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*Buffalo Law Review*

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## **The Betrayal of the Red, White & Blue: The Failures of Institutional Self-Regulation & The Military's #MeToo Movement**

KRISTEN M. STONE†

*We have relied on the chain of command to deal with this issue, and the chain of command has failed for decades. America gives us their sons and daughters, and we've failed to discharge the responsibility to take care of them.*

— Major General Dennis Laich  
United States Army (Retired)<sup>1</sup>

### INTRODUCTION

On April 22, 2020, Specialist Vanessa Guillén disappeared.<sup>2</sup> The next day, Vanessa's captain reported her

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1. Liz Halloran, *Stunned by Military Sex Scandals, Advocates Demand Changes* (May 26, 2013), <https://will.illinois.edu/news/story/stunned-by-military-sex-scandals-advocates-demand-changes>.

2. Johnny Diaz et al., *What to Know About the Death of Vanessa Guillen*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/article/vanessa-guillen-fort-hood.html>. Vanessa Guillén was posthumously advanced from Private First

missing to the United States Army Criminal Investigation Command, and a search ensued.<sup>3</sup> Weeks passed with no news from the military—not even to the family who desperately sought any inkling of information.<sup>4</sup> The family was not only worried because Vanessa had disappeared, but also because weeks prior she had disclosed that she did not feel safe on the base. Vanessa was being sexually harassed by her superior officer.<sup>5</sup>

Vanessa confided in a small group of individuals including her mother, other family members and friends, and even a few fellow soldiers.<sup>6</sup> Vanessa's mother asked for the soldier's name, but Vanessa did not want anyone getting involved. Vanessa never reported an incident to the Army's Sexual Harassment/Assault Response and Prevention Program (SHARP).<sup>7</sup> She told her mother that she wished to

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Class to the rank of Specialist on July 1, 2020. Carolina Sanchez, *Timeline: From Vanessa Guillen's Disappearance to Fort Hood Review Findings*, FOX 26 HOUS. (Dec. 8, 2020), <https://www.fox26houston.com/news/timeline-from-vanessa-guillens-disappearance-to-fort-hood-review-findings>.

3. Christina Carrega & Luis Martinez, *Timeline: What to Know About Missing Fort Hood Soldier Vanessa Guillen*, ABC NEWS (July 14, 2020, 4:31 PM), <https://abcnews.go.com/US/timeline-missing-fort-hood-soldier-vanessa-guillen/story?id=71597714>.

4. Andrea Cavallier, *Attorney for Family of Missing Soldier Vanessa Guillen Calls on Congress to Launch Investigation Against Fort Hood*, NBC NEWS (June 27, 2020, 6:25 PM), <https://www.nbcnews.com/dateline/attorney-family-missing-soldier-vanessa-guillen-calls-congress-launch-investigation-n1232347>.

5. Suspect, Aaron David Robinson, was a Specialist in the Army, Vanessa's superior at the time. Diaz et al., *supra* note 2; Cavallier, *supra* note 4.

6. Sydney Isenberg, *#IAmVanessaGuillen: Fort Hood Soldier's Story of Sexual Harassment Shines Light on Rampant Problem in the Military*, 25 ABC, <https://www.kxxv.com/hometown/bell-county/iamvanessaguillen-fort-hood-soldiers-story-of-sexual-harassment-shines-light-on-rampant-problem-in-the-military> (July 6, 2020, 5:21 PM).

7. Tim Stelloh & Andrea Cavallier, *Military Investigating Allegations that Missing Fort Hood Soldier Was Sexually Harassed*, NBC NEWS (June 18, 2020, 6:41 PM), <https://www.nbcnews.com/news/latino/military-investigating-allegations-missing-fort-hood-soldier-was-sexually-harassed-n1231496>; Leah Egan, *Vanessa Guillen: Soldier's Mom Says a Sergeant Sexually Harassed Daughter Before She Vanished, Calls for FBI to Take Over Case*, CRIME ONLINE (June 9, 2020), <https://www.crimeonline.com/2020/06/09/vanessa-guillen-soldiers-mom-says-a-sergeant-sexually-harassed-daughter-before-she-vanished-calls-for-fbi-to>

handle the situation herself, and a few weeks later she was gone.<sup>8</sup> Sixty-eight days after Vanessa's captain reported her missing, human remains were found near the Leon River in Bell County, Texas.<sup>9</sup> Shortly after, it was confirmed that the remains belonged to Vanessa.<sup>10</sup> Vanessa had not left the base alive. A fellow soldier murdered Vanessa after summoning her via text to his workplace on the base.<sup>11</sup> The perpetrator murdered Vanessa and transported her body to the spot where her remains were found.<sup>12</sup>

Vanessa Guillén's tragic story spawned a movement, one that would shine a new light on the decades long cycle of sexual violence in the military, and the institutional and legislative failures that allowed it to endure.<sup>13</sup> From social media accounts on Instagram, Twitter, and Facebook dedicated to the search for Vanessa, the #iamvanessaguillen hashtag was born.<sup>14</sup> The Guillén family encouraged other members of the military to use the hashtag to share their stories, and they did.<sup>15</sup> Today, the #iamvanessaguillen Facebook page has amassed over 39,000 posts,<sup>16</sup> becoming the center of the military's "#MeToo Movement."<sup>17</sup> Victims

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-take-over-case-exclusive/.

8. Egan, *supra* note 7.

9. Diaz et al., *supra* note 2.

10. *Id.*

11. *Id.*

12. Carrega & Martinez, *supra* note 3.

13. *See infra* Parts I, II.B.

14. Isenberg, *supra* note 6; Carrega & Martinez, *supra* note 3.

15. Isenberg, *supra* note 6.

16. #iamvanessaguillen, FACEBOOK <https://www.facebook.com/hashtag/iamvanessaguillen> (last visited May 28, 2022).

17. Wyatt Grantham-Phillips, *Fort Hood Soldier's Death Sparks Online Outcry: 'The Military Hasn't Had Their #MeToo Movement Yet,'* USA TODAY (July 6, 2020, 6:52 PM), <https://www.usatoday.com/story/news/nation/2020/07/06/vanessa-guillens-death-spotlights-sexual-assault-harassment-military/5383313002/>; Press Release, Rep. Jackie Speier, Rep. Speier Chairs Hearing on the Military's #MeToo Moment, Sparked by SPC Vanessa Guillén (July 29, 2020), [https://speier.house.gov/press-releases?ContentRecord\\_id=873CA87E-2B74-4A0](https://speier.house.gov/press-releases?ContentRecord_id=873CA87E-2B74-4A0)

detail instances of harassment, stalking, and assault, as well as further taunting and acts of aggression from fellow service members when they dared to file a report.<sup>18</sup> Others discuss their careers in the military being destroyed due to retaliatory reprimands,<sup>19</sup> and their psychological well-being shattered. All the while their abusers only ever lost one rank or were shuffled into different units, their military careers left wholly intact.<sup>20</sup>

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C-965B-ACA9974F912B; Georgia Turner, Post to #iamvanessaguillen, FACEBOOK (June 24, 2020), <https://www.facebook.com/hashtag/iamvanessaguillen> (“I was sexually assaulted in my rack while I was pregnant. When I reported it, they told me I was a liar. So I posted my story on the command page here and tagged my Capt. NCIS called me in ten minutes. The guy eventually confessed and got ONLY 2 years in the brig and now lives a happy life out in San Diego California. I was ridiculed by leadership. I was ostracized by shipmates. I was victim shamed, and lastly... nothing was done about any of it. . . . It’s always politics over people.”); Emily Marie, Post to #iamvanessaguillen, FACEBOOK (June 24, 2020), <https://www.facebook.com/hashtag/iamvanessaguillen> (“The military sucks for women. It doesn’t matter if you’re a PFC or an officer, a sergeant or a gunny. Changes are you WILL be harassed, you WILL be assaulted, and most likely our command won’t really care. They’ll sweep it under the rug, they’ll make you face your assailant every day as if nothing was wrong. . . .”); Alyssa Carrasco, Post to #iamvanessaguillen, FACEBOOK (July 8, 2020), <https://www.facebook.com/hashtag/iamvanessaguillen> (“[W]ithin a week after taking this picture I would be sexually assaulted by a man who was in charge of the barracks. Little did I know that the Navy would fail me the way they had. It wasn’t just word of mouth it was caught on camera. It was brought in front of the NCIS. It still got brushed under the rug. I was told he had more rights than I did. . . . And yes he still works there. Actually got a promotion before I was discharged. . . . The military fails women daily. When this picture was taken I was convinced I would retire from the Navy. [A] month after it was taken I was begging to get out.”).

18. Sandra Huff, Post to #iamvanessaguillen, FACEBOOK (July 1, 2020), <https://www.facebook.com/hashtag/iamvanessaguillen> (“Myself and almost every single woman I’ve ever served with have stories about harassment, stalking, or assault.”); Trista Vlcek, Post to #iamvanessaguillen, FACEBOOK (July 3, 2020), <https://www.facebook.com/hashtag/iamvanessaguillen> (“While at school, one of the men, in my class, from the hotel asked if I had a fun weekend. Another one told me not to say a word. That’s when I finally realized what happened to me.”).

19. Vlcek, *supra* note 18 (“The next few weeks were unbelievable. The unit sent me to the psych ward, my lawyer told me there was a huge lack of evidence, and the commander gave me an LOR [(Letter of Reprimand)] for attending a party, with alcohol, as a minor. I had to march and report to the commander in the same formation as my abusers.”).

