct a thorough "providency" inquiry to insure that the accused is pleading guilty voluntarily and

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influence); Anthony P. DeGiulio, *Command Control: Lawful Versus Unlawful Application*, 10 SAN DIEGO L. REV. 72 (1972) (examining the disciplinary policies established by command directives, the rule which blocks the accused from serving as the convening authority, and command control over counsel and military judges); Larry A. Gaydos & Michael Warren, *What Commanders Need to Know About Unlawful Command Control*, ARMY LAW., Oct. 1986, at 9 (presenting a methodology to inform commanders about problems of lawful and unlawful command influence); James D. Harty, *Unlawful Command Influence and Modern Military Justice*, 36 NAVAL L. REV. 231 (1986) (discussing the corrective measures that must be taken when commanders exercise unlawful command influence); Joseph Hely, *Command Influence on Military Justice*, 15 ST. LOUIS U. L.J. 300 (1970) (discussing the inherent tendency to abuse command influence); Lieutenant Richard C. Johnson, *Unlawful Command Influence: A Question of Balance*, THE JUDGE ADVOCATE GEN. (NAVY) J. 87, 88 (Mar.–Apr. 1965) (discussing problem of command control in system); Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 U.C.L.A. L. REV. 1 (1970) (addressing improper command influence).

[54] *See generally* SCHLUETER, *supra* note 30, ch. 9.

[55] *Id.*

[56] *See* UCMJ art. 36(a) (requiring that the rules of procedure for military courts parallel the procedures used in federal courts).

[57] R.C.M. 905. *See generally* SCHLUETER, *supra* note 30, ch. 13 (discussing motions practice).

[58] UCMJ art. 46; *see* R.C.M. 701 (setting out rules for discovery by both prosecution and defense counsel).

[59] UCMJ art. 10; *see* R.C.M. 707 (speedy trial rule). The 120-day rule does not include delays requested by the defense; thus, a case may take much longer than 120 days if the defense requests delays. R.C.M. 707(c).

[60] U.S. CONST. amend. VI.

[61] UCMJ art. 16.

[62] UCMJ art. 16; R.C.M. 902. For grounds for possible challenges to the military judge see UCMJ art. 26. *See also* R.C.M. 502, 503, and 902.

knowingly[63] and that it reflects the intent of both the accused and the government.[64] On the other hand, if the accused pleads not guilty, and the case is tried on the merits, the Military Rules of Evidence apply.[65] The accused may be tried either by a panel of members (the court-martial panel) or by a military judge.[66] If the accused is found guilty, sentencing is a separate proceeding which follows immediately.[67] Unlike the federal rules, the Military Rules of Evidence apply during sentencing.[68] The accused is entitled to present witnesses and other evidence for the court's consideration, and to challenge the prosecution's evidence.[69]

D. Post-Trial Review and Appellate Review of Courts-Martial

Post-trial review of a court-martial conviction at the command level are extremely detailed.[70] A copy of the record of trial is given to the accused, at no cost,[71] and depending on the level of punishment imposed on an accused, a judge advocate prepares a formal legal review of the proceedings.[72] That review, along with any clemency matters prepared by the accused,[73] are presented to the convening authority for his or her consideration.[74] The convening authority's powers in this area are typically very broad; he or she has the discretion to approve or disapprove any findings of guilt and either approve, suspend, or reduce the severity of the sentence.[75]

Depending on the level of court-martial and the punishment imposed, appellate review is automatic in one of the service courts of criminal appeals.[76] Before those courts an accused is represented by appellate counsel[77] and members

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[63] R.C.M. 910; *see* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (setting out requirements for what has become known as the *Care* inquiry).

[64] *See generally* United States v. King, 3 M.J. 458 (C.M.A. 1977); United States v. Green, 1 M.J. 453 (C.M.A. 1976).

[65] Those rules generally mirror the Federal Rules of Evidence but include a number of rules not found in the federal rules. Section III of the MREs includes very specific guidance on searches and seizures and inspections, eyewitness identification, and confessions. *See generally* SALTZBURG, et al., *supra* note 37, at Section V (explaining privileges under the MREs); *cf.* MIL. R. EVID. 501–513 (containing detailed rules governing privileges).

[66] R.C.M. 903.

[67] *See generally* SCHLUETER, *supra* note 30, ch. 16 (discussing sentencing procedures).

[68] R.C.M. 1001; MIL. R. EVID. 1101.

[69] *Id.* R.C.M. 1001(c).

[70] *See* SCHLUETER, *supra* note 30, ch. 17 (detailing the post-trial review process).

[71] UCMJ art. 54(c); R.C.M. 1104.

[72] UCMJ art. 60(d); R.C.M. 1106.

[73] *Id.* R.C.M. 1105.

[74] R.C.M. 1106.

[75] UCMJ art. 60; R.C.M. 1107.

[76] UCMJ art. 66.

[77] UCMJ art. 70.

of those courts are typically high-ranking military officers.[78] Those courts possess fact-finding powers[79] and have the authority to reassess a court-martial sentence.[80] An accused may petition for further review by the United States Court of Appeals for the Armed Forces, which is composed of five civilian judges and sits in Washington, D.C.[81] Finally, in certain cases, a service member may seek certiorari review by the Supreme Court.[82]

E. Summary

For purposes of this article, it is important to note several key points from the foregoing discussion: First, the military justice systems procedures closely parallel many of the procedures used in civilian criminal justice systems. Second, a military accused is entitled to most, if not all, of the constitutional protections that are available to someone being tried in a civilian criminal court. Third, commanders are an integral part of the military justice system. Finally, lawyers and judges are heavily involved at all levels of the military criminal justice system.

III. A SIREN SONG SUNG: ELIMINATE OR REDUCE THE COMMANDER'S PROSECUTORIAL DISCRETION

A. In General

Given the predominate role of commanders in the American military justice system, it is not surprising that those seeking to reform the system would focus their calls for change on the commander's role—starting with exercising discretion to even charge a service member with a crime all the way through post-trial review of a service member's court-martial conviction. As noted, *supra*, commentators, legislators, and the Department of Defense have struggled with balancing the competing roles of justice and discipline vis-à-vis the commander's roles.[83] The most recent and significant wave of proposals affecting the commander's role was triggered in 2013 by a growing number of revelations that sexual assaults in the military were being largely ignored and unprosecuted.[84] In response to that seemingly intractable problem and the military's slow response, several task forces were formed to consider reforms to the military justice system. If the past is prologue, there should be

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[78] UCMJ art. 66.

[79] R.C.M. 1203(b).

[80] R.C.M. 1203(b).

[81] UCMJ art. 67.

[82] UCMJ art. 67a; 28 U.S.C. § 1259; *see also* Effron, *supra* note 32, at 59 (overviewing the developments that led to the Military Justice Act).

[83] Schlueter, *supra* note 29, at 77 (concluding that primary purpose of military justice system is to enforce good order and discipline).

[84] Luis Martinez, *Number of Military Sexual Cases Higher This Year*, ABC News (Nov. 7, 2013, 5:28 PM), http://abcnews.go.com/blogs/politics/2013/11/number-of-military-sexual-assault-cases-higher-this-year (reporting the rise of military sexual assaults in 2013).

doubt, however, that the move to limit a commander's powers will continue to be challenged. It will be the same siren song, but a different verse.

This section first focuses on proposed changes to the UCMJ which would greatly reduce or limit the commander's role in preferring charges or convening a court-martial, and then turns to arguments as to why those changes should be rejected, in whole or in part. Although at first blush the proposed changes would seem to make the military justice fairer, they in effect would potentially undermine the system and have an adverse effect on good order and discipline.

B. The Proposals

Proposals to limit or remove the commander's powers to prefer court-martial charges or convene a court-martial generally fall into three categories. First, there have been proposals to eliminate the commander's prosecutorial powers and place them in the hands of military lawyers, alone.[85] One of the arguments supporting that approach is that lawyers, not commanders, are in the best position to assess whether a particular charged offense warrants a court-martial.[86]

A second category of proposals recommends that the decision to charge an accused with a crime be made by a commander outside the accused's chain of command, but within the military command structure.[87] These recent proposals,

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[85] *See, e.g.*, Murphy, *supra* note 13, at 175 (proposing that military lawyers obtain prosecutorial discretion over disposition of offenses); Letter from Heidi Boghosian, Exec. Dir., National Lawyers Guild to Mr. Paul S. Koffsky, Deputy Gen. Counsel, Dep't of Defense (June 30, 2014), *available at* http://www.nlg.org/news/releases/national-lawyers-guild-submits-comments-improving-military-justice-system-department (recommending that prosecutorial discretion be placed in the hands of independent prosecutors)

[86] *See, e.g.*, Murphy, *supra* note 13, at 175–76 (listing reasons for military attorneys to exert prosecutorial discretion instead of commanders).

