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The Canary in the Military Justice Mineshaft: A Review of Recent Sexual Assault Courts-Martial Tainted by Unlawful Command Influence

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**THE CANARY IN THE MILITARY JUSTICE MINESHAFT: A
REVIEW OF RECENT SEXUAL ASSAULT COURTS-MARTIAL
TAINTED BY UNLAWFUL COMMAND INFLUENCE**

*Lieutenant Colonel Mark Visger**

“[D]ue to the patent and intolerable efforts to manipulate the member selection process, contra every requirement of the law, the failures of the military judge, the [post-trial hearing] military judge, and the [lower appellate court], to investigate, recognize or ameliorate the clear court stacking in this case, and the actual prejudice to the Appellant of being tried by a panel cherry-picked for the Government, dismissal with prejudice is the only remedy that can eradicate the unlawful command influence and ensure the public perception of fairness in the military justice system.”

—U.S. Court of Appeals for the Armed Forces, reversing a forcible rape conviction and dismissing with prejudice.¹

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1. United States v. Riesbeck, 77 M.J. 154, 167 (C.A.A.F. 2018) (internal citations and quotations omitted).

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I. INTRODUCTION

In the seventeen-month period from May 2017-September 2018, military appellate courts reversed five sexual assault convictions based on the legal doctrine of Unlawful Command Influence (UCI).² This doctrine is designed to protect accused military members who are facing court-martial by ensuring that the decision-maker involved in a court-martial decides the case based on its merits rather than based on the desires of commanding officers.³ Two recent sexual assault cases have been significantly influenced by concerns of UCI, including the high-profile court-martial of Brigadier General Jeff Sinclair.⁴ Of particular note is the court-martial of *United States v. Riesbeck*, where the civilian Court of Appeals for the Armed Forces (CAAF) reversed a forcible rape conviction with prejudice for “court-stacking” (specifically, intentionally selecting female panel members (e.g., jurors) with the objective of increasing the chances of conviction in a sexual assault case) using the very strong language noted in the preamble to this article.⁵

Additionally, a recent Department of Defense report on the prosecution of sexual assault cases raised concerns that the political

2. See *infra* notes 112-117 and 142-194 and accompanying text.

3. See *infra* notes 57-70 and accompanying text.

4. See *infra* notes 103-111 and accompanying text.

5. *Riesbeck*, 77 M.J. at 167.

fight over the military handling of sexual assault prosecutions is bleeding over and potentially affecting the fairness of the trial process itself.⁶ All of these cases are tied to the military's efforts to retain jurisdiction over court-martial prosecutions after congressional threats to remove jurisdiction due to the military's mishandling of sexual assault prosecutions.⁷ This article will examine whether the five cases profiled in this article are in effect the "dead canary in the mineshaft" indicating that serious problems exist with the fundamental integrity of the court-martial process.

The doctrine of UCI addresses the fundamental tension of the military justice system—the tension between enforcing discipline and ensuring due process.⁸ Members of the military are drilled in the requirement for obedience to a superior's orders.⁹ Given this emphasis on obedience, one may question how a military legal proceeding can ever provide impartial due process—should not the military jury simply defer to what the commander wants?¹⁰ During World War II, commanders adopted this approach by taking advantage of their broad power over the court-martial process to direct the desired outcome at trial.¹¹ This approach resulted in a strong cry for reform after World War II, resulting in Congress codifying the prohibition of commanders interference in the court-martial process as part of the Uniform Code of Military Justice (UCMJ) in 1950.¹² Since then, military appellate courts have deemed UCI to be the "mortal enemy of military justice,"¹³ and for good reason. One cannot trust the integrity of the court-martial process if there are indicators that the decision-makers are being influenced by their commanding officers, explicitly or implicitly, to reach a particular outcome. Such finders of fact are not deciding the case based on the merits and evidence, and the integrity of the process is justly called into question.

6. JUDICIAL PROCEEDINGS PANEL SUBCOMM., REPORT ON THE BARRIERS TO THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES, (May 12, 2017), https://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_Barriers_Final_20170512.pdf (hereafter, JPP Report).

7. See *infra* notes 71-76 and accompanying text.

8. See *infra* notes 26-29 and accompanying text.

9. *Id.*

10. See *infra* notes 36-41 and accompanying text.

11. See LUTHER WEST, THEY CALL IT JUSTICE 39-45 (1977) (detailing the abuses during World War II).

12. Uniform Code of Military Justice, Pub. L. No. 506, 64 Stat. 107 (codified as amended at 10 U.S.C. §§ 801-946 (2012)).

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

In the past several years, the problem of UCI has again come into focus, this time in the political controversy surrounding the military's handling of sexual assault prosecutions.¹⁴ Congress has taken a strong interest in the military's handling of sexual assault prosecutions after criticism that the military was not taking these cases seriously.¹⁵ The political maneuvering that has taken place as a result of this heightened focus has resulted in UCI becoming an issue once again.¹⁶ Military leadership has reacted strongly to congressional criticism of its handling of sexual assault cases, motivated in significant part by their desire to retain commander jurisdiction over the court-martial process and not cede the process to either civilian or JAG control (which has been proposed).¹⁷ The military commanders view the court-martial power as an instrument of command, essential to ensuring discipline in the unit, so that the commander is able to achieve the mission—ultimately victory at war.¹⁸ This desire to retain jurisdiction then creates a situation in which military leaders respond to Congressional criticism and attempts to remove jurisdiction by demonstrating that they are taking strong action against sexual assault in order to obtain a desired political outcome (e.g., retention of court-martial jurisdiction).¹⁹ In addition, congressional oversight has moved beyond legislative reforms. More recently, Congress has injected itself into ongoing or recently-completed sexual assault courts-martial and has taken unfavorable action against commanders for their decisions in specific courts-martial.²⁰

The conflict between Congress and military leadership over commander jurisdiction has created a climate where these political considerations create the potential to substantively influence legal decisions in specific courts-martial. First, military members feel pressure to fall in line with their leadership's "get tough" attitude and thereby preserve commander jurisdiction.²¹ In response to threats to remove jurisdiction, military leaders fight to retain jurisdiction by cracking down on sexual assault. This message is transmitted to military members who sit on the military panels (akin to civilian juries). This political fight then creates very real pressures on

14. See *infra* notes 71-76 and accompanying text.

15. *Id.*

16. See *infra* notes 98-121 and accompanying text.

17. *Id.*

18. WEST, *supra* note 11, at 16-17.

19. See *infra* notes 71-76 and accompanying text.

20. *Id.*

21. See *infra* notes 98-121 and accompanying text.

members of a court-martial (who are well-aware of the political stakes and of their commander's position) to convict an accused defendant regardless of the strength of the evidence and sentence harshly.²²

Second, military members may be concerned about ramifications to their personal careers from congressional action as a result of decisions they make in sexual assault cases. This concern arises because Congress has approval authority over military promotions and nominations to key leadership positions. While UCI is prohibited by the UCMJ,²³ this prohibition by its terms only applies to military members and does not address potential interference by Congress.

Consider the following hypothetical case to demonstrate the problem: a Colonel, who has been selected for promotion to General but whose promotion is pending Senate confirmation, is the ranking officer presiding over a military panel (jury) for a high-profile sexual assault court-martial. This court-martial has garnered national media and congressional scrutiny. During the panel's deliberations, she is inclined to vote for acquittal, as she is not personally convinced by the evidence beyond a reasonable doubt that the accused defendant committed the sexual assault. However, she is concerned about whether her promotion will be held up in the Senate if the panel acquits. In addition, she is concerned that a not-guilty verdict in this case might prompt Congress to remove UCMJ jurisdiction from commanders, something she knows her chain of command opposes. She considers whether she should change her vote to "guilty" and pressure lower-ranking members of the panel to also vote for guilt. Ultimately, she votes her conscience and the accused is acquitted. But in response to this verdict, a Senator puts a hold on her promotion, effectively killing her chances of promotion to General.²⁴

If this hypothetical Colonel had been removed from the promotion list by her military superiors based on the outcome of the court-martial, she would be a victim of UCI because this action is explicitly prohibited by Article 37(a) of the UCMJ.²⁵ She would likely be able to pursue legal recourse. Despite this fact, there is nothing preventing Congress from engaging in similar behavior by rejecting her selection for promotion. Such an act by Congress would not be command influence because the "command influence" came from congressional

22. *Id.*

23. 10 U.S.C. § 837(a) (2012).

24. This scenario took place in a slightly different context, *mutatis mutandis*, in the case of Lieutenant General Susan Helms. *See infra* note 96 and accompanying text.

25. *See infra* note 45 and accompanying text.

sources and Article 37 only extends to persons subject to the UCMJ (in fact, Congress has significant constitutional prerogatives over the confirmation process). Despite this fact, “congressional command influence” along these lines has the same potential to undermine fairness and due process by bringing outside pressures into judicial decisions on the merits of particular cases. The consequences of “congressional command influence” are no different than Article 37 command influence—Congress has significant power to influence the career path of military officers, particularly through their confirmation to high-ranking positions and their approval of all military promotions for officers.

This article will examine the five sexual assault cases mentioned above and the greater context in which they were decided. The article will begin by examining the origins of the doctrine of unlawful command influence in the aftermath of World War II, which originated in direct response to commanders’ attempts to actively direct the outcome of specific courts-martial. It will then turn to the congressional effort to remove court-martial jurisdiction from commanders, with a focus on decisions made by Air Force Lieutenant General Franklin in two sexual assault courts-martial and the repercussions he faced as a result. Finally, the article will review the JPP report findings as well as the recent appellate court decisions and conclude with observations for addressing these concerns.