20. Huff, *supra* note 18 (“My career was essentially over. I stopped caring. My only focus was getting out honorably for my family. I’m out now. Medically,

The outpouring of heart-wrenching stories from both women and men, pushed House and Senate members to create a bill in honor of Vanessa. Two hundred and seven co-sponsors signed on to the current version of the bill, and one hundred and eighty-seven signed on to its predecessor. Even with significant support, both versions ended up where almost all legislation intent on altering the military's approach to sexual violence go—the House and Senate Committee on Armed Services—where they currently sit with no vote in sight.<sup>21</sup> The most recent bill, if passed, would have essentially overhauled the military's prosecutorial, adjudicatory, investigatory, and statutory approach to sex-related offenses. This “overhauling” approach made the road to passage and implementation a difficult one.<sup>22</sup> While bills which appear to completely rework a system may seem like the correct path to successful reform, often times, these expansive pieces of legislation try to do too much and too little all at the same time.

Although the I Am Vanessa Guillén Act currently sits in committee with its future uncertain, positive reform is taking place. In December 2021, President Joe Biden signed into law the National Defense Authorization Act for Fiscal

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because my mental health never recovered. 4 years later and he is still in the Marine Corps, with his rank, leading Marines.”).

21. The first iteration of the I Am Vanessa Guillén Act was introduced on September 16, 2020; and the second version was introduced on May 13, 2021. I Am Vanessa Guillén Act of 2021, S. 1611, 117th Cong.; I Am Vanessa Guillén Act of 2021, H.R. 3224, 117th Cong.; I Am Vanessa Guillén Act of 2020, H.R. 8270, 116th Cong.; *see also* ‘I Am Vanessa Guillen Act of 2020’ Introduced in the U.S. House, TX. PUB. RADIO (Sept. 16, 2020, 3:33 PM), <https://www.tpr.org/news/2020-09-16/i-am-vanessa-guillen-act-of-2020-introduced-in-the-u-s-house>; *H.R. 8270 (116th): I Am Vanessa Guillen Act of 2020*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr8270> (last visited May 28, 2022) (stating that the bill died after being introduced on September 16, 2020, in a previous Congress, but did not receive a vote); David C. Adams, *Congress to Let Military Reform Bill #IAMVanessaGuillen Die Without A Vote*, UNIVISION (Dec. 13, 2020, 12:06 PM), <https://www.univision.com/univision-news/united-states/congress-lets-iamvanesaguillen-military-reform-bill-die>.

22. *Cf. The Legislative Process*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/the-house-explained/the-legislative-process>.

Year 2022 (2022 NDAA).<sup>23</sup> Within the 2022 NDAA, provisions exist which closely mirror the most significant aspects of the I Am Vanessa Guillén Act.<sup>24</sup> The 2022 NDAA provisions create a prosecutorial office outside the chain of command, a standalone offense for sexual harassment, and an independent investigatory process for allegations of sexual harassment.<sup>25</sup> Although intent on fixing a system of self-regulation that has failed on a massive scale, the provisions within the 2022 NDAA will likely fall short of producing any substantial change within the military itself. This Comment is the first to examine the 2022 NDAA's approach to sex-related offenses in the armed forces and lays out how its provisions take a positive step forward, but one which is altogether too limited.

This Comment will proceed in three parts. Part I provides history on the military's sexual offense crisis and introduces the changes instituted by the 2022 NDAA provisions. Part II explores the good, the bad, and the ugly of the military's approach to sex-related offenses, and why while the 2022 NDAA's fractured approach was prudent, it

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23. See National Defense Authorization Act for Fiscal Year 2022 §§ 531, 539D, 543, Pub. L. No. 117-81, 135 Stat. 1541, 1692-94, 1699-1700, 1709-10 (2021) [hereinafter 2022 NDAA] (codified at 10 U.S.C. §§ 824a, 934 note, 1561).

24. Provisions within the 2022 NDAA create an Office for the Special Trial Counsel which echoes the Office of the Chief Prosecutor outlined in the I Am Vanessa Guillén Act. Compare 2022 NDAA, § 531, 135 Stat. at 1692-94 (codified at 10 U.S.C. § 824a), with H.R. 3224, 117th Cong., § 2(a) (2021); S. 1611, 117th Cong., § 2(a) (2021); H.R. 8270, 116th Cong., § 2(a) (2020); and S. 4600, 116th Cong., § 2(a) (2020). The 2022 NDAA also establishes a standalone offense for sexual harassment which was also written into the I Am Vanessa Guillén Act. Compare 2022 NDAA, § 539D, 135 Stat. at 1699-1700 (codified at 10 U.S.C. § 934 note), with H.R. 3224, 117th Cong., § 3(a) (2021); S. 1611, 117th Cong., § 3(a) (2021); H.R. 8270, 116th Cong., § 3(a) (2020); and S. 4600, 116th Cong., § 3(a) (2020). Lastly, the 2022 NDAA requires an "independent" investigation be undertaken for any formal complaints of sexual harassment which was also a required provision within the I Am Vanessa Guillén Act. Compare 2022 NDAA, § 543(a), 135 Stat. at 1709-10 (codified at 10 U.S.C. § 1561), with H.R. 8270, 116th Cong., § 3(b); S. 4600, 116th Cong., § 3(b); H.R. 3224, 117th Cong., § 3(b) (2021); and S. 1611, 117th Cong., § 3(b) (2021).

25. 2022 NDAA, §§ 531, 539D, 543, 135 Stat. at 1692-94, 1699-1700.

will still ultimately fail to produce any substantive reform. Finally, Part III explores a possible remedy which could be utilized to aid in truly transforming the military's approach to sex-related offenses.

#### I. A BROKEN SYSTEM: THE PAST, PRESENT, AND FUTURE OF MILITARY SEXUAL OFFENSES

Over the last four decades the military's sexual violence crisis has continued to increase at a rapid pace. The policies and procedures currently in place have failed to remedy the problem. And no changes have been instituted in an attempt to either lower the instances of sexual violence or increase victim reporting and overall case disposition. This Part explores the military's current approach to sex-related offenses and the harm it causes, as well as the 2022 NDAA's attempts to rectify the military's failed judicial system.

##### A. *The Military's Sexual Violence Crisis*

Vanessa Guillén's story is one of hundreds of thousands. Over the last thirty years, numerous scandals and tragedies have cropped up across each military branch. While temporarily shining a light on the military's failure to address its sexual violence problem, the light eventually fizzles out, and in the end, no meaningful change is made. Each scandal shares a similar pattern: the military acknowledges the problem and proceeds to make insignificant personnel changes in order to assuage concerns.

Throughout the 1990s numerous abuse scandals began to pop up across multiple military branches.<sup>26</sup> At one facility dozens of woman filed complaints of sexual advances ranging from unwanted touching to forcible sodomy.<sup>27</sup> Those

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26. See *THE INVISIBLE WAR* (Chain Camera Pictures 2012); Jackie Spinner, *In Wake of Sex Scandal, Caution Is the Rule at Aberdeen*, WASH. POST., Nov. 7, 1997, at B1, <https://www.washingtonpost.com/wp-srv/local/longterm/library/aberdeen/caution.htm>.

27. See *THE INVISIBLE WAR* (Chain Camera Pictures 2012).



disclosures resulted in thousands of abuse complaints from service members across the country pouring into a special Army hotline.<sup>28</sup> At the Air Force Academy, between 1993–2003, women made over one hundred official allegations of assaults and men made three.<sup>29</sup> High ranking Air Force generals knew of the assaults yet failed to take action, spending more effort on victim-blaming than remediation.<sup>30</sup> While these disturbing instances of sexual misconduct resulted in top commanders being “reassigned” or forced to retire, and some of the perpetrators being sent to prison, no major or minor overhaul was ever taken by any of the military branches or Congress.<sup>31</sup>

One of the most infamous military sexual scandals took place at the 35th annual Tailhook Symposium. The annual convention began as a reunion of naval aviators in Tijuana, Mexico, in 1956.<sup>32</sup> The symposium moved to Las Vegas in 1963 and expanded to include a number of professional development activities with substantial naval support.<sup>33</sup> While some may regard the symposium as a harmless

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28. *See id.*; Spinner, *supra* note 26.

29. THE INVISIBLE WAR (Chain Camera Pictures 2012); Clara Bingham, *Code of Dishonor*, VANITY FAIR (Nov. 6, 2006), <https://www.vanityfair.com/news/2003/12/airforce200312>.

30. THE INVISIBLE WAR (Chain Camera Pictures 2012); Bingham, *supra* note 29.

31. Though changes were made to the Academy’s internal structure and old policies were newly reinforced, no overarching policies or procedures changed within the armed forces. *See* THE INVISIBLE WAR (Chain Camera Pictures 2012); Bingham, *supra* note 29; Spinner, *supra* note 26.

32. DEP’T OF DEF., OFF. OF INSPECTOR GEN., TAILHOOK 91 – PART 1, REVIEW OF THE NAVY INVESTIGATIONS 1 (1992) [hereinafter TAILHOOK 91 REPORT PART 1], <https://ncisahistory.org/wp-content/uploads/2017/07/DoDIG-Report-of-Investigation-Tailhook-91-Review-of-the-Navy-Investigations.pdf>.