[87] In 2013, Senator Gillibrand sponsored the Military Justice Improvement Act (MJIA) which proposed that commanders would no longer have jurisdiction over specified offenses and the commander's power to grant post-trial clemency would be limited. S. 967, 113th Cong. (2013). In summary, her bill would have required that for offenses where the maximum punishment included confinement for more than one year (in effect a felony grade offense), that the decision to file court-martial charges would be made by someone in the rank of at least 0-6, with significant experience in trying such cases, and outside the chain of command. *Id.* Second, the bill would have required that only commanders outside the chain of command of the accused could actually convene general and special courts-martial; that responsibility would be handled by offices established by the chiefs of staff of each service. *Id.* The bill also proposed that a commander would no longer be permitted to consider a service member's character in deciding how to dispose of a case. *Id.* Although Senator Gillibrand's bill had bipartisan support, it eventually failed in the Senate by a close vote. Laura Basset, *Senators Shoot Down Gillibrand's Military Sexual Assault Reform Bill*, THE HUFFINGTON POST (Dec. 11, 2013, 2:10 PM), http://www.huffingtonpost.com/2014/12/11/gillibrands-military-sexual-assault_n_6309108.html; *see also* Eugene R. Fidell, *What Is to Be Done? Herewith a Proposed Ansell-Hodson Military Justice Reform Act of 2014* (May 13, 2014) http://globalmjreform.blogspot.com/2014/05/what-is-to-be-done-herewith-proposed.html (proposing "Ansell-Hodson Military Justice Reform Act of 2014").

which are not entirely new,[88] are grounded in the view that a commander may be biased in favor of an accused and decide, for inappropriate reasons, not to charge that accused.[89] But the opposite is true as well. Critics of the system can argue that commanders may be biased against a service member and treat that service member unfairly—a criticism which in part lead to the very adoption of the Uniform Code of Military Justice.[90] Still another related criticism is that the commander may treat similarly situated service members differently.[91]

A third category of proposals recommends that the prosecution of military offenses be handled by civilian prosecutors, in much the same way in which military justice cases are handled in other countries.[92] The principle argument is that that approach is consistent with emerging international norms and that if that approach works well in other countries, it should certainly work well in the United States.[93]

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[88] Use of a central command to prosecute military cases was proposed in legislation in the 1970s. *See* Sherman (1973), *supra* note 6, at 1400 n.10 (noting proposed legislative reforms which would have transferred a commander's authority over courts-martial to an independent military judiciary command under the control of the Judge Advocate General).

[89] *See* Lindsay Hoyle, *Command Responsibility—A Legal Obligation to Deter Sexual Violence in the Military*, 37 BOSTON COLLEGE INTERNATIONAL & COMP. L. REV. 353, 360 (2014) (noting that unit commanders are often biased in favor of an accused with whom they have a working relationship).

[90] Schlueter, *supra* note 3, at 158 (noting the perceived injustice toward service members in World War II); Frederick Bernays Weiner, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109, 112 (1989) (noting that prosecution of enlisted service members, in part, prompted the "Crowder-Ansell" dispute concerning court-martial practices during World War I and its underlying currents).

[91] James W. Smith, *A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System*, 27 WHITTIER L. REV. 671, 693 (2006) (using the term "different spanks for different ranks" and arguing that military justice system failed by treating officers and enlisted members differently in Abu-Ghraib courts-martial).

[92] *See generally* Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195, 197 (2000) (noting that in country after country changes are being made to how military cases are prosecuted, and by whom and that the American military justice system "pays precious little attention to developments in other countries' systems"); Sherman (1973), *supra* note 6, at 1400 (noting that in considering potential changes to the military justice system, other countries' approaches are "especially relevant").

[93] *See* Editorial, *No Hope for Justice*, N.Y. DAILY NEWS (Mar. 17, 2014, 4:00 AM), http://www.nydailynews.com/opinion/no-hope-justice-article-1.1722347 [hereinafter N.Y. DAILY NEWS] (discussing the reasoning of supporters such as New York Senator Gillibrand for removing sexual assault crimes in the US military justice system "from the chain of command to independent prosecutors," in the same manner as Canada, Israel and Germany have done); *Remove Prosecution of Sexual Assault from Military Chain of Command*, NAT'L ORG. FOR WOMEN, http://action.now.org/p/dia/action/public/?action_KEY=8152 (last visited Feb. 12, 2015) [hereinafter NAT'L ORG. FOR WOMEN] (discussing the need to remove sexual assault crimes from the chain of command in the US military justice system and adopt a separate system like Britain, Canada, and Israel); Op-Ed., *Gillibrand Should Keep up the Pressure to End Sexual Assaults in The Military*, BUFFALO NEWS (Mar. 12, 2014, 11:17 PM), http://www.buffalonews.com/opinion/buffalo-news-editorials/gillibrand-should-keep-up-the-pressure-to-end-sexual-assaults-in-the-military-20140312 [hereinafter BUFFALO NEWS] (emphasizing that the removal of sexual assaults from the chain of command has already occurred in Britain, Canada, and Israel, and should occur in the United States).

C. Responses to the Proposals to Remove or Limit the Commander's Prosecutorial Powers

1. In General: A System of Discipline or Justice?

In considering any proposed reforms regarding the role of commanders, it is critical that Congress recall that the primary function and purpose of the military justice system is to enforce good order and discipline in the armed forces.[94]

Those who view military justice as primarily a system of justice tend to see the role of the commander as a hindrance to justice and a relic of the past. Those who view the system as primarily a system for maintaining good order and discipline, see the commander's role as indispensable. Most of the governing rules and regulations in the military justice system attempt to balance those competing views. Despite the views of some commentators that the military justice system is primarily a system of justice,[95] the system's function and purpose have not changed since the original Articles of War were adopted in the 1700s. It was, and remains, a system designed to enforce discipline and good order.[96]

2. The Need for Commanders in the Military Justice System

The military courts have recognized that the commander is vested with broad discretion to decide how to best deal with discipline problems in his or her command and whether to prefer court-martial charges.[97] The commander's options range from a written letter of reprimand in the service member's file, nonjudicial punishment, an administrative discharge to court-martial charges.[98] Those decisions are made after consulting with the Staff Judge Advocate or a military prosecutor, who are members of the command.[99] The Staff Judge Advocate is expected to provide sound legal advice based on the nature and extent of the alleged criminal activity, the availability and admissibility of evidence against the accused, the needs of the command, the time necessary to investigate and prosecute the case, and the likely outcome of a trial on the merits.[100] Those are the types of decisions that local district attorneys and United States Attorneys make on a daily basis.

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[94] *See* Schlueter, *supra* note 29, at 77 (concluding that primary purpose of military justice is to enforce good order and discipline).

[95] *Id.* at 24 (citing commentators who view military justice as primarily a system of justice).

[96] *Id.* at 77 (concluding that primary purpose of military justice system is, in fact, to enforce good order and discipline).

[97] *See, e.g.*, United States v. Hagen, 25 M.J. 78, 84 (C.M.A. 1987) (holding that courts hesitate to review commander's decision regarding prosecution; there is strong presumption that convening authorities perform their duties without bias).

[98] SCHLUETER, *supra* note 30, § 1-8 (discussing options available to the commander for dealing with a service member's misconduct).

[99] UCMJ art. 34; SCHLUETER, *supra* note 30, at § 7-3.

[100] *Id.*

However, in the military the decision is the commander's to make, not the lawyer's.[101] That is because it is the commander, not the lawyer, who is responsible for the good order, discipline, and morale within the command.[102] American military commanders are well trained and highly educated. Those who fail to perform are usually removed from command or denied valued promotions.[103] Furthermore, the lawyers who advise them are also well trained and highly educated. And there are consequences if they fail to fulfill their obligations.[104]

3. It is Critical that Commanders Have Trust and Confidence in Their Legal Advisors

Under the current system, staff judge advocates serve as legal advisors for the commanders of major and subordinate commands.[105] It is critical that commanders trust and confide in those legal advisors on matters involving military justice, which in turn impact morale, and good order and discipline. That trust and confidence inures to the overall benefit of the command when the command is deployed and commanders must count on their legal advisors in matters far beyond military justice, such as operational law, international agreements, and important military and civilian personnel matters.[106]

Some proposals would remove the service member's commander, and even the commander's staff judge advocate, from making decisions on whether to prefer court-martial charges. Any changes to the system that would separate the commander's staff legal advisor from the important decision-making process of dealing with serious offenses—would undermine that critical relationship, not only

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[101] R.C.M. 407.

[102] John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 8 (2000) (arguing that commanders are integral figures in military justice); Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 159 (2000) (commander is responsible for, inter alia, discipline of his or her personnel).