II. HISTORY OF THE UNLAWFUL COMMAND INFLUENCE DOCTRINE

A. *Historical Context*

The earliest approaches to military justice placed the system squarely within the province of the commander. The needs of discipline and following orders, sometimes to the death, require that “offending soldiers be quickly and harshly dealt with.”²⁶ In his seminal work on Military Law, William Winthrop stated that courts-martial are “instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein.”²⁷ Discipline, being necessary to ensure effective military action, was indispensable to producing victory on the battlefield.²⁸

26. WEST, *supra* note 11, at 16.

27. WILLIAM WINTHROP, MILITARY LAW VOL. 1., 53 (1886).

28. WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 4 (1973).

This need created tension with the concept of justice and required lawmakers to delicately balance both the need for justice and the need for effective discipline.²⁹

The dichotomy between justice and discipline was brought into the limelight during World Wars I and II as broad swaths of the public were drafted and exposed to the court-martial process. They did not like what they saw.³⁰ In World War I, one-third of all court-martial acquittals were returned by the convening authority to the court-martial with a directive to change the verdict to guilty.³¹ This practice was subsequently prohibited by the 1920 Articles of War enacted by Congress.³² After World War I, the acting Judge Advocate General Samuel Ansell championed additional reforms to the military justice system.³³ Some of the reforms, to include JAG review of all completed courts-martial and appointed defense counsel for accused defendants, were included in the Articles of War.³⁴ But many of Ansell's proposals were rejected.³⁵

These reforms were tested in World War II and proved insufficient to restrain command influence.³⁶ Commanding Generals broadly controlled the court-martial process—they convened the court-martial, designated the individuals who heard the case, as well as the prosecutor and defense counsel (none of which were required to be attorneys).³⁷ These commanders expected convictions and maximum sentences, signaling their displeasure at any result less than this.³⁸ Because the commanding general was in a position to control practically every aspect of their subordinates' lives, the court-martial produced the expected results—convictions and harsh sentences.³⁹ During post-war studies of military justice, commanders openly admitted to deliberately influencing the court-martial process—frequently directing court members to adjudge the maximum sentence so that the commander could adjust the sentence downward where he thought it appropriate.⁴⁰ The injustices that were observed during

29. *Id.*

30. *Id.* at 14-15.

31. *Id.* at 8.

32. *Id.* at 10.

33. *Id.* at 7-10.

34. *Id.* at 9-10.

35. *Id.* at 10.

36. WEST, *supra* note 11, at 43-45.

37. *Id.* at 36.

38. *Id.*

39. *Id.* at 43.

40. *Id.*

World War II prompted a broad outcry for reform from a number of sources, from the American Legion to the New York City Bar Association.⁴¹

B. UCMJ provisions

The push for reform resulted in Congress passing the Uniform Code of Military Justice in 1950.⁴² In addition to substantively prohibiting UCI in Article 37, the UCMJ attempted to limit UCI through multiple measures: (1) the general court-martial (the highest level of court-martial) was required to have qualified attorneys serve as the prosecutor, defense counsel, and law member (the precursor to the military judge); (2) one-third enlisted representation on the court-martial panel was required in cases of enlisted accused; (3) a civilian court of last resort, the Court of Military Appeals (later renamed the Court of Appeals for the Armed Forces), was established to provide impartial civilian oversight of the system.⁴³ The Court of Military Appeals was specifically included to serve as “a further bulwark against impermissible unlawful command influence.”⁴⁴ Article 37’s UCI prohibitions were quite robust:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.⁴⁵

41. GENEROUS, *supra* note 28, at 23-24.

42. Uniform Code of Military Justice, Pub. L. 81-506, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C Code §§ 801-946a).

43. GENEROUS, *supra* note 28, at 42, 50.

44. *Thomas*, 22 M.J. at 246.

45. UCMJ art. 37(a), 10 U.S.C. § 837(a) (2012).

This last reference to an authority's judicial acts is significant as it relates to a commander's decision to refer a case to a court-martial (in other words, send a case to trial). This authority reflects the unusual role of the commander who, as the convening authority, decides whether trial by court-martial is appropriate and refers the case to court-martial. This referral decision is simultaneously a judicial determination and an exercise of prosecutorial discretion. The legal standard for referral is stated in Rule for Courts-Martial (R.C.M.) 601(d)(1): "there is probable cause to believe that an offense triable by a court-martial has been committed and that the accused committed it."⁴⁶

The convening authority's decision that the standard has been met and to refer charges to court-martial is essentially a judicial decision. Its judicial quality has been repeatedly recognized by the military appellate courts.⁴⁷ However, referral is defined as "the order of a convening authority that charges against an accused will be tried by a specified court-martial"⁴⁸--essentially a prosecutorial decision. An additional judicial decision was historically rendered after the trial if an accused was convicted and sentenced. In such cases, the commander has historically had discretion after trial to disapprove the findings of guilt or to approve a lesser sentence than that adjudged by the court-martial.⁴⁹ This post-trial authority took place while the convening authority took final action on the findings and sentence. At that point, the commander could disapprove guilty findings and/or reduce the sentence.⁵⁰

This post-trial action authority has recently been rescinded by Congress in reaction to convening authority actions which disapproved sexual assault convictions.⁵¹ As will be noted later in the article, this judicial authority that commanders exercise is significant due to the adverse consequences that Congress has imposed on

46. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 601(d)(1) (2019) (hereinafter MCM).

47. *See* United States v. Nealy, 71 M.J. 73, 78 (C.A.A.F. 2001) (Baker, C.J., concurring in the result) ("the convening authority plays a central role as . . . quasi-judicial decision maker."); United States v. Pringle, 41 C.M.R. 324, 326 (C.M.A. 1970) ("In referring a case to trial, the convening authority acts in a judicial capacity."); United States v. Nix, 36 C.M.R. 77, 78 (C.M.A. 1965) ("In military law, the convening authority performs a number of judicial functions.").

48. MCM, *supra* note 46, R.C.M. 601(a).

49. 10 U.S.C. §860(c) (2012), *amended by* National Defense Authorization Act for Fiscal Year 2014, § 1702(c), Pub. L. 113-66, 127 Stat. 955 (2013).

50. *Id.*

51. *See infra* notes 80-97 and accompanying text.

officers' careers resulting from those officers' judicial decisions in specific courts-martial (e.g., decisions whether to refer the case to court-martial or approve the adjudged findings and sentence).

Despite the reforms enacted by the UCMJ in 1950, a commander still exercised broad control over the court-martial process. The commander still selected the members, prosecutor, defense counsel and law member.⁵² While this authority allowed the commander to still exercise subtle means of control over the process,⁵³ Congress deemed this process necessary to ensure that the military justice system could operate during a wartime environment.⁵⁴ Subsequent reforms created the office of the military judge and moved military judges from convening authority control.⁵⁵ Despite this fact, criticism has continued to be levied against the process whereby the convening authority personally selects the members who serve as jurors on the case.⁵⁶

C. Current Doctrine

While the UCMJ was being considered in the 1950s, critics argued that a mere statutory prohibition of UCI was insufficient and that more was needed to prevent UCI. The Stanford Law Review in 1950 memorably argued that a mere legal prohibition of UCI “is about as effective as outlawing sin.”⁵⁷ Proponents of continued command control responded by arguing that “[y]ou cannot maintain discipline by administering justice.”⁵⁸ Congress settled the debate by allowing commanders to continue to administer the military justice system but added controls to prevent abuses. The most significant control was a civilian appellate court of last resort, the Court of Military Appeals (now called the Court of Appeals for the Armed Forces).⁵⁹ Further,

52. GENEROUS, *supra* note 28, at 51.

53. *Id.* at 36-37.

54. Major Christopher Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Members*, 176 MILITARY L. REV. 190, 223-224 (2003).

55. See 10 U.S.C. § 826 (c)(3)(A) (2012) (requiring military judges to be “directly responsible to the Judge Advocate General, or his designee” in the performance of military judge duties).

56. See Behan, *supra* note 54, at 243-276 (detailing the objections to convening authority selection of panel member and the contrary arguments).

57. *Can Military Trials Be Fair? Command Influence over Courts-Martial*, 2 STAN. L. REV. 547, 550 (1950) (hereinafter *Can Military Trials Be Fair?*).

58. GENEROUS, *supra* note 28, at 48.

59. *Id.* at 44-45.

as will be detailed below, this court has aggressively developed the doctrine of UCI, interpreting the Article 37 prohibition on UCI expansively to help insulate the military justice system from command influence.

As the doctrine of unlawful command influence evolved, courts identified two separate types of UCI—actual UCI and apparent UCI. Actual command influence is “an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case.”⁶⁰ In addition to actual interference in a specific case, the Court of Military Appeals developed the doctrine of apparent command influence in 1964, utilizing the doctrine to reverse a conviction, stating that “[t]he appearance, or the existence, of command influence provides a presumption of prejudice.”⁶¹ This standard evolved over the years and apparent command influence is now defined as one that “placed an ‘intolerable strain’ on the public’s perception of the military justice system because ‘an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.’”⁶²

In addition to this generous standard for apparent UCI, the evidentiary and procedural rules also favor an accused raising this claim. All that is required from an accused is “‘some evidence’ that unlawful command influence occurred.”⁶³ The defense must show more than “mere allegation or speculation,”⁶⁴ but once they do, the burden shifts to the prosecution to rebut the claim beyond a reasonable doubt.⁶⁵ The government may do so in one of three ways—prove beyond a reasonable doubt that:

[(1)] the predicate facts . . . do not exist, or [(2)] the facts as presented do not constitute unlawful command influence . . . or [(3)] the unlawful command influence did not place an intolerable strain upon the public’s perception of the military justice system and that an objective disinterested observer, fully informed of all the facts and circumstances would [*not*] harbor a

60. United States v. Boyce, 76 M.J. 242, 247 (C.A.A.F. 2017).

61. United States v. Johnson, 34 C.M.R. 328, 331 (C.M.A. 1964).

62. *Boyce*, 76 M.J. at 249.