33. The majority of the planning for the convention’s official functions was generally conducted by the office of the Assistant Chief of Naval Operations. The Navy provided free office space to the organization at Naval Air Station, Miramar, in California, and used the Navy’s extensive fleet of passenger aircrafts to transport attendees to Las Vegas. In 1991 alone, the Navy used some twenty-seven C-9 flights to transport approximately 1,600 people to the convention. TAILHOOK 91 REPORT PART 1, *supra* note 32, at 1–2.

military tradition, in fact, it was a hunting ground for predators. The annual Tailhook convention was well known throughout the naval aviation community for its wild partying, heaving drinking, and lewd behavior.<sup>34</sup> After the 1985 convention, Vice Admiral Edward H. Martin and a squadron commander then serving on the Tailhook Board of Directors reached out with significant concerns as to the conduct of the convention's attendees.<sup>35</sup> However, even after voicing such concerns, the activities and behaviors of the participants would continue over the next several years.

The years of misconduct at the Tailhook Convention finally came to a head at its 35th anniversary in 1991. On the third day of the symposium, at approximately 11:30 PM, Paula Coughlin, aide to Rear Admiral John W. Snyder, arrived alone to the third-floor hallway of the Hilton Hotel.<sup>36</sup> As she approached the hallway, she found it to be lined by men on both sides.<sup>37</sup> As she attempted to walk up the hallway, she was grabbed both on her buttocks and her breasts.<sup>38</sup> When she yelled at the men asking them what they were doing, they did not respond and continued to grope

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34. *Id.*; 140 CONG. REC. 1908 (1994) (statement of Rep. Schroeder on Respect for Men and Women in Uniform).

35. Describing the event as “a rambunctious drunken melee,” Vice Admiral Martin’s concerns were for the Navy’s reputation stating, “We can ill afford this type of behavior and indeed must not tolerate it. The Navy, not the individual, his organization or the Tailhook Association, is charged with the events and certainly will be cast in disreputable light.” TAILHOOK 91 REPORT PART 1, *supra* note 32, at 2–3; Associated Press, *Tailhook Member Warned of ‘Rowdiness’ 7 Years Ago*, DESERET NEWS (Oct. 10, 1992, 2:00 AM), <https://www.deseret.com/1992/10/10/19009662/tailhook-member-warned-of-rowdiness-7-years-ago>; *see also* Brenda Camp Gordon Orbell, *Discourse, Power, and Social Rupture: An Analysis of Tailhook 91* (Dec. 1997) (Ph.D. dissertation, Texas Tech University) (ProQuest).

36. DEP’T OF DEF., OFF. OF INSPECTOR GEN., TAILHOOK 91 – PART 2, EVENTS AT THE 35TH ANNUAL TAILHOOK SYMPOSIUM, at VI-12 (1993) [hereinafter TAILHOOK 91 REPORT PART 2], <https://apps.dtic.mil/sti/pdfs/ADA269008.pdf>; TAILHOOK 91 REPORT PART 1, *supra* note 32, at 3–4.

37. TAILHOOK 91 REPORT PART 2, *supra* note 36, at VI-12, F-26.

38. *Id.* at F-26–27.

her.<sup>39</sup> When Ms. Coughlin was finally able to break free, she ran into an open door that led to an administrative suite.<sup>40</sup> Ms. Coughlin was one of eighty-three women and seven men assaulted over the four-day convention.<sup>41</sup>

Ms. Coughlin first reported the assault on the morning of September 8th, to the commander to whom she was an aide.<sup>42</sup> At that time he suggested, “[t]hat’s what you get for going down a hallway of a bunch of drunken aviators.”<sup>43</sup> On September 29th, Ms. Coughlin sent a letter to the Assistant Chief of Naval Operations.<sup>44</sup> His superior, Admiral Jerome Johnson, read the letter and immediately ordered a criminal investigation.<sup>45</sup> The Navy’s investigation only identified a handful of the assaulting officers.<sup>46</sup> The Pentagon proceeded to conduct its own investigation.<sup>47</sup> The Pentagon report found a total of 117 officers engaged “in one or more incidents of indecent assault, indecent exposure, conduct unbecoming

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39. *Id.*

40. Ms. Coughlin later said, “I was appalled not only by the brutality of the incident, but the fact that the group did that to me knowing I was both a fellow officer and an admiral’s aide” *Id.* at F-27. A Federal Government civilian employee had witnessed Ms. Coughlin enter the hallway and stated “[a]s she advanced through the area, the gauntlet collapsed around her . . . . There were approximately 100 men in the hallway at the time . . . .” *Id.*; *see also* Coughlin v. Tailhook Ass’n, 112 F.3d 1052, 1054–55 (9th Cir. 1997).

41. *See* TAILHOOK 91 REPORT PART 2, *supra* note 36, at I-1, app. F.

42. *See* Joslyn Ogden, *Tailhook ‘91 and the U.S. Navy*, KENAN INST. FOR ETHICS 7–8, [https://kenan.ethics.duke.edu/wp-content/uploads/2018/01/TailhookUSNavy\\_Case2015.pdf](https://kenan.ethics.duke.edu/wp-content/uploads/2018/01/TailhookUSNavy_Case2015.pdf) (last visited May 28, 2022).

43. Kenneth B. Noble, *Tailhook Whistle-Blower Recalls Attack*, N.Y. TIMES, Oct. 4, 1994, at A12, <https://www.nytimes.com/1994/10/04/us/tailhook-whistle-blower-recalls-attack.html>.

44. TAILHOOK 91 REPORT PART 1, *supra* note 32, at 4; Ogden, *supra* note 43, at 8–9.

45. *See* TAILHOOK 91 REPORT PART 1, *supra* note 32, at 4.

46. John Lancaster, *Tailhook Probe Implicates 140 Officers: Pentagon Report Calls 90 Assaults at Navy Convention a ‘Failure of Leadership,’* WASH. POST, Apr. 24, 1993, at A1, <https://www.washingtonpost.com/archive/politics/1993/04/24/tailhook-probe-implicates-140-officers/e004554a-0440-4371-b8a9-a2ecaad05785/>.

47. *Id.*

an officer or failure to act in a proper leadership capacity.”<sup>48</sup> The probe also identified fifty-one participants who allegedly lied to investigators.<sup>49</sup>

In the end two admirals stepped down, and three others received censures, yet most of the 1991 Tailhook Convention cases were dropped, exonerated, received nonpunitive letters or counseling, or received a fine of \$500–2,000 and a letter of reprimand.<sup>50</sup> None of the perpetrators involved in the “gauntlet” received any form of severe punishment.<sup>51</sup> No overarching or broad military policies changed even though the years of misconduct at the Tailhook Convention was well

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48. *Id.*

49. *Id.*

50. Out of the 140 implicated, 118 were in the Navy and 22 were in the Marines. Sixty-two of the Navy cases were dismissed for lack of evidence. Forty-two were sent to “admiral mast” which is a form of disciplinary hearing. Of the forty-two, two were exonerated, twelve received nonpunitive letters or counseling, and twenty-eight received fines between \$500–2,000 and a letter of reprimand. Five of the individuals from the Navy implicated rejected the offer of admiral mast, and after meeting with “fact-finding boards” all five were cleared of wrongdoing. Of the cases involving Marines, prosecutors dropped three cases, six were exonerated, eleven received fines and a letter of reprimand, and two were court martialed. WILLIAM H. MCMICHAEL, *THE MOTHER OF ALL HOOKS: THE STORY OF THE U.S. NAVY’S TAILHOOK SCANDAL* 102–26 (1997); *see also* Susanne M. Schafer, *Two Navy Admirals Removed in Tailhook Scandal*, ASSOCIATED PRESS (Sept. 24, 1992), <https://apnews.com/article/95ed506e8e19069c903940c26a3193ae>; Neil A. Lewis, *Tailhook Affair Brings Censure of 3 Admirals*, N.Y. TIMES, Oct. 16, 1993, at 1, <https://www.nytimes.com/1993/10/16/us/tailhook-affair-brings-censure-of-3-admirals.html>. Individuals implicated who were members of the Navy were sent to an “admiral mast,” a proceeding at which an admiral in the U.S. Navy hears and disposes of the case. *See Admiral’s Mast*, BLACK’S LAW DICTIONARY (11th ed. 2019). Those in the Marines were sent to a hearing referred to as “office hours.” Both of these are considered “non-judicial” forms of punishment. MCMICHAEL, *supra*, at 114–116. Both of these are considered “non-judicial” forms of punishment. MCMICHAEL, *supra*, at 111–18; *Nonjudicial Punishment: Service Culture Divides in Military Justice*, HG.ORG, <https://www.hg.org/legal-articles/nonjudicial-punishment-service-culture-divid-es-in-military-justice-20041> (last visited May 28, 2022).

51. *See* Robert L. Beck, *Tailhook Scandal Set Stage for Gender Equality Fight*, SAN DIEGO UNION-TRIBUNE (Sept. 1, 2016, 4:00 PM), <https://www.sandiegouniontribune.com/opinion/commentary/sdut-utbg-tailhook-navy-women-2016sep01-story.html>.

known to superior officers.<sup>52</sup> And though thousands of Naval jobs were cut and promotions delayed, Congress took no legislative action to solve the serious problems raised by the Tailhook scandal or any of the other serious incidents of military sexual misconduct.<sup>53</sup>

While these scandals confirm that a problem exists, they fail to highlight the breadth of the crisis. Since 2010, the Department of Defense (DoD) “estimates that roughly 135,000 active duty Service members (65,400 women and 69,600 men) have been sexually assaulted, and about 509,000 active duty Service members (223,000 women and

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52. TAILHOOK 91 REPORT PART 1, *supra* note 32, at 2–3; David Evans, *Probe of Wild Navy Party Halts Promotions*, CHI. TRIB. (June 10, 1992), <https://www.chicagotribune.com/news/ct-xpm-1992-06-10-9202210511-story.html>.