[103] *See* Bower, *supra* note 53, at 67 n.10 (1988) (noting that "administrative sanctions have been employed, including forced resignations."). *But See* Melissa Epstein Mills, *Brass-Collar Crime: A Corporate Model for Command Responsibility*, 47 WILLAMETTE L. REV. 25 (2010) ("[I]n modern military times, the United States has never subjected one of its own commanders to criminal prosecution on a true command responsibility theory").

[104] *See, e.g.*, Lisa Burgess, *Top Air Force Lawyer Relieved of Command*, STARS & STRIPES (Dec. 9, 2006), *available at* http://www.stripes.com/news/top-air-force-lawyer-relieved-of-command-1.57765 (high ranking JAG relieved of command for failing to notify authorities of disciplinary actions taken by State where he was licensed to practice).

[105] *See* SCHLUETER, *supra* note 30, § 7-3(A) (outlining the procedural requisite of the Staff Judge Advocate's pretrial advice).

[106] *See generally* Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, 44 CREIGHTON L. REV. 1045 (2011) (discussing courts-martial practices in Afghanistan and Iraq from 2001 to 2009); William Westmoreland & George Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUB. POL'Y 1 (1980) (presenting views based upon their experiences in the combat environment).

in regards to military justice matters, but also the broader legal issues commanders face at home and when deployed.

4. Commanders Should Retain Prosecutorial Discretion

(a) *Comparison to Civilian Prosecutorial Decisions*

Although in many respects the American military mirrors civilian criminal justice systems, the military justice system is unique, and the role of the commander in that system is unique. As one commentator has written:

> The United States military justice system is integral to the military's mission. It is unique, and for good reason. Unlike the civilian justice system, which exists solely to enforce the laws of the jurisdiction and punish wrongdoers, our military justice system exists in order to help the military to succeed in its mission: to defend the nation. It is structured so that those in charge, commanding officers, can carry out the orders of their civilian leaders. Ultimately, it is structured to fight and win wars.[107]

Thus, shifting prosecutorial discretion to either a different command structure, or to military lawyers, would clearly undermine the commander's broad prosecutorial discretion. The proposed changes in the Military Justice Improvement Act[108] would have transferred the local commander's decision to some unspecified command structure, outside the commander's chain of command, and require the recommendations of a senior armed forces lawyer, who would be disconnected in time and space from the command. That amendment would have been tantamount to informing a district attorney that the decision to prosecute or not prosecute serious cases would be made in the state capital, or in Washington, D. C.—and that the decision would be binding on local authorities. Not only would that system undermine the effectiveness of the district attorney's offices, it would undermine the populace's confidence in the ability of local authorities to take care of local crime. So too with commanders. Once the members of a command discover that the decision regarding court-martial charges is being made by a person with no connection to the command, the members of the command will view the commander as powerless to deal with serious offenses in a quick and efficient manner.

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[107] Charles "Cully" Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, HERITAGE (Nov. 6, 2013), http://www.heritage.org/research/reports/2013/11/sexual-assault-in-the-military-understanding-the-problem-and-how-to-fix-it.

[108] S.967, 113th Congress (2013).

(b) *An Academic or Ivory Tower Decision*

Proposals to shift the decision to prosecute or not prosecute a case to a centralized command structure would mean that a high-ranking lawyer outside the command would be routinely making decisions concerning court-martial charges. Some may view that exercise as primarily "academic," which is disconnected from the real-world problems of the local command. Worse, others may view this as an "ivory tower" decision.[109]

The decision to prosecute almost always involves an armed forces prosecutor personally interviewing potential witnesses, reviewing the law enforcement reports, speaking personally to the commanders in the chain of command, and providing an informed "on the ground" assessment of the strengths and weaknesses of the case against an accused. In deciding whether to prosecute an accused, the prosecutor must make an informed assessment of whether the available evidence supports the charges against an accused.[110]

If prosecutorial discretion were removed to a high-ranking office at a centralized location, most of those critical elements in the decision-making process would be missing. A review of the memos, e-mails, and electronic evidence cannot adequately substitute for a decision made by the local commander, after a careful assessment and advice by the commander's legal advisor.

(c) *Undermining the Chain of Command*

Under the current system, it is the unit, or company commander, who usually initiates the charging process by preparing a charge sheet, i.e., "preferring charges."[111] That decision is made after consulting the military prosecutor assigned to that unit. Each commander in the chain of command is responsible for considering the possible charges and providing another level of assessment before it reaches the desk of the commander, acting as the convening authority on the case.[112] Removing the commander from the process of deciding what charges to bring would disrupt the normal chain of command —and potentially create doubt in the minds of the

[109] *Ivory Tower Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/ivory+tower (last visited Feb. 15, 2015) (defining an ivory tower as "an attitude of aloofness from or disdain or disregard for worldly or practical affairs").

[110] Experienced litigators know that a case which looks strong on paper can take on a different light after they personally interview witnesses and go over their pretrial statements, assess their demeanor, and then decide whether they will be strong or weak witnesses. Depending on the location of any central legal center charged with deciding whether to go forward with charges, counsel in that office will miss that opportunity. In short, they will make an ivory-tower and not real-world assessment.

[111] UCMJ art. 30; R.C.M. 304(b)(1).

[112] SCHLUETER, *supra* note 30, at § 6-2 (discussion of process of forwarding charges up through the chain of command).

service members whether the commander had any real authority over them.[113] The officers in an accused's chain of command are in the best position to make decisions that directly affect good order and discipline in that command.

(d) *The Need to Hold the Commander Responsible for the Offenses of Members of the Command*

There is still another reason for not stripping prosecutorial authority from the commander. If commanders no longer have the necessary disciplinary role in bringing charges or otherwise taking action to punish misconduct, it may be difficult to hold them personally responsible for the delicts of the service members under their command. For example, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia overturned the conviction of General Markač, a commander of a Special Police unit during the Croatian War of Independence in the 1990s.[114] The appellate court noted that although General Markač had some control over his subordinate commanders, his authority to discipline them for their misdeeds was not within his power because any crimes committed by members of his command fell under the jurisdiction of civilian prosecutors.[115]

Thus, the court said, there was a question about whether he could be held liable for crimes committed by his subordinates.[116] Although that court did not decide whether the commander could be held responsible, it is important to note that the court recognized the problem. The same issue could occur under the proposed amendments, where someone outside the chain of command is making a binding

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[113] *See generally* Victor M. Hansen, *The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences*, 21 MICH. ST. INT'L L. REV. 229, 266 (2013) (removing commander's authority to prefer charges would seriously undermine commander's authority within the unit; in future cases the members of the unit might question or doubt the commander's ability to initiate disciplinary proceedings against them).

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

[115] The Appeals Court observed:

> Turning first to superior responsibility, the Appeals Chamber notes that the Trial Chamber did not explicitly find that Markač possessed effective control over the Special Police. The Trial Chamber noted evidence indicative of a superior-subordinate relationship and found that commanders of relevant Special Police units were subordinated to Markač. *However, the Trial Chamber was unclear about the parameters of Markač's power to discipline Special Police members, noting that he could make requests and referrals, but that "crimes committed by members of the Special Police fell under the jurisdiction of State Prosecutors."* (Citations omitted, Emphasis added).

Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Appeal Judgment, ¶ 148 (App. Chamber, Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012). *See generally* Gary D. Solis, *The Gotovina Acquittal: A Sound Appellate Course Correction*, 215 MIL. L. REV. 78 (2013).

[116] *Id.*

decision to prosecute or not prosecute crimes occurring within the commander's command.[117]

Every CEO for a large organization knows that responsibility for the organization must be accompanied by the authority to manage the organization. The same holds true, to an even greater extent, in the military.[118]

5. Congress Should Not Adopt Other Countries' Systems as Models for American Military Justice

Proposals to eliminate or reduce the commander's prosecutorial discretion seem to rest on the view that first, military commanders are not to be trusted in exercising prosecutorial discretion[119] and that second, Congress should follow the lead of other countries and adopt procedures used in countries such as Canada and Great Britain.[120] That argument is reminiscent of the debate over whether other countries' laws should serve as a model for American legal systems.[121] In the hearings on those proposals, some commentators have urged Congress to go further and apply this approach to the prosecution of all cases by civilian prosecutors.[122] The

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[117] *See* Hoyle, *supra* note 89, at 387 (recommending that command responsibility be incorporated into the UCMJ as means of remedying lack of command interest in prosecuting sexual assault cases).

[118] *See, e.g.*, Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. REV. 251, 255 (2009) (noting that commander's failure to punish can be viewed as an expression of support for the act and thus constitute part of the injury).

[119] Bill Briggs, *Critics Underwhelmed with Pentagon Plan to Stem Military Sex Assaults*, U.S. NEWS (Aug. 15, 2013), http://www.nbcnews.com/news/other/critics-underwhelmed-pentagon-plan-stem-military-sex-assaults-f6C10928841 ("[T]here is a lack of trust in the system that has a chilling effect on reporting." (quoting Senator Gillibrand)).