63. *Id.*

64. *Id.*

65. *Id.*

significant doubt about the fairness of the proceeding.⁶⁶

In reviewing the legal framework for UCI, several points about UCI should be highlighted before considering UCI in the sexual assault context. First, the procedural structure strongly favors the defense, provided the defense is able to produce “some evidence.”⁶⁷ That said, the judge finding apparent UCI has wide latitude to fashion an appropriate remedy to eliminate the stain of UCI.⁶⁸ Dismissal with prejudice as a remedy for UCI is only appropriate where “the error cannot be rendered harmless.”⁶⁹ Second, despite the first point, the current congressional climate and congressional demands to get tough on sexual assault are unlikely to result in a finding of UCI because by its terms Article 37 does not apply to members of Congress, only to military members (e.g., persons “subject to the code”). In addition, a generalized UCI “in the air” will not be considered sufficient evidence to establish a claim of UCI.⁷⁰ Finally, note that the UCI doctrine does not address the situation spelled out in the introductory hypothetical, where a substantive fact-finder makes decisions, not based on the evidence, but based on possible adverse career effects from Congress due to an unfavorable outcome. The net effect is an UCI doctrine that is very robust as applied to members of the military who engage in command influence, but which does not address the two dynamics at play in the current political environment. The next section will address these dynamics and how they have played out over time.

III. THE POLITICAL FIGHT OVER REMOVAL OF MILITARY JURISDICTION

In recent years, the military’s handling of sexual assault cases has come under significant scrutiny by Congress.⁷¹ Senator Kirsten Gillibrand of New York championed a bill to remove court-martial jurisdiction from commanders, particularly due to the military’s

66. *Id.* (internal quotations and citations omitted).

67. *Id.*

68. *United States v. Lewis*, 63 M.J. 405, 416 (C.A.A.F. 2006).

69. *Id.*

70. *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991).

71. Craig Whitlock & Ed O’Keefe, *Female Lawmakers Leading Push to Crack Down on Military Sex Crimes*, WASHINGTON POST (May 24, 2013), https://www.washingtonpost.com/world/national-security/female-lawmakers-leading-push-to-crack-down-on-military-sex-crimes/2013/05/24/555848a2-c473-11e2-97fa-0657decebbbf_story.html?utm_term=.923d31c74b97.

handling of sexual assault cases.⁷² This bill narrowly failed.⁷³ Top leadership in each of the military services opposed this proposal and have acted to crack down on sexual assaults in response.⁷⁴ Despite the failure of the bill to remove jurisdiction, over 100 statutory reforms have been enacted since 2012 to address shortcomings in the military handling of sexual assault.⁷⁵ In addition, the threat to remove jurisdiction continues to loom over the military if it continues to have problems in prosecuting sexual assault cases.⁷⁶

The fight over jurisdiction has caused two fault lines of potential problems with command influence which this section will detail: (1) commanders facing adverse career consequences from Congress over independent decisions made concerning individual courts-martial; and (2) military members feeling pressure from their superiors to take harsh action in sexual assault cases to preserve commander jurisdiction. This section will outline how these specific influences have affected individual cases and have set the stage for the more recent spike in reversals for UCI.

A. Congressional Action against Individual Officers

During the same timeframe as the Gillibrand proposal was being considered, controversy erupted over the action of Lieutenant General Craig Franklin, commander of the Third Air Force in Europe. He was the convening authority reviewing the court-martial conviction of Lieutenant Colonel James Wilkerson.⁷⁷ Colonel Wilkerson served as the Inspector General for the Aviano (Italy) Air Base and was alleged to have sexually assaulted a house guest while she slept in his family

72. Ed O'Keefe, *How Kirsten Gillibrand Won by Losing*, WASHINGTON POST (Mar. 6, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/03/06/how-kirsten-gillibrand-won-by-losing/?utm_term=.b1d3580d7726.

73. *Id.*

74. Craig Whitlock, *U.S. Military Chiefs Balk at Taking Sex-Assault Cases out of Commanders' Hands*, WASHINGTON POST (June 3, 2013), https://www.washingtonpost.com/world/national-security/us-military-chiefs-balk-at-taking-sex-assault-cases-out-of-commanders-hands/2013/06/03/0af4f976-cc85-11e2-ac03-178510c9cc0a_story.html?utm_term=.0625c174b4bb.

75. JPP Report, *supra* note 6, at 2.

76. O'Keefe, *supra* note 72.

77. Robert Draper, *The Military's Rough Justice on Sexual Assault*, NEW YORK TIMES MAGAZINE (Nov. 26, 2014), <https://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html>.

quarters.⁷⁸ The military panel found Colonel Wilkerson guilty and sentenced him to one year of confinement and a dishonorable discharge.⁷⁹ The case was then sent to Lieutenant General Franklin for approval. Upon his review, Lieutenant General Franklin disapproved the conviction and dismissed the charges, which drew significant congressional ire.⁸⁰

Congressional response to Lieutenant General Franklin's actions from members who favored removal of jurisdiction from commanders was prompt. In response to Lieutenant General Franklin's action, Senators Barbara Boxer and Jeanne Shaheen, both proponents of removal of court-martial jurisdiction, wrote the Secretary of Defense Chuck Hagel directly, asking him to review the case. Their letter describes Franklin's action as "unacceptable" and "a travesty of justice."⁸¹ They requested that Hagel "immediately provide [them] detailed information regarding the basis for General Franklin's decision."⁸²

Shortly after the Wilkerson court-martial, Lieutenant General Franklin found himself the target of additional criticism because of his decision to not refer the court-martial charges against Airman First Class Brandon Wright for rape and sexual assault. In this particular case, the Article 32 investigating officer as well as his staff judge advocate (the senior legal advisor to the convening authority) recommended dismissal of the court-martial due to the weakness of the evidence. The primary weaknesses in the case were inconsistencies in the complainant's accounts of the events and the testimony of a third party who was present during the evening in question and who testified that the encounter appeared consensual.⁸³

Notwithstanding these facts, the complainant, through counsel, submitted a 12-page memorandum expressing her desire to proceed to

78. *Id.*

79. *Id.*

80. Craig Whitlock, *Air Force General's Reversal of Pilot's Sexual-Assault Conviction Angers Lawmakers*, WASHINGTON POST (Mar. 8, 2013), https://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?utm_term=.a257e1e7390a.

81. Press Release, *Boxer, Shaheen Call on Defense Secretary Hagel to Immediately Review Dismissal of Sexual Assault Case* (Mar. 4, 2013), <https://www.shaheen.senate.gov/news/press/boxer-shaheen-call-on-defense-secretary-hagel-to-immediately-review-dismissal-of-sexual-assault-case>.

82. *Id.*

83. *United States v. Wright*, 75 M.J. 501, 502 (A.F.C.C.A., 2015) (en banc).

court-martial and requesting an opportunity to meet with Lieutenant General Franklin.⁸⁴ Lieutenant General Franklin declined the request to meet and decided against referring charges to court-martial, dismissing the case.⁸⁵ In response, the acting Secretary of the Air Force intervened and transferred the case to a different court-martial convening authority (who had incidentally previously served on the Defense Task Force on Sexual Assault in the Military Services). This second convening authority, somewhat unsurprisingly, referred the case to general-court martial.⁸⁶

Lieutenant General Franklin and his Staff Judge Advocate retired shortly thereafter (the Staff Judge Advocate's retirement was involuntary after he was selected for early retirement by a review board during the same time frame but purportedly not in connection with this case).⁸⁷ At trial, the Airman Wright's defense counsel alleged UCI and ultimately the military judge agreed, but found that the second convening authority had acted independently and therefore the UCI did not prejudice Airman Wright.⁸⁸ Specifically, the military trial judge found that the Air Force Judge Advocate General (the highest ranking military lawyer in the Air Force), General Harding, telephoned the Staff Judge Advocate in the case, Colonel Bialke, and told him that "sexual assault cases, absent 'smoking gun' evidence about an alleged victim's credibility, should be sent to court-martial."⁸⁹

The military judge further ruled that General Harding did so because "the failure to have charges preferred against [Airman] Wright would enable Senator Kirsten Gillibrand to gain needed votes on a pending bill to remove commanders from the court-martial process," which Harding and the Air Force opposed.⁹⁰ After interlocutory appellate review, the case went to trial. Ultimately Airman Wright was acquitted of the charges.⁹¹

84. *Id.*

85. *Id.*

86. *Id.* at 504.

87. Nancy Montgomery, *Sexual Assault Case Not Dismissed Despite Ruling of Unlawful Command Influence*, STARS AND STRIPES (Aug. 12, 2015), <https://www.stripes.com/news/sexual-assault-case-not-dismissed-despite-ruling-of-unlawful-command-influence-1.362563>.

88. *Id.*

89. *Id.*

90. *Id.*

91. Nancy Montgomery, *Lengthy Sexual Assault Case Ends in Acquittal*, STARS AND STRIPES (Oct. 29, 2015), <https://www.stripes.com/news/lengthy-sexual-assault-case-ends-in-acquittal-1.375792>.