53. See Evans, *supra* note 52; see also Kingsley R. Browne, *Military Sex Scandals from Tailhook to the Present: The Cure Can be Worse than the Disease*, 14 DUKE J. GENDER L. & POL'Y 749, 758 (2007) (documenting Tailhook, its aftermath, and subsequent military sex scandals). The only legislation presented in response to the Tailhook Scandal that related to sexual misconduct was two concurrent resolutions introduced in Congress. Calling on the Secretary of Defense to Complete a Full Investigation into Alleged Sexual Harassment of Women at the Symposium of the Tailhook Association in September 1991, H.R. Con. Res. 344, 102d Cong. (1992); Expressing the Sense of the Congress Regarding the Elimination of Sexual Harassment and Sexual Assault in the Armed Forces, H.R. Con. Res. 359, 102d Cong. (1992). While concurrent resolutions must be passed in the same form by both houses, they do not require the signature of the president nor do they have the force of law. *Types of Legislation*, U.S. SENATE, [https://www.senate.gov/legislative/common/briefing/leg\\_laws\\_acts.htm](https://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm) (last visited May 28, 2022). Concurrent resolutions are often passed to set the time of Congress' adjournments, or to convey congratulations to another country on the anniversary of its independence. *Id.* In the case of the two concurrent resolutions introduced after the Tailhook Scandal, both were sent to the Subcommittee on Military Personnel and Compensation and were never brought up for a vote. Viewed through the “Committees” section on the legislation's page on Congress.gov the only action for both Concurrent Resolutions was their referral to the Subcommittee on Military Personnel and Compensation. Calling on the Secretary of Defense to Complete a Full Investigation into Alleged Sexual Harassment of Women at the Symposium of the Tailhook Association in September 1991, H.R. Con. Res. 344, 102d Cong. (1992), <https://www.congress.gov/bill/102nd-congress/house-concurrent-resolution/344/committees=310&s=1>; Expressing the Sense of the Congress Regarding the Elimination of Sexual Harassment and Sexual Assault in the Armed Forces, H.R. Con. Res. 359, 102d Cong. (1992), <https://www.congress.gov/bill/102nd-congress/house-concurrent-resolution/359/committees?r=5&s=1>.

286,000 men) have experienced sexual harassment.”<sup>54</sup> In 2018 alone, an estimated 20,500 service members experienced instances of sexual assault, which, compared to the 14,900 estimated in 2016, is a substantial increase.<sup>55</sup> Even though estimates of sexual assault and sexual harassment continue to rise, instances of sexual violence actually reported only make up a fraction of the total, and the number of reports leading to trial is constantly shrinking.<sup>56</sup>

The military’s approach to sexual offenses has led to a substantial increase in instances of sexual violence and a significant decrease in victim reporting. The armed forces’ inaction has led to intervention from non-military actors in the hopes of making a dent in these disturbing figures.

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54. LYNN ROSENTHAL ET AL., INDEP. REV. COMM’N ON SEXUAL ASSAULT IN THE MIL., *HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY* 11 (2021) [hereinafter *IRC REPORT*] (footnote omitted), <https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/irc-full-report-final-1923-7-1-21.pdf/irc-full-report-final-1923-7-1-21.pdf>.

55. DEP’T OF DEF., *SEXUAL ASSAULT PREVENTION AND RESPONSE*, DEP’T OF DEF. ANN. REP. ON SEXUAL ASSAULT IN MIL. 5 (2018) [hereinafter *2018 DOD ANNUAL REPORT*]; Press Release, Sen. Kristen Gillibrand, *After Recent Department of Defense Report Highlights Its Continued Failure to Address Crisis of Military Sexual Assault, Gillibrand Leads Bipartisan Group of Senators to Reintroduce Military Justice Improvement Act and Calls on Congress to Act* (June 13, 2019), <https://www.gillibrand.senate.gov/news/press/release/after-recent-department-of-defense-report-highlights-its-continued-failure-to-address-crisis-of-military-sexual-assault-gillibrand-leads-bipartisan-group-of-senators-to-reintroduce-military-justice-improvement-act-and-calls-on-congress-to-act>.

56. The only type of reports which lead to an investigation and possible case disposition are unrestricted reports. 2018 DOD ANNUAL REPORT, *supra* note 55, at app. B-5. There were 5,805 unrestricted reports in 2018, 5,699 in 2019, and 5,640 in 2020. DEP’T OF DEF., *SEXUAL ASSAULT PREVENTION AND RESPONSE*, DEP’T OF DEF. ANN. REP. ON SEXUAL ASSAULT IN MIL., at app. B-7 (2020) [hereinafter *2020 DOD ANNUAL REPORT*]; DEP’T OF DEF., *SEXUAL ASSAULT PREVENTION AND RESPONSE*, DEP’T OF DEF. ANN. REP. ON SEXUAL ASSAULT IN MIL., at app. B-7 (2019) [hereinafter *2019 DOD ANNUAL REPORT*]; 2018 DOD ANNUAL REPORT, *supra* note 55, at app. B-7. Of those unrestricted reports that were reported to court-martial in 2018 only 307 went to trial, in 2019 only 363, and in 2020 only 255. 2018 DOD ANNUAL REPORT, *supra* note 55, at app. B-22; 2019 DOD ANNUAL REPORT, *supra*, at app. B-22; 2020 DOD ANNUAL REPORT, *supra*, at app. B-23.

B. *Attempts at Reform: The 2022 National Defense Authorization Act*

The 2022 NDAA attempts to significantly impact how the military deals with sexual violence by limiting a commander's expansive authority. Unlike civilian communities, military commanders exercise discretion in deciding whether an offense should be charged and how the offender should be punished.<sup>57</sup> This broad authority can result in actions ranging from a court-martial to no punishment at all.<sup>58</sup>

“Article I, Section 8, Clause 14 of the United States Constitution gives Congress a primary if not plenary role in military justice matters.”<sup>59</sup> It states that Congress has the authority “[t]o make Rules for the Government and Regulation of the land and naval Forces.”<sup>60</sup> The greatest use of this authority to date occurred in 1950 when the 81st Congress passed an act to unify, consolidate, revise, and codify “the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard.”<sup>61</sup> Even though the Constitution provides Congress with the power and authority to modify or change the rules which govern the armed forces, the Uniform Code of Military Justice (UCMJ) has been modified only a handful of times.<sup>62</sup>

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57. *Military Justice Overview*, VICTIM & WITNESS ASSISTANCE COUNCIL, <https://vwac.defense.gov/military.aspx> (last visited May 28, 2022).

58. *Id.*

59. Victor Hansen, *Military Justice Reform: An Overview*, 27 FED. SENT'G REP. 88, 88 (2014).

60. U.S. CONST. art. I, § 8, cl. 14.

61. This Act, in essence, created the Uniform Code of Military Justice (UCMJ). Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801–946a).

62. The first modification made to the UCMJ since its inception was in 1968, when Congress created the military judiciary, provided for judge-alone trial, and required that judges and counsel be appointed for special court-martial. In the Military Justice Act of 1983, Congress provided for Supreme Court review of court-martial convictions, interlocutory appeals, and simplified post-trial

The 2022 NDAA attempts to rectify Congress' inaction by removing judicial authority outside of the chain of command. These provisions challenge the military's current prosecutorial, investigatory, adjudicatory, and statutory approach to sexual offenses.

### 1. The Office of the Special Trial Counsel

Section 531 of the 2022 NDAA attempts to remove control from commanders by creating and implementing an independent prosecutorial office: the Office of the Special Trial Counsel.<sup>63</sup> This office will have authority over "covered offenses" including murder, manslaughter, kidnapping, assault, stalking, retaliation, rape, sexual assault, other sexual misconduct, and any attempt, conspiracy, or solicitation to commit any covered offense.<sup>64</sup> The Judge Advocate General has the authority to appoint both the lead special trial counsel and the special trial counsel.

The Special Trial Counsel is a commissioned officer and a member of the bar who is qualified, by reason of education, training, experience, and temperament.<sup>65</sup> The lead Special Trial Counsel, in addition to the requirements needed for the

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processing. In 2013, 2014, and 2015, Congress required additional training and support in dealing with sex-related offenses, through the National Defense Authorization Act. Finally, 2016 marked the biggest change to the UCMJ since it was signed by President Harry S. Truman. In 2016, Congress passed another Military Justice Act which reorganized, reviewed, and updated the UCMJ. With all of these changes, however, no major impact was made to alter the armed forces' approach to sex-related offenses. David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 SAINT MARY'S L.J. 1, 12–13 (2018); Tomora Nance, *Changes to UCMJ: Military Justice Act of 2016 Brings About Training*, U.S. ARMY (May 17, 2018), [https://www.army.mil/article/205545/changes\\_to\\_ucmj\\_military\\_justice\\_act\\_of\\_2016\\_brings\\_about\\_training](https://www.army.mil/article/205545/changes_to_ucmj_military_justice_act_of_2016_brings_about_training); Meghann Myers, *Here's What You Need to Know About the Biggest Update to UCMJ in Decades*, MIL. TIMES (Jan. 15, 2019), <https://www.militarytimes.com/news/your-army/2019/01/15/heres-what-you-need-to-know-about-the-biggest-update-to-ucmj-in-decades/>.