[120] *See* Sherman (1973), *supra* note 6, at 1425 (arguing that the American military justice system should model the British or West German-Swedish military systems); *see also* N.Y. DAILY NEWS, *supra* note 93, discussing the reasoning of supporters such as New York Senator Gillibrand for removing sexual assault crimes in the US military justice system "from the chain of command to independent prosecutors," in the same manner as Canada, Israel and Germany have done); NAT'L ORG. FOR WOMEN, *supra* note 93 (discussing the need to remove sexual assault crimes from the chain of command in the US military justice system and adopt a separate system like Britain, Canada, and Israel); BUFFALO NEWS, *supra* note 93 (emphasizing that the removal of sexual assaults from the chain of command has already occurred in Britain, Canada, and Israel, and should occur in the United States).

[121] *See generally* Stephen Calabresi, *"A Shining City On A Hill": American Exceptionalism And The Supreme Court's Practice Of Relying On Foreign Law*, 86 B.U. L. REV 1335, 1338 (2006) (noting that the debate over whether an American court should apply foreign law is a "tale of two cultures—an elite lawyerly culture that favors things foreign and a popular culture that dislikes them. . .").

[122] *See* N.Y. DAILY NEWS, *supra* note 93 (discussing the reasoning of supporters such as New York Senator Gillibrand for removing sexual assault crimes in the US military justice system "from the chain of command to independent prosecutors," in the same manner as Canada, Israel and Germany have done); NAT'L ORG. FOR WOMEN, *supra* note 93 (discussing the need to remove sexual assault crimes from the chain of command in the US military justice system and adopt a separate system

argument is that the United States' military justice system is an "outlier" and that it is somehow deficient.[123]

It is helpful to understand generally how other countries' military justice systems work, especially in joint military operations with those countries. But Congress should not try to emulate other countries' military justice systems as model for the American military justice system.[124] The United States military is exceptional.[125] And its military justice system is very different than other countries' systems.[126] Before Congress gives any serious consideration to adopting the procedures used in other countries, it should compare those systems in terms of size of the military force, the world-wide and geographical disbursement of military personnel, the purpose of those military justice systems, the history and experience of those systems, and each country's expectations for its commanders in enforcing good order and discipline.

For example, various commentators have written that "[t]he [foremost] distinctive factor that separates the United States military from all other militaries is its ability to 'command the commons."[127] "America is the only country that can project military might globally."[128] "The military justice system...goes wherever the troops go–to provide uniform treatment regardless of locale or circumstances."[129] Given the global nature of America's armed forces, commanders must have the ability to "expeditiously deal with misconduct to prevent degradation of the unit's effectiveness and cohesion."[130]

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like Britain, Canada, and Israel); BUFFALO NEWS, *supra* note 93 (emphasizing that the removal of sexual assaults from the chain of command has already occurred in Britain, Canada, and Israel, and should occur in the United States).

[123] *See* N.Y. DAILY NEWS, *supra* note 93 (discussing the reasoning of supporters such as New York Senator Gillibrand for removing sexual assault crimes in the US military justice system "from the chain of command to independent prosecutors," in the same manner as Canada, Israel and Germany have done); NAT'L ORG. FOR WOMEN, *supra* note 93 (discussing the need to remove sexual assault crimes from the chain of command in the US military justice system and adopt a separate system like Britain, Canada, and Israel); BUFFALO NEWS, *supra* note 93 (emphasizing that the removal of sexual assaults from the chain of command has already occurred in Britain, Canada, and Israel, and should occur in the United States).

[124] *See* Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J. dissenting) (warning of the dangers of imposing "foreign moods, fads, or fashions on Americans.").

[125] *See* Calabresi, *supra* note 121, at 1392 (describing United States' military power as exceptional).

[126] *See* Theodore Essex & Leslea Tate Pickle, *A Reply to the Report of the Commission of the 50th Anniversary of the Uniform Code of Military Justice*, 52 A.F. L. REV. 233, 258 (2002) (describing how other countries' militaries and military justice systems are "radically different from the United States'").

[127] CRAIG CARUANA, AMERICAN POWER: STILL THE BEST HOPE FOR PEACE 77 (2012).

[128] Calabresi, *supra* note 121, at 1392 (quoting JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA (2004)).

[129] James B. Roan and Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 191 (2002).

[130] *Id.*

As noted by the Chairman of the Joint Chiefs of Staff:

> "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."[131] Any delay in "disciplinary action will invariably prejudice good order."[132]

Finally, it is important to note that the American military justice system deals with different types of caseloads. As noted by the Chairman of Joint Chiefs Staff:

> "[T]he scope and scale of our allies' caseloads are vastly different than ours. None of our allies handle the volume of cases that the U.S. military does. This is likely due to the greater size of our military forces in comparison." [133]

Even assuming that there is some merit in adopting another country's approach to military justice, the burden should be on the reformers to show that the American model is lacking and that adopting the other country's model will not adversely impact good order and discipline.

IV. A SIREN SONG SUNG: LIMIT COURT-MARTIAL JURISDICTION TO CERTAIN OFFENSES

A. The Proposals

A second siren song of reform consists of proposals to limit court-martial jurisdiction. Currently, a court-martial has subject matter jurisdiction over a wide range of offenses including those which are purely military in nature and those

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[131] REPORT OF THE ROLE OF THE COMMANDER SUBCOMM. TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 108 (2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/02_RoC/ROC_Report_Final.pdf (last visited Jul. 25, 2015) (quoting Transcript of RSP Public Meeting 209 (Sept. 25, 2013) (testimony of Lieutenant Colonel Kevin C. Harris, U.S. Marine Corps)).

[132] Roan & Buxton, *supra* note 129, at 191. In this same vein the late Judge Robinson O. Everett, former Chief Judge of the Court of Military Appeals, cogently pointed out: "[J]ustice delayed is justice defeated. . . . In military life, where to maintain discipline, the unpleasant consequences of offenses must be quick, certain and vivid—not something vague in the remote future." Roan & Buxton, *supra* note 129, at 191(quoting Robinson O. Everett, Military Justice in the Armed Forces of the United States (The Telegraph Press 1956).

[133] REPORT OF THE ROLE OF THE COMMANDER SUBCOMM. TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 108 (2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/02_RoC/ROC_Report_Final.pdf (last visited Jul. 25, 2015) (quoting Transcript of RSP Public Meeting 209 (Sept. 25, 2013) (testimony of Lieutenant Colonel Kevin C. Harris, U.S. Marine Corps)).

which are common law offenses.[134] As long as the accused is subject to personal court-martial jurisdiction, he or she may be prosecuted for violating one of the offenses listed in the UCMJ.[135]

One proposed changed to the military justice system, which seems perpetual, is that court-martial jurisdiction should be limited to purely military offenses, such as desertion or disobeying a lawful order.[136] Under this approach, the military would be able to prosecute military offenses, but not common law offenses. The latter would be subject to civilian prosecution.

A second proposal is that the now rejected "service-connection" requirement be reinstituted so that a court-martial would only have jurisdiction over offenses where there was some nexus between the offense and military interests.[137]

B. Responses to Proposals to Limit Court-Martial Jurisdiction

Proposals to limit court-martial jurisdiction seem to be grounded on a basic mistrust of the military justice system and a view that limiting jurisdiction to purely military offenses or service-connected offenses will somehow make the system fairer. In reality, these proposals, like a siren song, may have the appearance of fairness, but do not actually grant any substantial due process rights that do not already inure to a service member's benefit and at the same time undermine the ability of a commander to provide good order and discipline to his or her command.

The following section responds to both proposals—that the court-martial jurisdiction be limited to military offenses or that it be limited to service-connected offenses. Both present similar problems of application.

1. For Purposes of Effective Military Justice There is No Distinction Between Common Law Offenses and Military Offenses

For purposes of the military justice system, that distinction between common law offenses and military offenses is meaningless. Service members who commit crimes such as larceny,[138] sexual assault,[139] and murder[140] pose as significant a threat to good order and discipline as do the crimes of desertion,[141] disobedience of an

[134] UCMJ art. 18; R.C.M. 201.

[135] UCMJ art. 17.

[136] *See, e.g.*, Michael I. Spak, *Military Justice: The Oxymoron of the 1980's*, 20 CAL. W. L. REV. 436, 450 (1984) (proposing that court-martial jurisdiction be limited to purely military offenses).

[137] *See* Fidell, *supra* note 87 (proposing "Ansell-Hodson Military Justice Reform Act of 2014").

[138] UCMJ art. 121 (larceny).

[139] UCMJ art. 120 (sexual assault).

[140] UCMJ art. 118 (murder).