Senator McCaskill called for General Franklin to be removed from command because of this decision not to refer the Wright case to trial.⁹² Shortly thereafter, the topic of Lieutenant General Franklin was discussed at the confirmation hearings of the Secretary of the Air Force nominee, Deborah Lee James.⁹³ Shortly after Secretary James was confirmed, General Franklin received a phone call from the Chief of Staff of the Air Force (the highest ranking officer in the Air Force), who informed him that Secretary James had “lost confidence” in him and that she would be removing him from command shortly if he did not retire.⁹⁴

Lieutenant General Franklin submitted a voluntary retirement request shortly thereafter, losing a star in the process because he had not served sufficient time in the grade of Lieutenant General.⁹⁵ Similarly, in a less-dramatic case, Senator McCaskill blocked the nomination of Lieutenant General Susan Helms, who had been nominated to serve as the first female Vice Commander of U.S. Space Command, because General Helms had overturned a sexual assault court-martial conviction in her capacity as convening authority.⁹⁶ These episodes prompted Congress to amend the UCMJ to rescind the convening authority’s ability to disapprove findings of guilt in almost all cases.⁹⁷

B. Military’s “Get Tough” Response to Retain Jurisdiction

In response to congressional pressure, senior Generals and Admirals in each service took strong action to preserve commander jurisdiction over the court-martial process in the face of congressional criticism.⁹⁸ They opposed the removal of court-martial jurisdiction and acted strongly to press their case that the military could clean up

92. James Taranto, *McCaskill’s Consistently Inconsistent Military Policy*, WALL STREET JOURNAL, Feb. 3, 2014, at A15.

93. *See* United States v. Boyce, 76 M.J. 242, 245 (C.A.A.F. 2017). (discussing the situation surrounding the retirement of Lieutenant General Franklin). For further information regarding this case, *see infra* notes 142–152 and accompanying text.

94. *Boyce*, 76 M.J. at 245.

95. *Id.*

96. Craig Whitlock, *General’s Promotion Blocked over Her Dismissal of Sex-Assault Verdict*, WASHINGTON POST (May 6, 2013), https://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528_story.html?utm_term=.84d8af42ea5e.

97. *See* National Defense Authorization Act for Fiscal Year 2014, § 1702, Pub. L. 113-66, 127 Stat. 955 (2013) (amending 10 U.S.C. § 860 (2012))

98. Whitlock, *supra* note 58.

its act and properly prosecute sexual assaults.⁹⁹ This response has also created the potential for a climate that fosters actual unlawful command influence. This logic is reflected in the military judge's finding that the Air Force Judge Advocate General engaged in UCI in the Airman Wright case discussed in the previous section: "[Failure to prosecute Airman Wright] would enable Senator Kirsten Gillibrand to gain needed votes on a pending bill to remove commanders from the court-martial process."¹⁰⁰ Any military person responsible for making substantive decisions on case disposition or on guilt and sentence will be faced with the temptation to take this logic into account—particularly the higher-ranking individuals who are more acutely aware of the stakes of potential loss of commander jurisdiction.

In addition, the Secretary of Defense withheld jurisdiction over initial disposition of sexual assaults to the Special Court-Martial Convening Authority in the grade of O-6 (colonel or Navy captain) or higher.¹⁰¹ These commanders will normally have nearly 30 years of service and those selected for command at this level are considered to be the top prospects for future promotion to General or Admiral.¹⁰² Such individuals are going to be acutely aware of the political stakes involved in their decisions (and the potential ramifications to their own military careers if they make an unpopular decision). In such instances, the temptation is great for a commander to decide a case based on political considerations instead of the evidence.

Concerns about retaining commander jurisdiction also infected the high profile court-martial of Brigadier General Jeffrey A. Sinclair for

99. *Id.*

100. Montgomery, *supra* note 71.

101. Secretary of Defense, *Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases*, JUDICIAL PROCEEDINGS PANEL (Apr. 20, 2012), http://jpp.whs.mil/Public/docs/03_Topic-Areas/09-Withholding_Authority/20160408/01_SecDef_Memo_WithholdingAuthority_20120420.pdf.

102. See Lt. Col. (Ret.) Paul Edgar, *Some Thoughts on How to Improve the Selection of Brigade Commanders*, FOREIGN POLICY BEST DEFENSE (Oct. 13, 2014), <https://foreignpolicy.com/2014/10/13/some-thoughts-on-how-to-improve-the-selection-of-brigade-commanders/>, (noting that "brigade command is the earnest gateway to general officer and executive national leadership"); James Dao, *Panetta Proposes New Sexual Assault Rules for the Military*, NEW YORK TIMES AT WAR (Apr. 17, 2012), <https://atwar.blogs.nytimes.com/2012/04/17/panetta-proposes-new-sexual-assault-rules-for-the-military/> (noting that Colonels (or Navy Captains) are "more experienced" and "better equipped" to properly make decisions on a sexual assault case).

sexual assault.¹⁰³ In this case, the Army prosecuted an active duty General Officer for sexually assaulting his aide, a female Captain who was responsible for managing his daily responsibilities and with whom he had carried on a consensual affair.¹⁰⁴ The defense raised an UCI motion, alleging that UCI infected the decision to reject a defense offer to plead guilty, which is the process by which a plea bargain is reached in a court-martial.¹⁰⁵ The defense offer to plead was submitted to the XVIII Airborne Corps Commander, a three-star general, for a decision whether to accept the proposed plea agreement.¹⁰⁶

Based on legal requirements, the complainant was afforded an opportunity to be heard on whether the Corps Commander should approve the offer.¹⁰⁷ The complainant, through her special victim counsel, Captain Cassie Fowler, submitted a letter opposing the proposed agreement.¹⁰⁸ In this letter, Captain Fowler stated: “Allowing the accused to characterize this relationship as a consensual affair would only strengthen the arguments of those individuals that believe the prosecution of sexual assault should be taken away from the Army.”¹⁰⁹

The military judge ruled that this letter constituted “unlawful command influence” because it invoked the military senior leadership’s position on whether the military should retain court-martial jurisdiction as a reason to reject the proposed plea deal. The Corps Commander disapproved the proposed plea agreement in part because of this letter.¹¹⁰ As a result, the military judge ordered that the case be transferred to a different commander for action on the proposed plea deal.¹¹¹

The Sinclair episode is like the “he-who-shall-not-be-named” rule found in the Harry Potter novels. In those novels, characters avoided using the name of the lead villain, Lord Voldemort, out of fear that he

103. Alan Blinder & Richard A. Oppel Jr., *How a Military Sexual Assault Case Foundered*, THE NEW YORK TIMES (Mar. 12, 2014), <https://www.nytimes.com/2014/03/13/us/how-a-military-sexual-assault-case-founded.html>.

104. *Id.*

105. *Id.*

106. *Id.* (the article identifies the commander as Lieutenant General Joseph Anderson).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

would thereby gain more power. In the same way, commanders making decisions on sexual assault courts-martial are certainly aware of their leadership's concern over losing jurisdiction. It is hard to imagine that this consideration does not cross their minds when making decisions in such cases.

However, the moment such reasoning is explicitly stated or adopted, it becomes UCI. As a result, this consideration lurks below the surface, influencing substantive decisions. Judges and defense counsel will have difficulty determining the degree to which it influences decisions because the premise remains unstated. Captain Fowler's mistake was stating the argument directly in her letter to the Corps Commander. This episode raises the obvious question—do such considerations reach all the way into the panel deliberation room, where actual decisions on guilt, innocence and punishment are made? A recent court-martial suggests that it has reached this far.¹¹²

In *United States v. Schloff*, the accused was convicted of abusive sexual contact for the inappropriate touching of a female soldier/patient.¹¹³ Subsequent to the case, one of the panel members submitted a sworn statement asserting that political discussions had invaded the deliberations.¹¹⁴ The matter was submitted for a post-trial fact-finding hearing and the military judge ruled that the two senior officers on the panel in fact had discussed the political climate during deliberations:

At the beginning of deliberations on findings of appellant's court-martial, the president and senior ranking member of the panel, [Col JW], made a statement to the effect that based on the political climate, the Army could not seem weak or soft in dealing with sexual harassment or assault. He also asked a question to the effect of, "How does the Chief of Staff of the Army's current emphasis on sexual harassment affect the findings and our decision in this matter?" [Col AM] made some unspecified or similar

112. *United States v. Schloff*, ARMY 20150724 (A. Ct. Crim. App., Feb. 5, 2018) (summary disposition), <http://www.caaflog.com/wp-content/uploads/sd-schloff-cs.pdf>.

113. *Id.* at 1.

114. *Id.* at 2–3.

comments or comments indicating agreement with [Col JW].¹¹⁵

The Army Court of Appeals had no trouble ruling that this discussion constituted UCI and reversed the conviction.¹¹⁶ In this particular case, these comments came to light only because one of the panel members had the courage to submit an affidavit implicating two superior officers in inappropriate behavior.¹¹⁷ A case such as *Schloff* in this political climate might cause a reasonable outside observer of all military sexual assault prosecutions to “harbor a significant doubt about the fairness of the proceeding[s],”¹¹⁸ thus triggering apparent UCI.

One significant aspect of the military campaign to preserve jurisdiction is the fine line between offering military advice on the prospect of removing court-martial jurisdiction and engaging in an active campaign to oppose the removal of court-martial jurisdiction. Once the military took a position and actively campaigned to preserve jurisdiction, the message invariably seeped down the lower ranks that the military needed to “get tough” on sexual assault. The best example of this reasoning was a series of briefs given in 2012 by General James Amos, then-Commandant of the Marine Corps, colloquially entitled the “Heritage Brief.”¹¹⁹ Dwight Sullivan describes the message General Amos gave at Parris Island—similar to one he delivered to every officer and senior non-commissioned officer in the Marine Corps:

In his Heritage Brief delivered at Parris Island, the Commandant told the officers and staff NCOs in his audience that he had just met with five members of Congress at breakfast at his home and two of them walked out, saying they didn’t trust the Marine Corps to fix its sexual assault problem. The Commandant mentioned five bills pending in Congress, one of

115. *Id.* at 2 (alterations in original).

116. *Id.* at 5.

117. *Id.* at 2.

118. *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017) (internal quotations and citations omitted).