63. 2022 NDAA, Pub. L. No. 117-81, §§ 531, 135 Stat. 1541, 1692–94 (2021) (codified at 10 U.S.C. § 824a).

64. 2022 NDAA, § 531, 135 Stat. at 1693; 10 U.S.C. § 824a(c)(2).

65. 2022 NDAA, § 531, 135 Stat. at 1692; 10 U.S.C. § 824a(b)(1)(A)-(B).



special trial counsel, must be in a grade no lower than O-7, equivalent to a Brigadier General.<sup>66</sup> A crucial duty of the lead Special Trial Counsel is to ensure that the office remains independent of either the victim or accused chain of command and that all office activities are “free from unlawful or unauthorized influence or coercion.”<sup>67</sup>

One of the most critical aspects of this newly created office is the authority of the Special Trial Counsel to determine whether a crime falls within the office’s purview. Section 531 provides the Special Trial Counsel with the exclusive authority to either refer the charges for trial by court-martial, withdraw or dismiss the charges, or enter a plea agreement.<sup>68</sup> Should charges fall under the Special Trial Counsel’s control, they have complete authority to refer the charges to a general or special court-martial.<sup>69</sup> While victim’s and accused’s commanders can provide input, the special trial counsel is not obligated to abide by their recommendation.<sup>70</sup> And the determination of a special trial counsel to refer charges to a court-martial for trial is binding.<sup>71</sup> In the event the Special Trial Counsel decides not

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66. 2022 NDAA, § 531, 135 Stat. at 1692; 10 U.S.C. § 824a(b)(2). Under the I Am Vanessa Guillén Act the Chief Prosecutor only needs to be in a grade above O-6. H.R. 3224, 117th Cong., § 2(a)(2) (2021); S. 1611, 117th Cong., § 2(a)(2) (2021); H.R. 8270, 116th Cong., § 2(a)(2) (2020); S. 4600, 116th Cong., § 2(a)(2) (2020). A grade of O-6 signifies a commissioned officer in the position of Colonel. A grade of O-7 signifies a commissioned officer in the position of Brigadier General. The highest grade is a O-10; a four-star general. A five-star general falls under a “Special” category. *See Rank Insignia of the U.S. Armed Forces*, ARMY, <https://www.army.mil/e2/downloads/rv7/symbols/ranks.pdf> (last visited May 28, 2022).

67. 2022 NDAA, § 532, 135 Stat. at 1694–95; 10 U.S.C. § 1044f(a)(3)(A)-(B). The I Am Vanessa Guillén Act also required the Chief Prosecutor to be independent and outside the chain of command of the victim and accused. *See* H.R. 3224, 117th Cong., § 2(b) (2021); S. 1611, 117th Cong., § 2(b) (2021); H.R. 8270, 116th Cong., § 2(b) (2020); S. 4600, 116th Cong. § 2(b) (2020).

68. 2022 NDAA, § 531, 135 Stat. at 1692–93; 10 U.S.C. § 824a(c)(2)-(3).

69. *See id.*

70. 2022 NDAA, § 532, 135 Stat. at 1695; 10 U.S.C. § 1044f(a)(5).

71. 2022 NDAA, § 531, 135 Stat. at 1693; 10 U.S.C. § 824a(a)(4).

to proceed, the accused's commander may exercise any of their authorities outside of convening a court-martial. This may include non-judicial punishment or administrative action.<sup>72</sup>

This new office is meant to eliminate commander discretion by giving charging authority to an individual outside of the chain of command. The intent being that an outsider will be less biased and more dedicated to correctly prosecuting the case. However, the lead Special Trial Counsel is still a commissioned officer who, based on the required grade of O-7 or higher, has been in the military for decades.<sup>73</sup> This still leaves resounding concerns about whether this office is sufficiently independent.

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72. 2022 NDAA, § 531, 135 Stat. at 1693; 10 U.S.C. § 824a(a)(5). Commanders still have the ability to impose administrative action or non-judicial punishment. Administrative action is not meant to be punitive but rehabilitative and can range from counseling, reprimand, or involuntary separation. *Military Justice Overview*, *supra* note 57. Non-judicial punishment under Article 15 is a means of handling minor offenses requiring immediate corrective action. Nonjudicial punishment hearings are non-adversarial and require the commander to be convinced beyond a reasonable doubt that the service member committed the offense. The maximum punishment depends on the rank of the commander imposing the punishment and the rank of the service member being punished, but can include suspension from duty, confinement to quarters (no more than thirty consecutive days), or forfeiture of no more than one-half of one month's pay for two months. *Id.*; *see also* 10 U.S.C. § 815.

73. Time-in-service (TIS) and time-in-grade (TIG) influence officer promotions the most. TIS equals the total time that someone is in the Army. An officer must spend a given amount of time in each grade prior to advancement to the next grade and he or she typically cannot skip grades. To reach the grade of Colonel (O-6) a commissioned officers time in service must be twenty-two years, plus or minus, one year. Rod Powers, *Army Commissioned Officer Career Path*, BALANCE CAREERS (July 28, 2019), <https://www.thebalancecareers.com/army-commissioned-officer-career-information-3345007>. A promotion board reviews the officers who want a promotion to general—but the competition is tough and “only the most qualified O-6 candidates will be chosen.” The board considers the candidate's leadership results and the service needs. From those promotion board recommendations, the president of the United States then nominates an officer, and the Senate confirms or denies the promotion. After 20 to 30 years of military service, a general will be promoted to that rank. Tim Plaehn, *What Does It Take To Be a General in the Military?*, CAREER TREND (July 5, 2017), <https://career-trend.com/general-military-37191.html>.

## 2. Sexual Harassment: A Standalone Offense and Independent Investigative Process

In addition to creating an independent prosecutorial office, two other provisions of the 2022 NDAA alter the military's statutory and procedural processes for sexual harassment. Section 539D creates a standalone offense for sexual harassment within the UCMJ,<sup>74</sup> and section 543 constructs an independent investigatory process for formal complaints of sexual harassment.<sup>75</sup> While each addresses a different aspect of the overall development of a case, together they significantly transform the military's current approach to sexual harassment.

Under the UCMJ sexual harassment may be charged under four different articles, none of which are specifically designed for such an offense.<sup>76</sup> The 2022 NDAA creates a

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74. See 2022 NDAA, § 539D(a)(1), 135 Stat. at 1699–1700; 10 U.S.C. § 934 note; H.R. 3224, 117th Cong., § 3 (2021); S. 1611, 117th Cong., § 3 (2021); H.R. 8270, 116th Cong., § 3 (2020); S. 4600, 116th Cong., § 3 (2020).

75. 2022 NDAA, § 543(a), 135 Stat. at 1709–10; 10 U.S.C. § 1561.

76. Sexual harassment can be charged under Article 92 “Failure to obey order or regulation,” Article 93 “Cruelty and maltreatment,” Article 133 “Conduct unbecoming an officer and a gentleman” or Article 134 “General Article.” See 10 U.S.C. § 932; MANUAL FOR COURTS-MARTIAL UNITED STATES art. 93, at IV-29 (2019); *How Does the Military Define Sexual Harassment?*, L. OFF. OF JOCELYN C. STEWART, <https://www.ucmj-defender.com/military-define-sexual-harassment/> (last visited May 28, 2022); 10 U.S.C. § 933; MANUAL FOR COURTS-MARTIAL UNITED STATES art. 133, at IV-134–45 (2019) (“Instances of violation of this article include . . . using insulting or defamatory language to another officer in that officer’s presence or about that officer to other military persons . . . committing or attempting to commit a crime involving moral turpitude.”); see also *Conduct Unbecoming an Officer – Article 133, UCMJ*, GONZALEZ & WADDINGTON, <https://www.ucmjdefense.com/resources/military-offenses/conduct-unbecoming-an-officer-ucmj-art-133.html> (last visited May 28, 2022). Under the manual, Article 134 includes specific descriptions of offenses which fall within its purview. “Indecent conduct” and “indecent language” are both listed. The elements for “indecent conduct” include: “(1) [t]hat the accused engaged in certain conduct; (2) [t]hat the conduct was indecent; and (3) [t]hat, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.” MANUAL FOR COURTS-MARTIAL UNITED STATES art. 134, at IV-148 (2019). The elements for “indecent language”

standalone offense and renders it chargeable under the military's "catch-all" provision, Article 134.<sup>77</sup> Titled the "General Article," Article 134 currently lists sixteen specific offenses in the Manual for Courts-Martial.<sup>78</sup> Though each of Article 134's sixteen offenses list their own maximum punishment, the punishments range drastically from forfeiture of pay and allowances, a bad-conduct discharge, and potentially years of confinement.<sup>79</sup>

In addition to creating a new cause of action, the 2022 NDAA provisions alter the current investigative process for sexual harassment complaints.<sup>80</sup> Under existing military policies and procedures, there are three ways to report an instance of sexual harassment: formal, informal, or anonymous complaint.<sup>81</sup> The independent investigation

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are virtually identical with the exception of a couple of words: "(1) [t]hat the accused orally or in writing communicated to another person certain language; (2) [t]hat such language was indecent; and (3) [t]hat, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces." 10 U.S.C. § 934; MANUAL FOR COURTS-MARTIAL UNITED STATES art. 134, at IV-148 (2019).