[141] UCMJ art. 85 (desertion).

order,[142] and conduct unbecoming an officer and a gentleman.[143] The casual observer who asks what business the military has in trying service members who have stolen fellow service members' belongings does not understand the real problem posed by such "barracks' thieves."[144] Under the proposed revisions, would a court-martial have jurisdiction over larceny of government property, but not larceny of another's personal possessions? If that distinction were attempted, where would one try a principled and consistent line? The subtext of proposals to limit court-martial jurisdiction to purely military offenses is that American military justice cannot be trusted to try fairly a service member. Thus, the subtext continues, if courts-martial are to continue in existence, their ability to do harm should be limited to those offenses which are uniquely military in nature.

2. For Purposes of Effective Military Justice There is No Distinction Between Service-Connected and Non Service-Connected Offenses

In considering any proposals to adopt a service-connection requirement for court-martial jurisdiction, it is critical to note that such a requirement existed between 1969 and 1987. Thus, there is historical evidence of how such a limitation would work on the current military justice system.

In 1969, the Supreme Court held in *O'Callahan v. Parker*,[145] that courts-martial had subject matter jurisdiction over only "service-connected" offenses.[146]

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[142] UCMJ art. 90 (disobedience of orders).

[143] UCMJ art. 133 (conduct unbecoming an officer).

[144] *See, e.g.*, United States v. Morgan; 40 C.M.R. 583, 586 (A.B.R. 1969) (holding that trial counsel's reference to accused as a "barracks thief" and that such persons caused problems for the commander, was "merely a statement of common knowledge with the military community"). Most service members, enlisted and officers, understand the real damage to moral and discipline in a unit where an accused has stolen a possession from a fellow service member, a comrade in arms. It undermines trust and confidence in the ranks, qualities that are indispensable for good order and discipline.

[145] 395 U.S. 258 (1969). Sergeant O'Callahan, while on leave and dressed in civilian clothes, attempted to rape a young girl in her Honolulu hotel room. He was court-martialed for that offense and related offenses. Following a decision by the United States Court of Military Appeals affirming his conviction, he sought habeas corpus relief in federal district court. The district court and court of appeals denied relief.

[146] *Id.* at 272. The Court concluded that the offenses in O'Callahan's case were not service-connected:

> In the present case petitioner was properly absent from his military base when he committed the crimes with which he is charged. There was no connection-not even the remotest one-between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.

Id. at 273.

Writing for the Court, Justice Douglas observed that courts-martial were "not yet an independent instrument of justice" and that "courts-martial as institution are singularly inept in dealing with the nice subtleties of constitutional law."[147] Two years later, the Supreme Court again addressed the question of service connection in *Relford v. Commandant.*[148] A unanimous Court concluded that Relford's court-martial had subject matter jurisdiction and set out what became popularly characterized as the twelve *Relford* factors for determining service connection.[149] The Court said that those factors were to serve as a template for the lower court's use in determining, in an *ad hoc* fashion, whether an offense was service connected. A few years later the Court in *Schlesinger v. Councilman*[150] condensed those factors. Stating its confidence in the military criminal system,[151] the Court said that the task of determining service connection is largely a question of:

> (1) Measuring the impact of the offense on military discipline and effectiveness;
>
> (2) Determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society; and

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[147] *Id.* at 265.

[148] 401 U. S. 355 (1971). Corporal Relford, while at Fort Dix, New Jersey, sexually assaulted two civilian women. *Id.* at 360. The first victim was the sister of another service member who was abducted from her car in the hospital parking lot. *Id.* The second victim was the wife of a service member who worked at the Post Exchange and was assaulted on the post as she drove from her on-post home to the exchange. *Id.*

[149] The twelve factors listed by the Court are:

1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.

One might add still another factor implicit in the others:

12. The offense's being among those traditionally prosecuted in civilian courts.

Relford v. Commandant, U. S. Disciplinary Barracks, Ft. Leavenworth, 401 U.S. 355, 365 (1971). Applying these factors, the Court held that the accused's offenses were service-connected. *Id.* at 369.

[150] 420 U.S. 738 (1975). Captain Councilman was charged with selling marihuana to another service member. *Id.* at 739.

[151] *Id.* at 758.

(3) Deciding whether that interest can be adequately vindicated in the civilian courts.[152]

In his dissent in *O'Callahan*, Justice Harlan prophetically wrote: "[I]nfinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the [court-martial] jurisdiction issue."[153] In attempting to follow the Supreme Court's guidance over the next twelve years, the military courts struggled in applying the service connection requirement.[154] In so doing, the courts devised a number of guidelines which often required very fine line-drawing. One such test was to determine the situs of the offense. For example, a drug sale consummated just off post was normally not service connected.[155] But a drug sale begun off post and consummated on post was service connected.[156] The service connection requirement was finally put to rest in *Solorio v. United States*.[157] The Court, by a vote of 5 to 4 concluded that the majority in *O'Callahan* had departed from long-standing precedent which held that Congress holds plenary power over the military and that court-martial jurisdiction should depend on whether the accused was a member of the armed forces when he or she committed the charged offenses.[158]

The proposal to reinstitute the service connection requirement through an amendment to the UCMJ—no matter how carefully crafted—would take the military courts back to a time where considerable resources were spent on sorting out what constituted a service-connected offense.[159]

3. The Problem of Mixed Offenses

Making distinctions between military and common law offenses, or creating distinctions between service-connected and non-service connected offenses, creates an issue where an accused has committed multiple offenses—some of which are in the excluded list of offenses (common law offenses) and some which are on the

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[152] *Id.* at 760.

[153] O'Callahan, 395 U.S. at 273 (Harlan, J. dissenting).

[154] *See* SCHLUETER, *supra* note 30 at § 4-11(B) (discussing military courts' application of *Relford* factors).

[155] For example, in United States v. Klink, 5 M.J. 404 (C.M.A. 1978), a drug case prosecuted by this author, the Court of Military Appeals reversed the conviction, holding that there was no service connection where the drug offense occurred 30 feet off-post.

[156] United States v. Seivers, 8 M.J. 63 (C.M.A. 1979).

[157] 483 U. S. 435 (1987). Solorio, a member of the Coast Guard, was court-martialed for sexually assaulting young female victims.

[158] *Id.* at 451.

[159] In Solorio the Supreme Court noted the "confusion created by the complexity of the service connection requirement," and that "much time and energy has also been expended in litigation over other jurisdictional factors, such as the status of the victim of the crime, and the results are difficult to reconcile." *Id.* at 449.

included list (military offenses). Or where some offenses are service-connected, and others are not.

It is not uncommon for a service member to be tried for multiple offenses at a single court-martial. For example, consider the case of a male service member who:

- First, sexually assaults (a common law offense) a female service member (probably service connected), and a civilian female off-base (probably non service-connected),[160] at the same party;

- Second, violates a direct order from his commander to have no contact with the victim pending an investigation (a military offense, which would probably be service connected),[161] and

- Third, goes AWOL (a military offense which is probably service connected)[162] to avoid prosecution.

Under current military justice procedures, because commanders are permitted to try a service member of all known offenses at a single trial,[163] the service member would be subject to one court-martial for all four offenses. In this hypothetical, all four of the charged offenses relate to one another and provide context for the fact finders. But if the court-martial has jurisdiction only over the military offenses of disobedience of the no-contact order and the AWOL, the accused would be subjected to two separate trials—one in the military and the other under the civilian justice system—assuming a civilian prosecutor was willing to try the accused on the two sexual assault charges. While that would not technically be a violation of double jeopardy,[164] it subjects the accused to two separate trials and is certainly not any fairer to either the victim or the accused.[165] And there is authority for the

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[160] UCMJ art. 120.

[161] UCMJ art. 90.

[162] UCMJ art. 86.

[163] R.C.M. 307(c)(4) (all known charges may be charged at same time); *see also* R.C.M. 601(e)(2) Discussion (stating that ordinarily all known charges against an accused should be referred to a single court-martial).

[164] *See, e.g.*, United States v. Ragard, 56 M.J. 852, 856 (Army Ct. Crim. App. 2002) (holding no violation of double jeopardy clause: District of Columbia Corporation Counsel processed civilian charges against accused under pretrial diversion program; even assuming accused was punished for civilian charges, civilian and military offenses were distinct).

[165] A service member facing both a court-martial and a civilian trial might have to retain multiple defense counsel. While a civilian counsel can represent an accused at a court-martial, a military defense counsel is not authorized to represent service members in civilian criminal trials. Depending on existing agreements between military and civilian authorities, a service member might be placed in pretrial confinement in a civilian facility, which would not be subject to military regulations concerning the condition of the facility or the treatment of those confined. From the viewpoint of a victim, in the hypothetical the victim might have to testify at both the court-martial and the civilian trial. Her testimony would probably be important for the disobedience of an order

view that if an accused is tried first by a civilian court, a court-martial may not be permitted to hear the case if the charges are related.[166]

4. The Problem of Overseas Offenses

Under the current system, a service member who commits an offense overseas may be prosecuted for those offenses in a court-martial convened at that location. An applicable international treaty or agreement may confer concurrent, or exclusive, jurisdiction on the foreign government for certain offenses. The proposed limitations on court-martial jurisdiction would potentially create jurisdictional gaps over offenses that were not purely military offenses or service-connected offenses. That would mean that for those excluded offenses, an alternate system of prosecuting those offenses would be required.