119. Dwight Sullivan, *Top 10 military justice stories of 2012 — #1 The politicization of the military’s response to sexual assaults*, CAAFLOG (Jan. 1, 2013), <http://www.caaflg.com/2013/01/01/top-10-military-justice-stories-of-2012-1-the-politicization-of-the-militarys-response-to-sexual-assaults/#more-19521>.

which would completely remove convening authorities from the sexual assault referral process because Congress has “no confidence” in the Marine Corps’ “ability or willingness to do anything about” sexual assaults itself. He said the bill would take control from Marine Corps commanders and give it to the Department of Justice. He told his audience that he assured one of the members of Congress at his home: “I am the Commandant of the Marine Corps and I am telling you we are going to fix it. I’m sick of it; we’re fixing it.”¹²⁰

General Amos then went on to state in the briefing that 80 percent of sexual assault allegations were “legitimate.”¹²¹ With messages like this being sent by the top commander of the Marine Corps, and likely similar ones from the other military branches, it is not surprising to see substantive decisions in individual cases affected by a concern to preserve commander jurisdiction. There is a role for the military to engage with Congress to respond to criticisms on the military’s handling of sexual assault cases and offer its advice as to whether removal of jurisdiction from commanders is advisable. But when military leadership goes beyond these roles and engages in an active campaign to preserve commander jurisdiction, it is unsurprising to see outcomes like the *Schloff* case.

IV. EFFECTS ON THE MILITARY JUSTICE PROCESS

A. JPP Report

As part of the ongoing concern over the military handling of sexual assault cases, Congress directed the Department of Defense to report on the effect of recent changes and the handling of sexual assault cases.¹²² This requirement led the Secretary of Defense to establish the Subcommittee to the Judicial Proceedings Panel, which issued its most recent report on May 12, 2017.¹²³ The report found that many of the congressionally directed changes had been “valuable” and that there appeared to be increased “confidence that

120. *Id.*

121. *Id.*

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

123. JPP Report, *supra* note 6, at 2.

the criminal justice system will help the victim and vigorously prosecute the accused.”¹²⁴ However, the committee noted that it had been “repeatedly told on its site visits” that the reforms “raised serious questions about the fundamental fairness of the military justice process when it comes to the treatment of the accused.”¹²⁵

One of the issues identified by the JPP Report was that almost every sexual assault was referred to court-martial for trial regardless of merit.¹²⁶ One contributing factor to this phenomenon that the Subcommittee identified is the low standard for referral, which at the time was “reasonable grounds” under Rule for Courts-Martial 601¹²⁷ (although the standard was recently changed to probable cause¹²⁸). In addition, the rule specifies that the reasonable grounds finding can rely on “hearsay in whole or in part” and that the convening authority “may consider information from any source” in rendering her decision.¹²⁹ The JPP Report noted that this standard was significantly lower than that in the civilian sector and the ABA’s Criminal Justice Standards.¹³⁰ The panel noted that the ABA Criminal Justice Standards for Prosecution limits prosecutions to situations where “admissible evidence will be sufficient to support conviction beyond a reasonable doubt and [when] the decision to charge is in the interest of justice.”¹³¹ Similarly, the U.S. Attorneys’ Manual limits prosecutions to situations where “admissible evidence will probably be sufficient to obtain and sustain a conviction.”¹³² The Report also noted that Congress had amended the UCMJ to require the Secretary of Defense to issue nonbinding guidance for disposition of cases which, when published, might help ameliorate this situation and introduce a standard similar to the ABA and U.S. Attorneys’

124. *Id.* at Executive Summary.

125. *Id.*

126. *Id.* at 12.

127. *Id.* at 10.

128. *See* Exec. Order No. 13825, annex 2, 83 Fed. Reg. 9889 (Mar. 1, 2018) (amending R.C.M. 601(d)(1)). In addition, this new standard requires a written determination of probable cause by the convening authority’s senior legal advisor prior to referral. *Id.* This new requirement may address some of the concerns raised by the Subcommittee in this regard.

129. MCM, *supra* note 46, R.C.M. 601(d)(1).

130. JPP Report, *supra* note 6, at 10.

131. *Id.* (quoting CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-4.3 (AM. BAR ASS’N, 4th ed. 2015)).

132. *Id.* (quoting U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, Section 9-27.220 (1997, updated Jan. 2017)).

standards.¹³³ This guidance has been subsequently published in the 2019 Manual for Courts-Martial, taking effect on January 1, 2019.¹³⁴

However, even if the standards and guidance for referral are modified, the JPP Report also found that there was substantial pressure to refer all sexual assault cases to trial.¹³⁵ This is unsurprising in light of the Lieutenant General Franklin incident discussed earlier, where his decision not to refer a sexual assault case to court-martial contributed to his early retirement at a lower rank. Specifically, the Report noted:

Judge advocates overwhelmingly reported a perception of pressure on convening authorities to refer sexual assault cases to court-martial, regardless of merit. According to many of the judge advocates interviewed on site visits, this pressure extends to weak cases that civilian jurisdictions would not prosecute, and in some cases, have already declined to prosecute. The vast majority of prosecutors and defense counsel who spoke with the Subcommittee have the impression that this pressure causes convening authorities to favor referral to court-martial rather than deal with the potential adverse ramifications of not referring a sexual assault case, such as career setbacks, media scrutiny, the possibility of their non-referral decisions being subjected to elevated review, or questions about why a case was not referred.¹³⁶

Another commander who was interviewed by the panel indicated that “he forwards every sexual assault case to the next general officer in the chain of command” and that “he felt the need to ‘do something immediately’ or face harm to his career.”¹³⁷ The JPP found that there were multiple repercussions from referring every case to court-martial. These include: (1) high acquittal rate; (2) diversion of prosecution resources away from “more serious and well-supported allegations”; (3) prosecutors finding themselves in an “ethical quandary” by trying cases “with no reasonable likelihood of

133. *Id.* at 14. This guidance was recently issued in the new Manual for Courts-Martial.

134. MCM, *supra* note 46, app. 2.1.

135. *Id.*

136. *Id.*

137. *Id.*

conviction”; (4) low conviction rate causing discredit to the entire military justice system; (5) an increase in processing times “as more cases flood the system;” and (6) “[w]hen weak cases linger in the system pending trial, the accused’s and victim’s careers and lives remain on hold until the case is resolved.”¹³⁸

This report suggests that a climate of UCI exists concerning decisions to refer cases to court-martial. Commanders are making disposition decisions not based on the legal merits of a case, but instead on how the commander perceives Congress or their chain of command will react. The prospect of politically-motivated referrals to trial is then made worse by comments such as General Amos’ statements that eighty percent of the complaints are legitimate—which could be interpreted as a directive to convict in eighty percent of cases.¹³⁹ While the recently-published disposition guidance specifically prohibits consideration of career or political considerations in making referral decisions,¹⁴⁰ the guidance is by its terms “non-binding” and not intended to create an enforceable right by an accused.¹⁴¹ A review of recent cases decided by the military appellate courts, particularly the civilian Court of Appeals for the Armed Forces, indicates that the corrosive effects of UCI are in fact affecting the integrity of the court-martial process as well.

B. Recent CAAF Cases Reversing due to UCI

The recent cases decided by CAAF reversing sexual assault cases for UCI appear to be a culmination of the foregoing political and legal struggles. As noted earlier in *Schloff* and the account of the *Sinclair* court-martial, political pressures contributed to UCI in those cases even affected the panel’s internal deliberations on guilt in the *Schloff* case. This section will detail four additional cases that have been decided in a relatively narrow timeframe, all involving CAAF reversals of sexual assault convictions. These cases indicate that the *Schloff* and *Sinclair* cases may not be isolated and there might be a larger problem.

138. *Id.* at 21.

139. *See supra* notes 119-121 and accompanying text.

140. MCM, *supra* note 46, at app. 2.1, para. 2-7.

141. *Id.* at para. 1.4.

1. *United States v. Boyce*

This case provides a demonstration of how congressional involvement in particular cases can undermine the validity of subsequent cases. *Boyce* involves a familiar figure, Lieutenant General Craig Franklin, discussed earlier in this article, who was forced to retire early at a loss of rank after his run-in with Congress over his disapproval of Lieutenant Colonel Wilkerson's sexual assault conviction and General Franklin's decision to not refer Airman Wright's case to a court-martial and dismiss the charges.¹⁴² Shortly after he submitted his retirement request, yet another sexual assault case came to General Franklin for decision, and General Franklin elected to refer these sexual assault charges against Airman Boyce to general court-martial.¹⁴³ Not surprisingly, the defense moved to dismiss the case, alleging unlawful command influence on General Franklin's decision to refer Airman Boyce's charges to court-martial (which, as discussed earlier, is a quasi-judicial act).¹⁴⁴

After Airman Boyce was convicted, the CAAF, in a 3-2 decision, reversed on appeal for apparent UCI.¹⁴⁵ The court noted that there was no actual UCI, as the case against Boyce was strong and there were no outside attempts to influence General Franklin's decision to refer in this particular case.¹⁴⁶ However, the court found apparent UCI, detailing a chronology that drew a direct link between congressional action and subsequent actions by the Secretary of the Air Force and the Chief of Staff of the Air Force.¹⁴⁷ The court detailed a timeline of events which constituted apparent UCI:

- Prior to the confirmation of Deborah Lee James as Secretary of the Air Force, a key member of the Senate Armed Services Committee who would later vote on her nomination commented on Lt Gen Franklin's decision to set aside the findings and sentence in the *Wilkerson* case. The senator specifically stated that commanders needed to be held 'accountable' for their handling of sexual assault charges.

142. 76 M.J. 242, 245-56 (C.A.A.F. 2017).

143. *Id.* at 246.

144. *Id.*

145. *Id.* at 244.

146. *Id.* at 250.

147. *Id.* at 251-52.