77. 2022 NDAA, § 539D(a)(1), 135 Stat. at 1699–1700; 10 U.S.C. § 934 note. The I Am Vanessa Guillén Act would create a separate article of the UCMJ, art. 120d. H.R. 3224, 117th Cong., § 3(a) (2021); S. 1611, 117th Cong., § 3(a) (2021); H.R. 8270, 116th Cong., § 3(a) (2020); S. 4600, 116th, § 3(a) (2020).

78. See MANUAL FOR COURTS-MARTIAL UNITED STATES art. 134, at IV-135 (2019).

79. Although the 2022 NDAA provision creates the standalone offense chargeable under Article 134, it does not list the punishments which can be initiated. With Article 134's punishments ranging considerably, without a distinct punishment, a conviction for sexual harassment could potentially result in something as minimal as forfeiture of pay. 2022 NDAA, § 539D, 135 Stat. at 1699–1700; 10 U.S.C. § 934 note; MANUAL FOR COURTS-MARTIAL UNITED STATES art. 134, at IV-135–51 (2019).

80. See 2022 NDAA, § 543(a), 135 Stat. at 1709–10; 10 U.S.C. § 1561. The I Am Vanessa Guillén Act would also alter the military's policies and procedures on investigating sexual harassment complaints. H.R. 3224, 117th Cong., § 3(b) (2021); S. 1611, 117th Cong., § 3(b) (2021); H.R. 8270, 116th Cong., § 3(b) (2020); S. 4600, 116th Cong., § 3(b) (2020).

81. See Carolyn M. Warner & Mia A. Armstrong, *The Role of Military Law and Systemic Issues in the Military's Handling of Sexual Assault Cases*, 54 LAW

implemented by section 543 only impacts the formal complaint process. A formal complaint is initiated by completion of the DA Form 7746, which documents the nature of the complaint and the requested remedies.<sup>82</sup>

Current policy dictates that the full-time brigade Sexual Assault Response Coordinator (SARC) must immediately refer all formal complaints to the Brigade commander. The commander then requires the complainant to attest to the form's accuracy and warns of the potential adverse consequences for knowingly submitting a false complaint.<sup>83</sup> The complaint is then forwarded onto the first commander in the chain of command with general court-martial convening authority.<sup>84</sup>

The commander decides whether to appoint an investigating officer, or initiate an informal inquiry under his own control.<sup>85</sup> Prior to 2021, Investigating Officers (IOs) could be any person, who in the opinion of the appointing authority, is best qualified for the duty by reason of their education, training, experience, length of service, demonstrated sound judgment and temperament.<sup>86</sup> But since March 2021, IOs must come from outside the accuser's brigade.<sup>87</sup> At the conclusion of the investigation, a legal

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& SOC'Y REV. 265, 272–73 (2020); Army Regul. 600–20, § 7–8(e) (2020), [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/ARN32931-AR\\_600-20-004-WEB-6.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN32931-AR_600-20-004-WEB-6.pdf).

82. Army Regul. 600–20, § 7–8(n) (2020).

83. *Id.*

84. *Id.*

85. *See* Army Regul. 600–20, § 7–8(n)(9) (2020).

86. Prior to 2021, when a commander instituted a formal investigation, called a 15–6 investigation, the investigating officer only had to meet certain broad requirements, but could still be within the accuser's chain of command. *See* Army Regul. 15–6, § 2–3(a) (2016), [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/pdf/web/r15\\_6.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r15_6.pdf).

87. Memorandum from Michael X. Garrett, U.S. General, to U.S. Army Forces Command on Assignment of Investigating Officers for Formal Sexual Harassment Complaints (n.d.), <https://federalnewsnetwork.com/wp-content/uploads/2021/03/FORSCOM-Memo-Investigating-Officers-for-Sexual-Harassme>

review ensues,<sup>88</sup> and then the commander decides whether to approve or disprove all or part of the findings and recommendations, or seek further investigation.<sup>89</sup>

As a result of section 543 of the 2022 NDAA, in the event of a formal complaint, an independent investigator must be appointed.<sup>90</sup> Within seventy-two hours of receiving a formal complaint, the commanding officer must forward the formal complaint onto an independent investigator and the next superior officer within the chain of command with general court-martial convening authority.<sup>91</sup> This eliminates the option of initiating an informal investigation under the commander's control. The remainder of the formal complaint process is left unchanged.

The military's history with sexual misconduct is one plagued by scandal, opacity, and mistrust. The 2022 NDAA provisions attempt to remedy these issues by altering the

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nt-11-March-2021.pdf (last visited May 28, 2022); Scott Maucione, *Army Changing How Sexual Harassment Is Investigated*, FED. NEWS NETWORK (Mar. 29, 2021, 1:33 PM), <https://federalnewsnetwork.com/army/2021/03/army-changing-how-sexual-harassment-is-investigated/>; Haley Britzky, *Almost a Year After Vanessa Guillén's Disappearance, the Army Moves Forward with Sexual Harassment Reform*, TASK & PURPOSE (Mar. 26, 2021, 11:14 AM), <https://taskandpurpose.com/news/army-forces-command-sexual-harassment-policy/>.

88. Army Regul. 600–20, § 7–8(n)(9)(o)-(p) (2020). A legal review involves the investigation report being sent to the Staff Judge Advocate for a review of the legal sufficiency of the allegation. U.S. ARMY, SHARP GUIDEBOOK 21–22 (2014), [https://www.sapr.mil/public/docs/reports/FY14\\_POTUS/FY14\\_DoD\\_Report\\_to\\_POTUS\\_Enclosure\\_1\\_Army.pdf](https://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Enclosure_1_Army.pdf) [<https://web.archive.org/web/20210323184433/https://www.soc.mil/SWCS/sharp/pdf/SHARP-Guidebook.pdf>].

89. Army Regul. 600–20, § 7–8(n)(9)(p) (2020). In addressing how a formal complaint is resolved, Army Regulation 600-20 states that, “[p]unitive or administrative actions against a subject do not necessarily change offending behaviors or rectify the situation for the individual complainant or unit. Commanders will take corrective action to preclude recurrence of sexual harassment and address any management deficiencies or other contributing factors that caused the complaint to be filed. Commanders should review the investigation to assess factors or perceptions that may have contributed to the reporting of an unsubstantiated complaint.” Army Regul. 600–20, § 7–8(o) (2020).

90. 2022 NDAA § 543(a), Pub. L. No. 117-81, 135 Stat. 1541, 1709–10 (2021) (codified at 10 U.S.C. § 1561(b)).

91. *Id.*

military's sexual violence processes, yet they fail to move the bar far enough. This failure will likely leave the military and its sexual violence victims in the same endless cycle of unreported, uninvestigated, and unadjudicated sexual offenses.

## II. THE SUCCESSES AND FAILURES OF THE 2022 NATIONAL DEFENSE AUTHORIZATION ACT

History has shown that in the wake of tragedy, though reform is necessary, reform seldom occurs, and legislation asking for an inch is far better than one demanding a mile. Massive overhauling bills and attempts at tragedy-induced change would seem like the most logical path to reform. However, in retrospect, foundational institutions such as the military require a subtle, skilled strategy for true change to occur. Yet, even with the proper procedural approach, legislation can fail when it refuses to push the substantive boundary far enough. This Part addresses the 2022 NDAA's successes with its piecemeal rather than overhaul approach to sex-related offenses in the armed forces, as well as its failures through its perpetuation of military self-regulation.

### A. *The Road to Reform: The Benefits of the Piecemeal Approach*

While at first blush the I Am Vanessa Guillén Act's overhauling approach would appear to be the most efficient and effective way to implement change, history proves that real change can only occur through the piecemeal process. The 2022 NDAA provisions initiated change using the only method to successfully alter the military's decades old approach to sexual offenses. Not the result of tragedy, scandal, or massive-scale bills, these changes were hidden away within an expansive, sprawling piece of legislation.

Congressional action—particularly on a sweeping scale—is best accomplished in small bites.<sup>92</sup> Breaking reform into pieces is more politically feasible than enacting comprehensive change in one fell swoop.<sup>93</sup> This is particularly true in situations with a high degree of legislative gridlock, such as the one that exists today.<sup>94</sup> When parties are extremely polarized, and have differing policy preferences, high political barriers to major policy revisions are frequently created both internally and across party lines. This drives lawmakers to modify policy through incremental change.<sup>95</sup> Rather than combining all reform measures and forcing an all-or-nothing vote, often dooming the reform efforts, legislators can pick and choose what they wish to support by breaking up comprehensive reform into smaller pieces.<sup>96</sup>

Additionally, the incremental approach is less likely to

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92. Cf. Thad Kousser, *The Blessings and Curses of Piecemeal Reform*, 44 LOY. L.A. L. REV. 569, 583–91 (2011) (discussing the advantages of the piecemeal approach to constitutional reform); Briana Lynn Rosenbaum, *The Legislative Role in Procedural Rulemaking Through Incremental Reform*, 97 NEB. L. REV. 762, 799–806 (2019) (discussing the advantages of incremental procedural changes to impact substantive law); Tony Payan, *Immigration Reform: A Comprehensive vs. Piecemeal Approach*, in 2013 POLICY RECOMMENDATIONS FOR THE OBAMA ADMINISTRATION 87, 90–91 (James A. Baker III Inst. for Pub. Pol’y of Rice Univ. 2013) (discussing the advantages of the piecemeal approach to immigration reform); Elizabeth C. Price, *The Evolution of Health Care Decision-Making: The Political Paradigm and Beyond*, 65 TENN. L. REV. 619, 630–32 (1998) (addressing the successful use of the piecemeal approach in both state and federal healthcare reform).