One alternate approach would be to rely on the host foreign government to try the service member. That alternative would only work if the United States was willing to turn over its citizens to the host country's criminal justice system—not always a wise or prudent course where the host country's criminal justice system provides less due process protections than the American system. That approach has been used, for example, for service members assigned in countries such as Germany where the United States has a Status of Forces Agreement.[167]

An alternate approach would be to vest prosecution in the hands of federal prosecutors, assuming that the federal government had jurisdiction over those offenses.[168] In 2000, Congress enacted the Military Extraterritorial Jurisdiction

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charge to establish that the accused in fact came into contact with her, despite the no-contact order by his superiors. Those problems could be avoided by trying all three offenses at a single court-martial.

[166] *See, e.g.*, United States v. Anderson, 36 M.J. 963, 969 (A.F.C.M.R. 1993) (citing Air Force policy of not conducting military prosecution after state prosecution; if military trial is held first, the question of subsequent state prosecution is matter for state to decide); United States v. Olsen, 24 M.J. 669, 671 (A.F.C.M.R. 1987) (accused's court-martial conviction reversed where trial followed conviction in state court; government failed to follow Air Force Regulation 111-1, (now AFI 51–201), which prohibits court-martial following civilian trial unless the Secretary of the Air Force specifically approves the prosecution). *Cf.* United States v. Lorenc, 26 M.J. 793, 794–95 (A.F.C.M.R. 1988) (court-martial not barred by A.F. Reg. 111-1 (now AFI 51–201) where civilian and military offenses were sufficiently dissimilar).

[167] AGREEMENT BETWEEN THE PARTIES TO THE NORTH ATLANTIC TREATY REGARDING THE STATUS OF THEIR FORCES (NATO SOFA), Art. VII (noting jurisdiction of United States for offenses punishable by United States but not by receiving state). *See generally* SCHLUETER, *supra* note 30, at § 4-12(C) (discussing issue of concurrent jurisdiction with foreign courts).

[168] See Military Extraterritorial Jurisdiction Act (MEJA), 18 USC § 3261 (2012). Congress enacted MEJA to fill a perceived jurisdictional gap over civilians employed by, or accompanying, the armed forces abroad. 18 USC § 3261(a). *See, e.g.*, United States v. Lazarro, 2 M.J. 76 (C.M.A. 1976). In *Lazarro*, the accused was charged with stealing government funds from the commissioned officers' mess in Japan. The court noted that that offense could have been tried in a United States district court because 18 USC § 641, larceny of United States funds, applied overseas. *See generally* Jan

Act (MEJA) in an attempt to close a jurisdictional gap over civilians who were employed by or accompanying the armed forces overseas.[169] That Act, however, only covers felony offenses.[170] Under that approach, the accused and witnesses could be transported back to the United States for trial in a United States District Court. Or Congress could create a system of federal courts overseas to handle those cases.[171] It is clear that either of those approaches would create a new set of jurisdictional, logistical, and legal issues such as providing defense counsel, subpoenaing and transporting witnesses, and imposing pretrial confinement.[172]

A third alternate solution would be to recognize an "overseas exception," similar to the approach taken by the military courts in responding to the *O'Callahan-Relford* service connection requirements, discussed, *supra*.[173] But if the proposed changes limiting court-martial jurisdiction rest on the view, expressed by Justice Douglas in *O'Callahan*, that "courts-martial as institution are singularly inept in dealing with the nice subtleties of constitutional law,"[174] then service members tried overseas by courts-martial would be subjected to an inferior criminal justice process.

5. Inability to Impose Nonjudicial Punishment

Nonjudicial punishment is considered an essential disciplinary tool for commanders to use in dealing with minor offenses.[175] Limiting court-martial jurisdiction to only military offenses or service-connected offenses would, by implication, necessarily negatively impact a commander's authority to impose nonjudicial punishment under Article 15 of the UCMJ for minor offenses. Article 15 provides that a commander may impose punishment, for minor offenses instead of court-martialing a service member.[176] Such procedures permit the commander to impose punishment without preferring court-martial charges, often to the benefit of an accused, who if convicted, would have a conviction on their record.[177] Unless a service member is

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Horbaly & Miles Mullins, *Extraterritorial Jurisdiction and Its Effect on the Administration of Military Criminal Justice Overseas*, 71 MIL. L. REV. 1 (1976) (discussing issue of jurisdiction for offenses committed overseas).

[169] MEJA, 18 USC § 3261.

[170] *Id.*

[171] Sherman (1973), *supra* note 6, at 1421 (discussing possibility of creating divisions of United States District courts in foreign countries, but noting difficulty of obtaining agreement from host countries).

[172] *See id.* at 1420 (noting problems of transporting the accused and other participants back to the United States)

[173] *See, e.g.*, United States v. Black, 1 M.J. 340, 342–45 (C.M.A. 1976) (discussing overseas exception).

[174] O'Callahan, 395 U.S. at 265.

[175] SCHLUETER, *supra* note 30, at § 3-1 discussing the importance of the commander's ability to impose nonjudicial punishment).

[176] UCMJ art. 15.

[177] UCMJ art. 15.

attached to a vessel, the service member can turn down the commander's proposed Article 15 procedures and demand a court-martial.[178] The same is true for a summary court-martial; the accused must consent, unless they are assigned or attached to a vessel.[179] If the UCMJ is amended to provide for court-martial jurisdiction over only military offenses, which are service-connected, and the commander offers the accused an Article 15, or prefers summary court-martial charges, the accused can refuse to proceed, and thus put the commander in the "check-mate" position of not being able to impose nonjudicial punishment under Article 15—thus depriving the commander of that important disciplinary tool.

6. Adverse Effect on Power to Impose Pretrial Confinement

Under the current system, a commander may place an accused in pretrial confinement pending disposition of the charges.[180] The system provides for both command review[181] and judicial review of that decision by a neutral and detached hearing officer,[182] and then by a military judge.[183] The current system is an integrated and coordinated decision by the chain of command, which in part depends on the probable disposition of the charges.[184] Limiting court-martial jurisdiction to purely military offenses could impose jurisdictional and administrative questions about the ability of a commander to impose pretrial confinement for an offense over which the military had no jurisdiction. Assuming that a commander had no authority to dispose of non-military offenses, it would put the commander in the position of arresting and detaining service members, on behalf of the civilian community which could, but not necessarily, have jurisdiction over non-military offenses.

7. Potential Speedy Trial Problems

The military justice system currently recognizes several speedy trial protections—constitutional, statutory, and regulatory.[185] Those protections are triggered by the preferral of court-martial charges and/or pretrial confinement of the accused. Under the current system commanders and legal advisors work together to ensure that the case moves in a timely and efficient manner. Separating military and non-

[178] UCMJ art. 15.

[179] UCMJ art. 15.

[180] MCM, R.C.M. 305(c) (discussing imposition of pretrial confinement).

[181] MCM, R.C.M. 305(h)(2) (commander must decide, within 72 hours, whether to continue pretrial confinement).

[182] MCM, R.C.M. 305(i)(1) (review by neutral and detached reviewing officer).

[183] The accused could file a motion for appropriate relief with the military judge. *See* SCHLUETER, *supra* note 30, at § 13-5(C) (discussing motion for appropriate relief regarding pretrial confinement issues).

[184] MCM, R.C.M. 305(h)(2) Discussion (listing multiple factors to be considered in deciding whether to impose pretrial confinement, including the weight of the evidence against the accused).

[185] *See* SCHLUETER, *supra* note 30, at § 13-3(D) (discussing speedy trial protections under the Sixth Amendment, the Fifth Amendment, and the UCMJ).

military offenses would create legal and administrative problems of coordinating parallel military and civilian proceedings, thus potentially creating speedy trial issues.[186] For example, placing an accused in civilian confinement might trigger the military's speedy trial rules, depending on whether the confinement was requested by the military.[187] If an accused were charged with committing both military and non-military offenses and was subjected to parallel proceedings, which one should go first? If the civilian trial goes first, would that time count against the government for not trying the accused in a court-martial earlier?[188]

8. Plea Bargaining.Adversely Affected

As in the civilian community, the military justice system depends heavily on the ability of the convening authority and the accused to plea bargain and execute a "pretrial agreement."[189] Those agreements typically require the accused to enter a plea of guilty in return for reduction of charges, dismissal of some of the charges, or a sentence limitation. Separating military from non-military offenses would mean that an accused, facing both types of charges, would have to plea bargain with both military and civilian authorities. Both sides would be potentially disadvantaged. The prosecution would be potentially disadvantaged by losing one or more charges to the civilian prosecutor, which could be used as bargaining chips. The accused would also lose that option, and would be further disadvantaged by needing another counsel licensed to practice in the civilian jurisdiction pressing the civilian charges

9. Adversely Affecting Agreements with Local Civilian Prosecutors

Many installations have agreements with local prosecutors (state and federal) that determine which office—military or civilian—will prosecute an accused.[190]

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[186] *See, e.g.*, United States v. Duncan, 34 M.J. 1232, 1240–41, 1245 (A.C.M.R. 1992), *aff'd on other grounds*, 38 M.J. 476 (C.M.A. 1993) (providing detailed discussion on problems associated with concurrent jurisdiction and holding that accused was denied speedy trial where military delayed prosecution until after prosecution by DOJ).