- Ms. James subsequently was confirmed by the Senate, and on December 20, 2013, she was sworn in as Secretary of the Air Force.
- On December 23, 2013, Lt Gen Franklin read what he described as an article in which one of the senators on the Senate Armed Services Committee indicated that he was scheduled to retire in the near future.
- On December 27, 2013, the Chief of Staff of the Air Force telephoned Lt Gen Franklin and informed him that the new Secretary had “lost confidence” in him and that he had two options: voluntarily retire from the Air Force at the lower grade of major general, or wait for the Secretary to remove him from his command in the immediate future.
- Three hours after this call, Lt Gen Franklin decided to retire. Because Lt Gen Franklin did not have the requisite time in his highest pay grade, this retirement carried with it a loss of rank and a concomitant loss of retirement pay.
- In his written retirement request, Lt Gen Franklin acknowledged the following: “My decisions as a [GCMCA] have come under great public scrutiny,” and “media attention ... will likely occur on subsequent sexual assault cases I deal with.”
- On the same day that Lt Gen Franklin was contacted by the Chief of Staff, he received the referral package regarding Appellant's case. On January 6, 2014, Lt Gen Franklin referred Appellant's case, which included sexual assault charges, to a general court-martial. Thus, Appellant's case qualified as a “subsequent sexual assault case[]” that Lt Gen Franklin had expressed concern about due to the likelihood of “media attention” and “great public scrutiny.”¹⁴⁸

The majority found “the totality of the circumstances in this case to be particularly troubling and egregious.”¹⁴⁹ The court further stated

148. *Id.* (alterations in original).

149. *Id.* at 252.

that “[s]pecifically [the Court] conclude[s] that members of the public would understandably question whether the conduct of the Secretary of the Air Force and/or the Chief of Staff of the Air Force improperly inhibited [General] Franklin from exercising his court-martial convening authority in a truly independent and impartial manner as is required to ensure the integrity of the referral process.”¹⁵⁰

This ruling is breathtaking in its potential implications. One could readily argue that it calls into question every Air Force sexual assault case referred to court-martial subsequent to the Franklin incident. It is impossible not to imagine that every convening authority in the Air Force “got the message” after General Franklin’s retirement announcement and would refer every case to trial to avoid the same negative career implications. In fact, the JPP Report indicates that this scenario is exactly what is happening.¹⁵¹ The court, however, downplayed this possibility:

In reaching our holding in this case, we fully acknowledge that we do not have the authority to redress the chilling effect that the conduct of the Secretary of the Air Force and/or the Chief of Staff of the Air Force generally may have had on other convening authorities and in other criminal cases that are not before us. We recognize that such systemic problems must be left to Congress and the executive to address. Nonetheless, in individual cases that are properly presented to this Court—such as Appellant’s—we will remain ever mindful of Chief Judge Everett’s admonition that unlawful command influence is the “mortal enemy of military justice,” and we will meet our responsibility to serve as a “bulwark” against it by taking all appropriate steps within our power to counteract its malignant effects.¹⁵²

This dictum suggests that we should expect CAAF to engage in close examination for UCI during their appellate review and aggressively act to curtail it.

150. *Id.* at 252-53.

151. *See supra* notes 135-137 and accompanying text.

152. *Id.* at 253.

2. *United States v. Riesbeck*

In *U.S. v. Riesbeck*, the CAAF reversed a forcible rape conviction arising out of the Coast Guard and dismissed the case with prejudice due to egregious “court stacking” (e.g., selecting individual panel members to achieve a particular outcome—a finding of guilty), which is a form of UCI.¹⁵³ The CAAF was particularly concerned that the seven-person court-martial panel was comprised of five women, four of whom had been trained as victim advocates.¹⁵⁴ A victim advocate is a command-nominated individual who undergoes special training and certification to provide assistance to victims of sexual assault.¹⁵⁵ Article 25 of the Uniform Code of Military Justice requires a convening authority to select “best-qualified” panel members in accordance with specified criteria.¹⁵⁶ Gender is not one of the Article 25 criteria and because only 15-20 percent of the pool of potential panel members were women, the military judge at the post-trial hearing found that the convening authority “most likely” intentionally selected a large number of women “given the intense external pressures” the military was facing regarding sexual assault cases.¹⁵⁷ The CAAF, agreeing with this assessment, concluded the panel selection resulted from a misguided (in the opinion of CAAF) belief that women are more likely than men to convict in sexual assault cases and stated the result “smacks of a panel that was ‘hand-picked’ by or for the [prosecution].”¹⁵⁸

However, the CAAF was even more troubled by the failure of the lower courts (which consist of military attorneys as the presiding judges) to protect the integrity of the court-martial process.¹⁵⁹ The CAAF noted that when the defense objected to the panel, the trial court judge “blithely assert[ed] that the issues could be worked out on appeal.”¹⁶⁰ Meanwhile, the lower appellate court, the Coast Guard Court of Criminal Appeals (CGCCA), affirmed the conviction twice—once on direct appeal and a second time after CAAF sent the

153. 77 M.J. 154 (C.A.A.F. 2018).

154. *Id.* at 158.

155. U.S. DEPT. OF HOMELAND SECURITY, UNITED STATES COAST GUARD COMMANDANT INSTRUCTION M1754.10E, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM, chapter 1(O) (2016).

156. UCMJ, art. 25, 10 U.S.C. § 825 (2012).

157. *Riesbeck*, 77 M.J. at 160-161.

158. *Id.* at 166 (alterations in original).

159. *Id.* at 167.

160. *Id.* at 159 (alterations in original).

case back for a post-trial hearing on the court-stacking issue.¹⁶¹ The CAAF, clearly frustrated by these continual failings, dismissed the lower courts' reasoning as "pure sophistry"¹⁶² and "absurdity"¹⁶³ and a "stain on the military justice system."¹⁶⁴ In an extraordinary conclusion, the CAAF openly scolded all involved in the process, stating: "[D]ue to the patent and intolerable efforts to manipulate the member selection process, contra every requirement of the law, the failures of the military judge, the [post-trial hearing] military judge, and the CGCCA, to investigate, recognize or ameliorate the clear court stacking in this case, and the actual prejudice to the Appellant of being tried by a panel cherry-picked for the Government, dismissal with prejudice is the only remedy that can 'eradicate the unlawful command influence and ensure the public perception of fairness in the military justice system.'"¹⁶⁵

3. *United States v. Commisso*¹⁶⁶

In *Commisso*, the CAAF reversed another sexual assault conviction, this time for dishonest answers given by panel members during voir dire.¹⁶⁷ While not directly implicating UCI, the court invoked the legal doctrine of "implied bias" where a member can be challenged for cause and should not sit on the court-martial "in the interest of having the court-martial free from substantial doubt as to legality fairness, and impartiality."¹⁶⁸ While this case does not directly discuss UCI, the doctrine of implied bias is very similar to apparent UCI in its focus on appearance of fairness. This case contains many similar dynamics as those found in the other cases discussed in this article are also present. In this case, three of the ten panel members who heard *Commisso*'s case regularly sat on a monthly Sexual Assault Review Board (SARB), during which each pending sexual assault case was discussed, and during which a slide with the facts of each case as alleged by the complainant is shown.¹⁶⁹ Despite this fact, these three members answered in the negative to the following questions posed by the defense counsel: "Does anyone have any prior

161. *Id.* at 160-162.

162. *Id.* at 162.

163. *Id.* at 163.

164. *Id.* at 159 n.6.

165. *Id.* at 167 (internal citations omitted).

166. 76 M.J. 315 (C.A.A.F. 2017).

167. *Id.* at 317-318.

168. *Id.* at 321, 323 (citing R.C.M. 912(f)(1)(N)).

169. *Id.* at 317-18.

knowledge of the facts or events alleged in this case?"; "Has anyone heard about any of the facts of this case whatsoever?"; "Are you, a member of your family, or close friend a member of a group or charity that deals with issues of sexual assault [either] in [the] military or in general?" and "Have you ever been a unit victim advocate, a sexual assault response coordinator, or otherwise involved in [the] sexual assault response system?"¹⁷⁰ During the course of the trial, one of the panel members determined that he did have knowledge of the case from his prior involvement in the SARB.¹⁷¹ He discussed the matter with the other two panel members who also sat on the SARB, but did not disclose the matter to the military judge.¹⁷² The matter was not discovered until one of the panel members disclosed the fact after the trial had concluded.¹⁷³ During the post-trial hearing, one of the panel members testified that he was concerned about "aggressive" defense counsel questioning on voir dire and stated "sometimes when he is sitting on panels he wants to jump over the bar and punch the [defense attorney]."¹⁷⁴ After chastising the members in question¹⁷⁵ and the military judge¹⁷⁶ for failing to sufficiently develop the record during the post-trial hearing, the court reversed the conviction, stating that these facts "might have cast substantial doubt as to the legality, fairness and impartiality of Appellant's court-martial, . . . , and thus would have provided a valid basis for a challenge for cause."¹⁷⁷

4. *United States v. Barry*¹⁷⁸

Most recently, on September 5, 2018, the CAAF reversed another court-martial conviction for sexual assault and dismissed the case with prejudice due to unlawful command influence by the Navy's Deputy Judge Advocate General, the second highest ranking Navy JAG Corps officer (and who was subsequently promoted to Judge Advocate General).¹⁷⁹ Senior Chief Barry was convicted of sexual assault of his then-girlfriend based on her allegation of nonconsensual anal sex.¹⁸⁰

170. *Id.* at 319 (brackets in original).

171. *Id.*

172. *Id.* at 320.

173. *Id.* at 319.

174. *Id.*

175. *Id.* at 322–23.

176. *Id.* at 323–24.

177. *Id.* at 324 (internal quotations marks, brackets and citation omitted).

178. 78 M.J. 70 (C.A.A.F. 2018).

179. *Id.* at 75.

180. *Id.* at 73.