93. Kousser, *supra* note 92, at 586–87.

94. Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947–96*, 93 AM. POL. SCI. REV. 519, 519–20 (1999); Lee Drutman, *How Much Longer Can This Era of Political Gridlock Last?*, FIVETHIRTYEIGHT (Mar. 4, 2021, 6:00 AM), <https://fivethirtyeight.com/features/how-much-longer-can-this-era-of-political-gridlock-last/>; Ed Kilgore, *Today’s Gridlock Is Like a 19th-Century Nightmare*, N.Y. MAG.: INTELLIGENCER (Mar. 6, 2021), <https://nymag.com/intelligencer/2021/03/todays-gridlock-is-like-a-19th-century-nightmare.html>.

95. See Binder, *supra* note 94, at 528–30 (addressing the high level of legislative gridlock with high polarization and wide policy preferences within the parties both internally and externally); Rosenbaum, *supra* note 92, at 804–05.

96. Kousser, *supra* note 92, at 586–87.



receive public notice, especially if the proposed procedural changes are buried in a larger substantive reform package.<sup>97</sup> “When major policy occurs at critical junctures, existing special issues groups mobilize to bring public attention to the affected social or public issue.”<sup>98</sup> “When lawmakers state a substantive policy and promise to act on its merits—[the public] listens.”<sup>99</sup> By contrast, incremental change is harder to see.<sup>100</sup> The I Am Vanessa Guillén Act and the 2022 NDAA highlight this challenge of too much transparency. Following the introduction of the I Am Vanessa Guillén Act, promises made by legislators led to widespread media coverage and increased debate.<sup>101</sup> This led to too much public notice and stalled the reform process. Meanwhile, the 2022 NDAA inserted provisions within a substantial reform package that is annually renewed, resulting in far less attention and no red flag being raised. This allowed the 2022 NDAA provisions to fly under the public radar.

In a time with deep political polarization and internal party squabbling, the piecemeal approach can be the necessary solution to implement change. One recent example of this is President Biden’s proposed Build Back Better Bill.<sup>102</sup> Its massive overhaul of critical policy areas resulted

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97. Rosenbaum, *supra* note 92, at 810–11.

98. *Id.* at 813.

99. *Id.*

100. *Id.*

101. Christopher Brito, *House Will Vote on Bill Named After Slain Fort Hood Soldier Vanessa Guillén*, CBS NEWS (Sept. 17, 2020, 12:12 PM), <https://www.cbsnews.com/news/vanessa-guillen-bill-military-sexual-assault-harrassment-house-vote/> (quoting Congresswoman Jackie Speier as stating that the bill would be put to a vote “either in the next few weeks or it will be in November”); Veronica Stracqualursi, *Lawmakers Unveil Bipartisan Bill Named After Vanessa Guillen to Change Sexual Harassment Reporting in Military*, CNN, <https://www.cnn.com/2020/09/16/politics/vanessa-guillen-house-bill-military-sexual-harassment/index.html> (Sept. 16, 2020, 8:20 PM).

102. See Jeremy Dillon et al., *What’s Ahead for ‘Build Back Better’: 4 Scenarios*, E&E NEWS (Jan. 3, 2022, 6:22 AM), <https://www.eenews.net/articles/whats-ahead-for-build-back-better-4-scenarios/>; Andrea Shalal & Jarrett Renshaw, *How the White House Hopes to Save Biden’s Build Back Better Bill*, REUTERS (Jan.

in a lack of support,<sup>103</sup> forcing legislators to explore the benefits of the piecemeal method.<sup>104</sup> President Biden himself approved of an incremental approach, stating “I think we can break the package up, get as much as we can now and come back and fight for the rest.”<sup>105</sup> Though this process would be much slower, parts of the whole have a greater chance of success.<sup>106</sup>

The overhaul approach initially used by Build Back Better, has also been used in failed attempts to transform the military’s approach to sexual violence. Over the last thirteen years, Congress has introduced at least twenty bills targeting the military’s policies and procedures on sexual offenses.<sup>107</sup> Congress introduced six of these bills in 2019

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18, 2022, 11:42 AM), <https://www.reuters.com/world/us/how-white-house-hopes-save-bidens-spending-bill-2022-01-18/>; Michael Collins & Joey Garrison, *Free Pre-K, Medicare Expansion: What Won’t Happen With Build Back Better Likely Dead*, USA TODAY, <https://www.usatoday.com/story/news/politics/2021/12/19/joe-manchin-build-back-better-explained/8960657002/> (Dec. 19, 2021, 4:41 PM).

103. Kelsey Snell & Barbara Sprunt, *Democrats Are Struggling to Sell Biden’s Agenda. It Isn’t the First Time, Either*, NPR (Dec. 10, 2021, 5:00 AM), <https://www.npr.org/2021/12/10/1062895561/democrats-struggles-to-sell-bidens-agenda-mirror-past-messaging-woes>.

104. Elaine Kamarck, *Biden Can Still Salvage His Build Back Better Bill if He Settles for a Piece by Piece Strategy*, BROOKINGS (Dec. 21, 2021), <https://www.brookings.edu/blog/fixgov/2021/12/21/biden-can-still-salvage-his-build-back-better-bill-if-he-settles-for-a-piece-by-piece-strategy/>; Rosemary Becchi et al., *Build Back Better Act: Recent Developments and Takeaways*, JDSUPRA (Dec. 23, 2021), <https://www.jdsupra.com/legalnews/build-back-better-act-recent-6661260/>.

105. Victor Reklaitis, *Biden Sees Build Back Better Package Broken Up to Get Parts of It Passed*, MARKETWATCH (Jan. 19, 2022, 4:49 PM), <https://www.marketwatch.com/story/biden-sees-build-back-better-package-broken-up-to-get-parts-of-it-passed-2022-01-19>; Alexandra Alper, *Build Back Better Plan Could Pass in Chunks, Biden Says*, REUTERS (Jan. 19, 2022, 7:40 PM), <https://www.reuters.com/world/us/biden-says-he-will-look-pass-build-back-better-elements-piecemeal-2022-01-19/>.

106. Becchi et al., *supra* note 104.

107. There have been at least twenty pieces of legislation solely dedicated to implementing substantial changes to the military’s approach to sex-related offenses introduced in either the House of Representatives or the Senate which were never brought for a vote. H.R. 840, 111th Cong. (2009); S. 3647, 112th Cong. (2012); S. 871, 113th Cong. (2013); H.R. 2002, 113th Cong. (2013); S. 548, 113th Cong. (2013); S. 964, 113th Cong. (2013); H.R. 2227, 113th Cong. (2013); S. 1092,

alone.<sup>108</sup> Many were brought in response to the DoD's Annual Report on Sexual Assault in the Military, finding an astronomical increase in the number of service members becoming victims of sexual assault.<sup>109</sup> The report not only elicited a response from the acting Secretary of Defense but from enraged members of Congress seeking change.<sup>110</sup> In the end, however, Congress never passed any of those six bills, with most left buried in committee.<sup>111</sup>

This pattern of legislative inaction has been going on since at least 2009. The Military Domestic and Sexual Violence Response Act, a 142-page piece of legislation entirely devoted to overhauling the military's approach to

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113th Cong. (2013); S. 2870, 114th Cong. (2016); H.R. 5257, 114th Cong. (2016); H.R. 3209, 115th Cong. (2017); S. 1495, 116th Cong. (2019); H.R. 3015, 116th Cong. (2019); S. 1500, 116th Cong. (2019); H.R. 7060, 116th Cong. (2020); S. 1526, 116th Cong. (2019); H.R. 3216, 116th Cong. (2019); H.R. 3148, 116th Cong. (2019); H.R. 5738, 116th Cong. (2020); H.R. 3224, 117th Cong. (2021); S. 1611, 117th Cong. (2021).

108. See S. 1495, 116th Cong. (2019); H.R. 3015, 116th Cong. (2019); S. 1500, 116th Cong. (2019); S. 1526, 116th Cong. (2019); H.R. 3216, 116th Cong. (2019); H.R. 3148, 116th Cong. (2019).

109. 2018 DoD ANNUAL REPORT, *supra* note 55.

110. The shocking figures from the 2018 report led to then acting Secretary of Defense Patrick Shanahan requesting a task force be formed, the Sexual Assault Accountability and Investigation Task Force, to elicit suggestions on how to fix the crisis within the military. See Memorandum from Patrick M. Shanahan, Acting Sec'y of Def., on Establishment of the Sexual Assault Accountability and Investigation Task Force (Mar. 27, 2019), <https://media.defense.gov/2019/Apr/16/2002116965/-1/-1/1/Establishment-of-the-Sexual-Assault-and-Investigation-Task-Force.pdf>; 2018 DoD ANNUAL REPORT, *supra* note 55, at 5; David Vergun, *DOD Task Force Will Address Military Sexual Assaults*, U.S. DEP'T OF DEF. (Apr. 22, 2019), <https://www.defense.gov/Explore/News/Article/Article/1820678/dod-task-force-will-address-military-sexual-assaults/>; Press Release, Sen. Kristen Gillibrand, After Recent Department of Defense Report Highlights Its Continued Failure to Address Crisis of Military Sexual Assault, Gillibrand Leads Bipartisan Group of Senators to Reintroduce Military Justice Improvement Act and Calls on Congress to Act (June 13, 2019), <https://www.gillibrand.senate.gov/news/press/release/after-recent-department-of-defense-report-highlights-its-continued-failure-to-address-crisis-of-military-sexual-assault-gillibrand-leads-bipartisan-group-of-senators-to-reintroduce-military-justice-improvement-act-and-calls-on-congress-to-act>.