[187] *See, e.g.*, United States v. Thomas, 43 M.J. 626, 636–37 (A.F. Ct. Crim. App. 1995) (accused's confinement in military facility not accountable to U.S.; confinement was at request of Germans pending their lengthy investigation); United States v. Bramer, 43 M.J. 538 (N-M. Ct. Crim. App. 1995) (civilian confinement, not requested by military, did not start speedy trial clock); United States v. Youngberg, 38 M.J. 635, 546–47 (A.C.M.R. 1993) (speedy trial clock did not run from date of preferral of charges where German authorities did not waive jurisdiction until shortly before trial); United States v. McCallister, 24 M.J. 881, 887 (A.C.M.R. 1987) (accountability began when accused was held in civilian jail at request of government); United States v. Asbury, 28 M.J. 595, 597–99 (N.M.C.M.R. 1989) (time spent in civilian detention did not count against government for speedy trial purposes).

[188] *See, e.g.*, Duncan, 34 M.J. at 1245, *aff'd on other grounds*, 38 M.J. 476 (C.M.A. 1993) (noting that agreement between DOJ and military can authorize delay of military proceedings; court concluded that accused should have been tried by court-martial before federal prosecution).

[189] *See generally* SCHLUETER, *supra* note 30, ch. 9 (discussing military pretrial agreement practices and policies).

[190] *See, e.g.*, AR 27-10, *Military Justice*, ch. 23 (discussing agreements with federal authorities to

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

10. Issuing Get-Out-of Jail Free Tickets for Service Members

The underlying assumption in any proposals to limit court-martial jurisdiction is that if military authorities do not prosecute service members for common law offenses, civilian authorities will. That can be a false assumption. Civilian prosecutors, for the most part, are often overwhelmed in dealing with their civilian population. It would be a mistake to assume that simply because a service member committed an offense in the same geographical area covered by a civilian prosecutor, the prosecutor would be willing to add to their case load. Unless the crime was viewed as a threat to the civilian community, most prosecutors would hesitate to prosecute the case. The same would generally hold true for federal prosecutors.

Because under the Tenth Amendment, Congress could not deputize a state prosecutor to try American service members[191] it is conceivable that crimes by service members would go unpunished. The same would be truer for service members who commit offenses overseas, where the foreign court may have no interest in prosecuting military personnel.

11. The Problem of Political Pressure

As one commentator has noted, there is often tremendous political pressure on commanders in deciding whether to prosecute a service member.[192] A clear example of that arose from the recent media and Congressional attention placed on the prosecution of sexual assaults in the military justice system; significant political pressure being brought to bear on officials in the Department of Defense to fix the problem.[193] A consistent theme in the public debate was the view that too many

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prosecute service members).

[191] *See* U.S. Const. amend. X (reserving powers for the States)

[192] Hayes, *supra* note 9, at 175 (noting that military leaders are extremely susceptible to congressional pressure).

[193] *See* Pauline Jelinek, *Pentagon: Reports of Sexual Assaults Up 46 Percent*, WASH. POST (Nov. 7, 2013), *available at* http://www.washingtonpost.com/world/national-security/pentagon-reports-of-sexual-assaults-up-46-percent/2013/11/07/e864f03e-47ed-11e3-bf0c-cebf37c6f484_story.html (reporting the rise in sexual assaults has caused some to lose confidence in the Department of Defense); *DOD Strives to Eliminate Sexual Assault*, U.S. DEP'T OF DEFENSE (Dec. 20, 2013), http://www.defense.gov/news/newsarticle.aspx?id=121380.

service members were escaping prosecution and that it was the local commanders who were to blame. It was that debate that prompted proposed changes to shift the decision to prosecute or not prosecute to a centralized office, staffed by high ranking officers with trial experience. Ironically, moving the prosecutorial decisions to a higher, centralized office might simply exacerbate the potential for political pressure. There is a real danger that Congress, the President, or the media could subject a service member to a court-martial because of such pressures on that office, and not because there was probable cause to believe that he or she committed the offense.[194]

C. Summary of Responses

The foregoing discussion makes it clear that limiting court-martial jurisdiction to purely military offenses or to offenses which are service connected, creates a whole host of issues., These issues would not only threaten the ability of a commander to maintain discipline, but may actually result in greater administrative burdens on military and civilian authorities, with little or no additional protections for victims of crimes committed by service members.

V. A SIREN SONG HEARD: REDUCING THE COMMANDER'S ABILITY TO GRANT POST-TRIAL CLEMENCY

A. In General

A third siren song relates to the commander's post-trial authority to grant clemency to an accused who has been convicted by a court-martial.[195] This song varies from the first two in that this siren song was heard by Congress in 2013 and resulted in amendments to the UCMJ. It is consistent with the first two songs, however, in that it severely limits a commander's powers—after a service member has been convicted.

In the National Defense Authorization Act for Fiscal Year 2014, Congress amended Article 60 to circumscribe the convening authority's powers to set aside a court-martial's findings and sentence.[196] The changes were the result of Congressional reaction to at least one case where a convening authority set aside the sexual assault conviction of a high-ranking officer on grounds of insufficient evidence to support the conviction.[197] Before that enactment, a convening authority possessed

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[194] Hayes, *supra* note 9, at 176 (recounting experience of general whose promotion was held up twice in Senate due to media attention on his role in not prosecuting an accused for murder of soldier, whom the accused believed to be a homosexual).

[195] The 2013 National Defense Authorization Act, Pub. L. 113-66, made a significant number of amendments to both the UCMJ and the Manual for Courts-Martial. One of those changes was an amendment to Article 60, UCMJ, which resulted in limiting the commander's clemency powers. *Id.* at § 1706.

[196] UCMJ art. 60.

[197] Craig Whitlock, *Air Force General's Reversal of Pilot's Sexual-Assault Conviction Angers*

broad discretion to set aside findings and sentences, in whole or in part, for any or no reason at all. That power was originally grounded in the belief that an accused's service record could warrant post-trial relief.[198] But it also reflected the view that the court-martial may have gotten it wrong, either in finding the accused guilty or in the sentence it adjudged.

The amendments to Article 60 altered the convening authority's post-trial powers with regard to his or her actions on the court-martial findings and on the sentence adjudged by the court-martial. Summarized, the amendments to Article 60 concerning the commander's powers regarding findings provide that:

- A convening authority may not disapprove a finding of guilty, or reduce the finding to a lesser-included offense, unless the accused was found guilty of a "qualifying offense."[199] A qualifying offense,[200] must meet two criteria. First, the maximum authorized punishment for the offense includes confinement for two years or less.[201] And second, the sentence adjudged by the court-martial does not include dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.[202]

- Even if those two criteria are met, certain sexual offenses are excluded.[203] The Secretary of Defense may exclude other offenses, by promulgating regulations.[204]

- If the convening authority takes action to dismiss or change the findings for a qualifying offense, he or she must provide a written explanation for that action.[205]

Lawmakers, WASH. POST (Mar. 8, 2013), http://www.washingtonpost.com/world/national-security/air-force-generals-reversal-of-pilots-sexual-assault-conviction-angers-lawmakers/2013/03/08/f84b49c2-8816-11e2-8646-d574216d3c8c_story.html.

[198] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Spec. Subcomn. of the House Comm. on Armed Services*, 81st Cong. 1182–85 (1949) (hearings on the proposed adoption of the Uniform Code of Military Justice).

[199] UCMJ art. 60(c)(3)

[200] UCMJ art. 60(c)(3)(D) (defining qualifying offense).

[201] UCMJ art. 60(c)(3)(B)(i)(I).

[202] UCMJ art. 60(c)(3)(B)(i)(II).

[203] UMCJ Article 60(c)(3)(D) lists the following sexual offenses as not being qualifying offenses: rape, Article 120(a); sexual assault, Article 120(b); rape, sexual assault or sexual abuse of a child, Article 120b; and forcible sodomy, Article 125.