The allegations of UCI centered on the decision of the convening authority to approve the findings and sentence. As Congress has removed this authority from convening authorities subsequent to the Lieutenant Colonel Wilkerson case, the exercise of this particular authority is no longer an issue.¹⁸¹

Despite this fact, the contours of command influence from the highest levels became apparent yet again. The convening authority, Rear Admiral Patrick Lorge, spent over two and a half months closely reviewing the record of trial and harbored strong doubts about whether Senior Chief Barry was in fact guilty.¹⁸² Admiral Lorge was generally aware of the pressures on the Navy in regards to sexual assault and had met with the then-sitting Judge Advocate General (Admiral DeRenzi), who discussed the pressures she faced in her position with regard to sexual assault.¹⁸³ In addition, Admiral Lorge’s senior legal advisor “strongly, and on multiple occasions” advised Admiral Lorge to approve the findings and sentence, reminding him of “the political pressures on the system.”¹⁸⁴ Unsure of what to do, he sought the counsel of Rear Admiral James Crawford, with whom he had worked in a previous assignment and who was then serving as the Deputy Judge Advocate General.¹⁸⁵ Admiral Crawford told Admiral Lorge that he “had smart lawyers so he should let them figure it out.”¹⁸⁶ Admiral Crawford then said words to the effect of “not to put a target on [your] back,” implying that failing to approve the finding of guilty and the sentence would put a target on Admiral Lorge’s back.¹⁸⁷ Admiral Lorge ultimately approved the conviction and sentence, but included an “unusual” caveat in which he stated that “I have never reviewed a case that has given me greater pause” and urged the appellate courts to overturn the case (something that was then within Admiral Lorge’s power to accomplish when he wrote this caveat).¹⁸⁸

The CAAF unanimously ruled that Senior Chief Barry’s conviction should be overturned but disagreed as to the legal rationale. The majority opinion, in a 3-2 vote, ruled that Admiral Crawford’s action constituted UCI and served as a basis to dismiss with

181. See *supra* notes 77-97 and accompanying text.

182. *Barry*, 78 M.J. at 74.

183. *Id.* at 74–75. The court noted, however, that this meeting did not constitute UCI. *Id.*

184. *Id.* at 75.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 73.

prejudice.¹⁸⁹ While this case was unusual in that the perpetrator of UCI, Admiral Crawford, did not exercise the mantle of command authority, the court determined that anyone subject to the UCMJ could engage in UCI.¹⁹⁰ Specifically, based on these conversations, “[Admiral] Lorge believed harm would befall the Navy if he did not fall in line.”¹⁹¹ As a result, “[Admiral] Lorge would have taken different action in the case.”¹⁹² Noting that Admiral Lorge believed that the prosecution had failed to establish Senior Chief Barry’s guilt beyond a reasonable doubt, the court determined that dismissal with prejudice was the only remedy that “will provide meaningful relief.”¹⁹³

While the court was careful to note that any UCI on the part of Admiral Crawford was “unintentional,”¹⁹⁴ the prospective impact of this case is substantial. The case demonstrates that the political pressures of the military’s sexual assault situation has invaded the highest levels of the U.S. Navy’s JAG Corps. This suggests that the same political pressures to protect commander jurisdiction being felt by military leaders is also being felt by their attorneys. Previous reforms to the military justice system sought to inject attorneys into the process to serve as guardians of the system, to promote due process and minimize the potential of command abuses. Now, even the military attorneys are being influenced by these political pressures.

C. *Emerging Themes from Recent Cases:*

The number of reversals, implicating basic concerns about fundamental fairness and coming over a relatively small period of time, has to be concerning. Two additional themes seem to be emerging, neither of which are positive:

- (1) Some of the highest-ranking officials in the various services are being implicated for UCI. In the cases reviewed above, many of the top leaders in the various services, to include the

189. *Id.* at 72, 80. The dissent, on the other hand, believed that this erroneous action should be returned to the convening authority with a directive to disapprove the finding of guilty pursuant to Rule for Courts-Martial 1107(g). *Id.* at 72, 88–89 (Ryan, J., dissenting).

190. *Id.* at 76–77.

191. *Id.* at 78.

192. *Id.*

193. *Id.* at 79 & nn.9, 15.

194. *Id.* at 78. Despite this fact, the court noted that Admiral Crawford was not statutorily authorized to give legal advice to Admiral Lorge. *Id.* at 77 n.6.

top military lawyers, have been implicated in UCI. In the cases detailed above, the activities of the Secretary of the Air Force (*Boyce*), the Chief of Staff of the Air Force (*Boyce*), the Air Force Judge Advocate General (*Boyce*), the Navy Judge Advocate General (*Barry*), and the Navy Deputy Judge Advocate General (*Barry*) have been called into question or actually ruled to constitute UCI. In the General Sinclair court-martial noted earlier, Brigadier General Paul Wilson, a high ranking Army JAG general, was separately found to have committed UCI.¹⁹⁵ In the case of the Heritage Brief given by the former Commandant of the Marine Corps, claims of UCI required extensive litigation.¹⁹⁶

- (2) The CAAF appears to be increasingly frustrated by the failure of lower courts and military attorneys to police the system. This frustration led to strong language in *Riesbeck*, which is harshly critical of the two appellate decisions and the two trial-level military judges who heard that matter. The court dismissed the lower courts' reasoning as "pure sophistry" in a ruling that had to send shock waves among the trial judges and the military courts of appeal.¹⁹⁷ Similarly, CAAF was critical of the military judge conducting the post-trial hearing in *Commisso*. One particular deficiency that the court noted was the fact that the military judge did not ask the critical and seemingly obvious question of why the three panel members failed to notify the judge once they realized that they in fact had outside knowledge of the case (noting that panel members have a continuing obligation to inform the military judge before the close of trial if he or she realizes that the answers provided during voir dire were incorrect).¹⁹⁸ The CAAF called this failure to inquire an "egregious oversight" on the part of the military judge.¹⁹⁹ Given the answers that had been adduced to that point from one of the panel members, which were

195. Blinder & Opper, *supra* note 104.

196. Michael Doyle, *Tough Talk by Marine Commandant James Amos Complicates Sexual-Assault Cases*, McCLATCHY NEWSPAPERS (Sept. 13, 2012), <https://www.mcclatchydc.com/news/nation-world/national/national-security/article24736978.html>.

197. *Riesbeck*, 77 M.J. at 162.

198. *Commisso*, 76 M.J. at 323–24.

199. *Id.* at 324.

strongly critical of defense counsel generally, one might speculate that the military judge avoided the question in an attempt to salvage the court-martial conviction (instead of developing the facts fairly and impartially).

This second development could be especially troubling if it reflects a larger trend. Military judges were just recently afforded tenure by statute,²⁰⁰ which should afford a heightened level of independence. However, military judges, both trial and appellate, are senior military officers selected and certified by their respective Judge Advocate General.²⁰¹ As noted in the previous paragraph, senior military attorneys, including the Judge Advocates General of two military services, have been implicated in UCI. While judges' decisions are protected by the same UCI doctrines discussed in this article, these individuals face the same pressures. To be clear, there are no documented instances of any judge—trial or appellate—being affected by UCI in sexual assault cases. It appears in the *Riesbeck* and *Commisso* decisions that the CAAF is concerned that military judges also are being influenced by these considerations. The CAAF's harsh language perhaps recognizes these dangers and seeks to prevent it.

V. POSSIBILITIES FOR REFORM

The cases noted in this article suggest that the military has over-corrected in its endeavor to maintain commander jurisdiction. When a driver is skidding on icy or wet roads, the worst thing the driver can do is to turn the steering wheel in the opposite direction from which the driver is skidding—this will only make the skid worse and cause the driver to lose control. Instead, one “steers into the skid” in order to re-gain control and then, once control is re-gained, steer the vehicle in the proper direction. By engaging in a get-tough campaign in order to preserve commander jurisdiction, the military has similarly over-corrected and is threatening to skid out of control. If Congress determines that, based on these CAAF decisions, the military has gone too far in attempting to get tough on sexual assault, Congress may very well decide to remove commander jurisdiction—but for very different reasons than their original concerns.

200. See Military Justice Act of 2016, Pub. L. No. 114-328, § 5184, 130 Stat. 2000 (2016) (amending 10 U.S.C. § 826) (requiring that assignments for military judges “shall be for appropriate minimum periods”).

201. See 10 U.S.C. § 826(c) (2012) (requiring a military judge to be designated by the Judge Advocate General or his designee).

Because of the problems noted in this article, Congress and the military should work together to consider further reforms to excise the UCI that has begun to become evident. In its April 1950 article, *Can Military Trials Be Fair?*, the Stanford Law Review raised similar concerns about whether the newly-passed protections in the UCMJ could stem command influence, but at the same time recognized that removal of jurisdiction was not advisable.²⁰² Instead, the article suggested two possible alternatives to limit command influence modeled on other countries' military justice systems at that time.²⁰³ This juncture may be an appropriate time to consider these proposed reforms. The two proposals offered by the Stanford Law Review article, along with a long-standing proposal for reforming the panel member selection process, offer three possibilities to address these concerns and improve fairness short of the drastic remedy of removing commander jurisdiction altogether.

A. *Remove Convening Authority Selection of Panel Members*

This proposed reform has been debated since the adoption of the UCMJ and many proponents argued for its inclusion into the UCMJ.²⁰⁴ Indeed, the proposition that the Commanding General who refers a case to court-martial for prosecution also personally selects the members from among her subordinates who will decide upon guilt and adjudge a sentence is unsettling at first glance. As was argued during the debates leading up to the adoption of the UCMJ, this is akin to having a criminal jury selected by the sheriff's office or district attorney.²⁰⁵

This debate goes to the heart of what it means for commanders to be able to use the military justice system to effectuate discipline and, thereby, an effective fighting force. Proponents of reform argue that this practice creates too great a risk of command influence and, at a minimum, creates the appearance of impropriety.²⁰⁶ In fact, the Canadian and British systems have abandoned this practice after courts ruled that the practice violated fundamental human rights

202. *Can Military Trials Be Fair?*, *supra* note 57, at 552–53.

203. *Id.*

204. *See generally* Behan, *supra* note 54.

205. GENEROUS, *supra* note 28, at 45–46.

206. *Id.*

requirements for fair trials.²⁰⁷ On the other hand, defenders of convening authority selection of panel members argue that this practice is operationally necessary in order to maintain discipline in a deployed environment and the practice is central to the principle of the commander's responsibility to maintain discipline.²⁰⁸ In light of renewed concerns about unlawful command influence in sexual assault trials, it may be time to reconsider this practice.

Consider a recent court-martial that took place at West Point Military Academy, where the author is currently assigned. After a trial that ran from May 1–4, 2017, Cadet Jacob Whisenhut was convicted of raping a fellow cadet while at field training.²⁰⁹ Cadet Whisenhut's attorney maintained that the sexual activity in question was consensual, while the victim testified that she froze when she awoke to find the defendant in her sleeping bag.²¹⁰ During sentencing argument in open court, the prosecutor asked that the panel sentence Cadet Whisenhut to fifteen years' confinement and a dismissal.²¹¹ The military panel exceeded the prosecutor's request and sentenced him to twenty-one years' confinement and a dismissal.²¹² At the very same time that the trial was ongoing, the convening authority who personally selected the panel members from within his command to hear Cadet Whisenhut's case, Lieutenant General Robert Caslen Jr., testified in front of Congress along with the other service academy superintendents regarding their efforts to eliminate sexual assault and

207. See *R. v. Généreux*, [1992] 1 S.C.R. 259, 314 (Can.) (invalidating the practice as violative of the Canadian Charter of Rights and Freedoms); *Findlay v. United Kingdom*, 24 Eur. H.R. Rep. 221 (1997) (invalidating the practice under the European Convention on Human Rights and Fundamental Freedoms).

208. Behan, *supra* note 54, at 289–98.

209. Associated Press, *West Point Cadet Found Guilty of Sexual Assault of Classmate*, NEW YORK UPSTATE (May 5, 2017), <https://www.newyorkupstate.com/hudson-valley/2017/05/west-point-cadet-found-guilty-of-sexual-assault-of-classmate.html>.

210. Michael Randall, *West Point Cadet's Court-Martial Trial Starts*, TIMES HERALD-RECORD (May 1, 2017), <http://www.recordonline.com/news/20170501/west-point-cadets-court-martial-trial-starts?start=2>.

211. This information based on author's personal interview of prosecutor in the case. While courts-martial are open to the public, the author was not present at the trial.

212. Associated Press, *supra* note 209.

harassment at the military academies.²¹³ During his remarks, General Caslen testified to Congress that one of his top priorities was the elimination of sexual assault.²¹⁴ He then proceeded to provide detailed information on his efforts to do so.²¹⁵

Two years later, the Army Court of Criminal Appeals reversed Whisenhut’s conviction and dismissed the charges on a finding of factual insufficiency.²¹⁶ The court reversed pursuant to Article 66 of the UCMJ, which essentially grants the court *de novo* review of court-martial convictions, a much broader standard than that found in civilian appellate courts: “The Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.”²¹⁷ The court concluded that it was not convinced beyond a reasonable doubt in this case.²¹⁸ Given this sequence of events and the subsequent reversal by the Army Court of Criminal Appeals, a reasonable observer cannot help but to suspect that General Caslen’s testimony influenced the deliberations of the panel members in Whisenhut’s case.

Much has been written on the issue of convening authority selection of panel members over the past 100 years.²¹⁹ This article will not address the substantive arguments on both sides. It should be enough to note this additional dynamic of command emphasis on

213. *On Sexual Assault Prevention and Response Programs at the Military Services Academies: Hearing Before the Subcommittee on Military Personnel, H. Armed Services Comm.* 115th Cong. (2017), <http://docs.house.gov/meetings/AS/AS02/20170502/105900/HHRG-115-AS02-Wstate-CaslenR-20170502.pdf> (Statement of Lieutenant General Robert L. Caslen, Jr., USA Superintendent of the United State Military Academy).

214. Statement by Lieutenant General Robert L. Caslen, Jr., USA Superintendent of the United States Military Academy Before the House Armed Services Committee Subcommittee on Military Personnel, First Session, 115th Congress, On Sexual Assault Prevention and Response Programs at the Military Service Academies (May 2, 2017), <http://docs.house.gov/meetings/AS/AS02/20170502/105900/HHRG-115-AS02-Wstate-CaslenR-20170502.pdf>.

215. *Id.*

216. *United States v. Whisenhunt*, Army 20170275, 2019 WL 2368568, at *1 (Army Crim. App. Jun. 3, 2019) (*per curiam*).

217. 10 U.S.C. § 866(c) (2012) (current version at 10 U.S.C. § 866(d)(2) (2019)).

218. *Whisenhut*, 2019 WL 2368568, at *2.

219. For a comprehensive history of the convening authority selection of panel members and analysis of the arguments for and against this policy, see Behan, *supra*

note 54.

sexual assault and its effects on (1) the perception of fairness of trials, and (2) the actual bias of panel members who see themselves as executing their commander's initiatives to eliminate sexual assault instead of fairly adjudicating guilt and innocence, as was seen in *United States v. Schloff* and which was potentially implicated in *United States v. Whisenhut*. At a minimum, the current environment has shifted to the degree that it might be necessary to re-examine whether a change is warranted.

B. Incorporate Civilian Judges into Courts-Martial

The Stanford Law Review suggested this model in 1950 as a possible means of further addressing command influence, in a nod to the British practice.²²⁰ Under this model, a civilian "Judge Martial" presided over all general courts-martial, appointed by a civilian "Chief Judge Martial."²²¹ This model was criticized because it still allowed for panel-members personally selected by the commander acting as the convening authority, and command influence was still possible.²²²

This 1950 proposal has been overtaken somewhat by subsequent reforms to the law member process in 1968. At that time, Congress amended the UCMJ to create the office of military judge, with powers akin to civilian judges.²²³ Military judges are now answerable only to their judicial chain of command to their respective Judge Advocate General.²²⁴ As discussed earlier in the article, more recently the UCMJ was amended in 2016 to give military judges tenure of protected terms of office.²²⁵ While some of the cases discussed in this article implicated some of the services' Judge Advocates General for UCI, and CAAF has expressed frustration with the military trial and appellate judiciary, movement to such a system would be premature. In addition, implementation of such a system would require civilian judges to be able to serve in a combat zone to hear cases, as operational requirements will likely require this option.²²⁶

220. *Can Military Trials Be Fair?*, *supra* note 57, at 554.

221. *Id.*

222. *Id.* at 555.

223. GENEROUS, *supra* note 28, at 198.

224. See 10 U.S.C. § 826(c) (2012) (requiring a military judge to be designated by the Judge Advocate General or his designee).

225. See *supra* note 200 and accompanying text.

226. See Lieutenant Colonel Mark Visger, *Civilian Court-Martial Jurisdiction and United States v. Ali: A Re-Examination of the Historical Practice*, 46 TEXAS TECH L. REV. 1111, 1129–1134 (2014) (detailing the need to hold courts-martial in combat environments).

C. Create Three-Judge Panels to Try Cases

This proposal was also made by Stanford Law Review in 1950, which noted that almost every other country, save Britain and the United States, follow this practice.²²⁷ Under such a model, a three-judge panel would hear a general court-martial case against an accused and decide upon guilt and sentence in lieu of a jury-type military panel.²²⁸ Such a model is very similar to the civil law-style inquisitorial system, in contrast to the adversarial model that is the feature of the American system. Under such a system, convening authorities would still refer cases, but would not be required to select panel members and the absence of members would remove opportunities for command influence. This model has the possibility of removing almost all opportunity for command influence, assuming again that the three-judge panels themselves were not subject to command influence. However, such a model is foreign to the American common-law jury system and is unlikely to gain traction.

VI. CONCLUSION

As stated in the introduction, the appellate decisions profiled in this article appear to be the dead canary in the mineshaft, indicating that unlawful command influence is threatening the integrity of the military justice system. The political campaign to remove commander jurisdiction due to the military's handling of sexual assault cases seems to have died down more recently, and the cases discussed in this article may be relics of the political controversy that existed in 2013-2014. That said, continued scrutiny by CAAF is likely; and continued appellate reversals of sexual assault convictions might reignite the move to remove jurisdiction if it is perceived that the military cannot adhere to norms of fundamental fairness in trying these cases. In addition, the political response to the recent *Whisenhut* decision may result in actions which raise additional fairness concerns. In particular, withdrawal of the broad Article 66 review authority from military appellate courts as a result of the *Whisenhut* decision would remove another check on UCI.

There are multiple considerations at play in addressing the problem of sexual assault in the military—constitutional, military, political and societal, to name a few. While there are concerns about

227. *Can Military Trials Be Fair?*, *supra* note 57, at 555.

228. *Id.* at 556.

due process rights of those accused of sexual assault, the issues raised in this article should be equally concerning for victims whose cases get sidetracked by legal battles associated with UCI and which are reversed on appeal due to these legal issues. The cases cited in this article involve three such victims who will now have to undergo the rigors of a second trial due to reversals on appeal and two who will receive no recourse due to the charges against their assailants being dismissed with prejudice.

All involved in military justice should be concerned whether these trends indicate a larger problem. Both Congress and senior commanders should be cognizant of unintended messages that their actions send and the potential of their actions to undermine the appearance of fairness of the court-martial system. At a minimum, these cases should remind those involved with the military justice system of the continued need for vigilance and professionalism in order to maintain the viability of the military justice system.

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