[204] UCMJ art. 60(c)(3(D)(i)(III).

[205] UCMJ art. 60(c)(2)(C).

The effect of these changes is that the convening authority's power to set aside a finding of guilt at the post-trial stage is now limited to relatively minor offenses or light punishments, which do not involve sex-related offenses.[206]

Regarding the ability of a convening authority to take actions on an adjudged sentence, a commander may not disapprove, commute, or suspend, in whole or in part, any adjudged sentence including a dismissal, a punitive discharge, or confinement for more than six months.[207] In effect, a convening authority's powers are severely limited in all but the most minor of cases.

Finally, a 2014 amendment to the Manual for Courts-Martial now provides that the convening authority may not consider any evidence concerning a victim's character unless that evidence was presented at trial.[208] The commander, however, is permitted to consider matters submitted by the victim, who may have something to say about the service member's conviction or adjudged sentence.[209]

The following discussion presents several reasons why the recently enacted amendments should be abrogated, and the commander's powers restored.

B. Responses to Reducing the Commander's Post-Trial Clemency Powers

1. In General

The UCMJ provides for careful review of any court-martial conviction, starting at the command level. Depending on the level of court-martial and the sentence adjudged, the commander who convened the court-martial considers legal advice from his or her staff judge advocate, in a post-trial recommendation, on whether it is appropriate to approve the findings and the sentence. That legal recommendation generally focuses on reporting the results of the court-martial,[210] whether there are any recommendations for clemency from the court-martial itself,[211] and in some cases it must include a discussion and recommendation on alleged legal errors in the court-martial.[212] In determining the most appropriate action to take on review,

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[206] *See generally* Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60, UCMJ*, ARMY LAW., Jul. 2014, at 23 (discussing 2014 changes to Article 60, which dramatically altered the convening authority's discretion in acting on an accused's court-martial).

[207] UCMJ art. 60(c)(3)(D).

[208] R.C.M. 1107(b)(3)(C). The change was in response to a mandate from Congress in the National Defense Authorization Act for Fiscal Year 2014. National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, § 1706(b), 127 Stat 672, 961 (2014).

[209] UCMJ art. 60(d)(1).

[210] R.C.M. 1106(d)(3).

[211] R.C.M. 1106(d)(3).

[212] R.C.M. 1106(d)(4). *See also* United States v. Hill, 27 M.J. 293 (C.M.A. 1988) (noting that the President intended in the Manual for Courts-Martial that the staff judge advocate respond to any allegations of legal error submitted post-trial by the defense counsel).

the commander may consider information submitted by an accused that was not formally offered into evidence at trial.[213]

Once the commander takes final action on the case, and depending on the level of court-martial and the adjudged sentence, the case is automatically appealed to one of the service's Courts of Criminal Appeals for review.[214] It has been assumed for many years that an accused's best chance of obtaining post-trial relief of a conviction was at the initial review stage by a convening authority.[215] That is no longer the case.

2. Deferring Deserved Clemency

The effect of the changes to the convening authority's post-trial powers means that no matter how deserving an accused may be of clemency, the convening authority may not act. Instead, the service member must wait until his or her case is heard by one of the services' Courts of Criminal Appeals. Those courts do have the power to consider legal arguments as to why the conviction should be reversed and whether there is sufficient factual information to support the conviction. The military appellate courts also have the power to reassess a service member's sentence. But appellate review can sometimes take years to complete. Thus, even assuming a service member could have been granted some relief by the convening authority, he or she may have to wait for appellate relief. In the meantime, the service member may have already completed his or her confinement and been discharged.

3. Adverse Impact on Discipline

Although it is not likely to be a common occurrence, a case could arise where the convening authority's lack of post-trial powers could adversely impact discipline. For example, members of the command may perceive political pressure was brought to bear on the decision to prosecute a service member, or that it is clear that the court members convicted an accused but strongly believed that some clemency was required. In addition, the command may conclude that the system is rigged against service members—a perception that has long plagued the military justice system.[216]

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[213] R.C.M. 1107(b)(3)(A)(iii) and 1105.

[214] UCMJ art. 66.

[215] *See, e.g.*, United States v. Rivera, 42 C.M.R. 198, 199 (C.M.A. 1970) (noting that post-trial review of court-martial by convening authority provides best chance for clemency). *Cf.* Michael J. Marinello, *Convening Authority Clemency: Is it Really an Accused's Best Chance for Relief?*, 54 NAVAL L. REV. 169, 195–196 (2001) (noting that post-trial clemency is not common; most cases in which reduction of sentence occurred was due to pretrial agreement between an accused and the convening authority).

[216] *See generally* Schlueter, *supra* note 12, at 5-8 (noting reasons for lack of respect for military justice).

VI. CONCLUSION

Proposals to reform the military justice system are not new, and will be a permanent part of the American military justice landscape. The most recent round of proposals arose from frustration and anger that many feel towards the military's initial response to what appeared to be systemic problems in dealing with sexual assault cases. That anger is understandable. And lethargic responses to that problem are indefensible.

But the answer to that problem does not rest in removing or reducing the commander's roles, pretrial or post-trial, or in limiting court-martial jurisdiction. This is not the first time that the military has faced problems and it will not be the last. One feature of the military is that it does respond, adapt, and can issue orders to fix the problems.

There is a danger that in rushing to "fix" what some consider to be problems in the military justice system, the fix will throw off the delicate balance between discipline and justice—to the detriment of the command structure, those accused of committing offenses, and victims of the alleged offenses.[217]

The UCMJ was enacted in 1950 as a response to complaints and concerns about the operation of the existing Articles of War during World War II.[218] In enacting the UCMJ, Congress struggled with the issue of balancing the need for command control and discipline against the view that the military justice system could be made fairer.[219] The final product was considered a compromise.[220] On the one hand, there was concern about the ability of the commander to maintain discipline within the ranks. On the other hand, there was concern about protecting the rights of service members against the arbitrary actions of commanders. Although the commander remained an integral part of the military justice structure, the statute expanded due process protections to service members and created a civilian court to review courts-martial convictions. Since its enactment, the UCMJ has been amended numerous times, sometimes to favor the prosecution of offenses and at other times to expand the protections to the accused.

The proposed amendments discussed in this article clearly undermine the commander's authority. Thus, whether intended or not, the balance tips in favor of the accused, even though the apparent intent is to ensure that more cases go to trial.

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[217] *See generally* Hansen, *supra* note 113, at 271 (2013) (noting that while efforts to reform the military justice system are warranted, the author concludes that reducing the role of the commander will undermine the ability of the commander to regulate his or her subordinates regarding the law of armed conflict).

[218] *See generally* Morgan, *supra* note 5, at 169 (discussing background of adoption of the UCMJ).

[219] *See* United States v. Littrice, 13 C.M.R. 43, 47 (C.M.A. 1953) (identifying "the necessity of maintaining a delicate balance between justice and discipline").

[220] *See id.* at 47 (referring to the liberalizing of the military justice system as a compromise).

In doing so, it affects the very core of the military justice system—the role of the commander. And it adversely affects anyone associated with the alleged offenses in the command: witnesses, counsel, and even victims. Currently, the commander and his or her legal advisor consider all of those interests in deciding whether to prosecute a case or choose some other route for dealing with the issue. Placing that decision in some distant office or in the hands of civilian prosecutors creates the possibility that those diverse interests are not adequately considered or balanced.

If Congress is to make any changes to the Uniform Code of Military Justice, it should be to first, reaffirm the view that the primary purpose of the military justice system is to enforce good order and discipline and second, retain the commander's critical role in that system, without limitation.[221]

The Supreme Court of the United States has stated that the purpose of the military is to fight and win wars.[222] It is absolutely essential that commanders—who are ultimately responsible for accomplishing that mission—be vested with the authority and responsibility for maintaining good order and discipline within their command. To that end, the UCMJ should be amended by adding the following language:

> The purpose of military law is to assist in maintaining good order and discipline in the armed forces, to provide due process of law, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

That proposed language, which is a variation on similar language in the preamble to the Manual for Courts-Martial,[223] reflects the long-standing and tested view that the military justice system is designed primarily to promote good order and discipline.

Finally, in responding to the siren songs of reform, Congress should carefully analyze the proposed changes, consider the myriad potential problems of administering any proposed reforms, as discussed *supra*, and determine whether less drastic measures can be taken to remedy any perceived problems in the military justice system.

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[221] Schlueter, *supra* note 29, at 77 (concluding that the primary purpose of the military justice system is to promote good order and discipline).

[222] United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955).

[223] The Preamble to the Manual for Courts-Martial lists the due process language first, before the language concerning good order and discipline. In my view, the order of those purposes is critical. Listing the discipline purpose first more accurately reflects the function and purpose of the military justice system. Schlueter, *supra* note 29, at 77 (concluding that the primary purpose of the military justice system is to promote good order and discipline).