111. When viewed on Congress.gov which tracks the legislative history of bills, all six bills introduced in 2019 were left in committee where they died.

sexual offenses, was introduced in the House in February 2009.<sup>112</sup> After being referred through a string of committees, the bill was never brought up for a vote.<sup>113</sup> Fast forward almost four years to November 2012, when the Military Sexual Assault Prevention Act was introduced in the Senate, read twice, and sent to the Committee on Armed Services—where it died.<sup>114</sup> Or six months later in May 2013, when both the House and the Senate simultaneously presented pieces of legislation referred to as the Combating Military Sexual Assault Act. Both were passed down through different committees and subcommittees where they were never brought for a vote and also died.<sup>115</sup> This pattern continues today with the I Am Vanessa Guillén Act, currently sitting in committee with no vote in sight.<sup>116</sup>

However, even with each of these bills' failures, change within the military was quietly taking place. The 2022

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112. Military Domestic and Sexual Violence Response Act, H.R. 840, 111th Cong. (2009), <https://www.congress.gov/bill/111th-congress/house-bill/840/actions?r=67&s=1> (introduced Feb. 3, 2009).

113. The committees included the House Armed Services, the House Judiciary, the House Veterans' Affairs, the Subcommittee on Health, the Subcommittee on Military Personnel, and the Subcommittee on Crime, Terrorism and Homeland Security. *Id.*

114. Military Sexual Assault Prevention Act of 2012, S. 3647, 112th Cong., <https://www.congress.gov/bill/112th-congress/senate-bill/3647/all-actions> (noting on November 29, 2012, that the bill was read "twice and referred to the Committee on Armed Services").

115. Combating Military Sexual Assault Act of 2013, H.R. 2002, 113th Cong., <https://www.congress.gov/bill/113th-congress/house-bill/2002/committees?r=78&s=1> (referred to House Armed Services Subcommittee on Military Personnel on June 20, 2013, with no further action taken); Combating Military Sexual Assault Act of 2013, S. 871, 113th Cong., <https://www.congress.gov/bill/113th-congress/senate-bill/871/committees> (referred to Senate Armed Services Committee with hearing, but no further action taken).

116. *See* I Am Vanessa Guillén Act of 2020, H.R. 8270, 116th Cong., <https://www.congress.gov/bill/116th-congress/house-bill/8270/committees?r=5&s=1> (referred to House Armed Services Committee on September 16, 2020 with no further action taken); I Am Vanessa Guillén Act of 2021, H.R. 3224, 117th Cong., <https://www.congress.gov/bill/117th-congress/house-bill/3224/committees?r=2&s=1> (referred to House Armed Services Committee on May 13, 2021 with no further action taken).

NDAA provisions are only the newest addition in a long line of past changes implemented using the piecemeal approach. The National Defense Authorization Acts for fiscal years 2013 to 2021 included numerous provisions modifying the military's policies on sex-related crimes.<sup>117</sup> Although

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117. National Defense Authorization Act for Fiscal Year 2013 §§ 578–79, Pub. L. No. 112-239, 126 Stat. 1632, 1763–64 [hereinafter 2013 NDAA] (codified at 10 U.S.C. § 1561 note); National Defense Authorization Act for Fiscal Year 2014 §§ 1702–03, 1705, Pub. L. No. 113-66, 127 Stat. 672, 954–58, 959–60 (2013) [hereinafter 2014 NDAA] (codified at 10 U.S.C. §§ 832, 843 note, 856); Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 § 546, Pub. L. No. 113-291, 128 Stat. 3292, 3374–75 (2014) [hereinafter 2015 NDAA] (codified at 10 U.S.C. § 1561 note); National Defense Authorization Act for Fiscal Year 2016 § 538, Pub. L. No. 114-92, 129 Stat. 726, 817–818 (2015) [hereinafter 2016 NDAA]; National Defense Authorization Act for Fiscal Year 2017 § 543, Pub. L. No. 114-328, 130 Stat. 2000, 2127 (2016) [hereinafter 2017 NDAA] (codified at 10 U.S.C. § 1561 note); National Defense Authorization Act for Fiscal Year 2018 § 707, Pub. L. No. 115-91, 131 Stat. 1283, 1436 (2017) [hereinafter 2018 NDAA] (codified as amended at 38 U.S.C. § 1720D(a)(2)(A)); John S. McCain National Defense Authorization Act for Fiscal Year 2019 §§ 535–36, Pub. L. No. 115-232, 132 Stat. 1636, 1761 (2018) [hereinafter 2019 NDAA] (codified at 10 U.S.C. §§ 1561 note, 673 note); National Defense Authorization Act for Fiscal Year 2020 §§ 532, 538, 731, Pub. L. No. 116-92, 133 Stat. 1198, 1359–61, 1363–64, 1457–60 (2019) [hereinafter 2020 NDAA] (codified as amended at 10 U.S.C. § 837, 1044e note, 2733a); William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 § 525, 539, 539A, Pub. L. No. 116-283, 134 Stat. 3388, 3600, 3606–08 (2021) [hereinafter 2021 NDAA] (sec. 539 codified as amended at 10 U.S.C. § 7461 note; sec. 539A codified at 10 U.S.C. § 1561 note). Section 578 of the 2013 NDAA seeks to eliminate service members who are believed to have been discharged or dismissed from the armed forces in retaliation for filing a report related to a sexual offense. The provision requires administrative review of any involuntary discharges within one-year of an unrestricted report. Section 579 established a policy and plan for prevention and response to sexual harassment. 2013 NDAA, § 578–579, 126 Stat. at 1763–64; *see* 10 U.S.C. § 1561 note. Section 1702 of the 2014 NDAA eliminates commanders’ (convening authorities) ability to modify sentences for serious offenses by overturning a guilty verdict or reducing the finding of guilty to that of a lesser included offense. Section 1703 of the 2014 NDAA also eliminates the 5-year statute of limitation for trial by court-martial for additional offenses involving sex-related crimes, and section 1705 states that an individual who is found guilty of an offense in violation of section 920(a) or (b) of the UCMJ (rape, sexual assault of a child, forcible sodomy, or an attempt to commit these offenses) must face the minimum punishment of dismissal or dishonorable discharge. 2014 NDAA, §§ 1702–03, 127 Stat. at 954–58, 959–60; *see* 10 U.S.C. §§ 832, 843 note, 856. Section 546 of the 2015 NDAA ordered the establishment of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces. The committee would be responsible for advising

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the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the armed forces and would be required to submit an annual report to describe the results of the activities of the Advisory Committee. 2015 NDAA, § 546, 128 Stat. at 3374–75; *see* 10 U.S.C. § 1561 note. Section 538 of the 2016 NDAA established improvements in the Department of Defense Prevention and Response to Sexual Assaults to better understand the impact that such assaults have on male victims. This provision included training specific to the impact on male victims of sexual assault. 2016 NDAA, § 538, 129 Stat. at 817–818. Section 543 of the 2017 NDAA requires the inclusion in the Advisory Committee’s annual report of information on complaints of retaliation in connection with reports of sexual assault in the armed forces. 2017 NDAA, § 543, 130 Stat. at 2127; *see* 10 U.S.C. § 1561 note. Section 707 of the 2018 NDAA expanded sexual trauma counseling and treatment to include not only members serving on active duty but those also serving on active duty for training or inactive duty for training (reserve members). 2018 NDAA, § 707, 131 Stat. at 1436; *see* 38 U.S.C. § 1720D(a)(2)(A). Sections 535 and 536 of the 2019 NDAA created a uniform command action form for disposition of unrestricted reports of sexual assault involving service members, and also instituted standardized policies for the expedited transfer of victims in cases of sexual assault or domestic violence. 2019 NDAA, §§ 535–36, 132 Stat. at 1761; *se* 10 U.S.C. §§ 1561 note, 673 note. Section 532 of the 2020 NDAA increases the protection of convictions of sexual assault by outlining greater restrictions on what a commander cannot do, including prohibiting a commanding officer from censuring, reprimanding, or admonishing the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court. Section 537 of the 2020 NDAA requires that a service member who was the victim of an alleged sexual assault at the hands of another service member to receive notifications of each significant event in the military justice process that relates to the investigation, prosecution, and confinement of the offender for such assault. Section 731 of the 2020 NDAA, for the first time since the Feres Doctrine was established, created an exception which gives a service member, who suffer malpractice at a military facility, the right to receive compensation from the military claims system. While not related to sexual assault policies and practices, this creates the first opening in the unbreakable wall that the Feres Doctrine has created for service members who have suffered harm at the hands of the armed forces. 2020 NDAA, §§ 532, 538, 731, 133 Stat. at 1359–61, 1363–64, 1457–60; *see* 10 U.S.C. § 837, 1044e note, 2733a. Section 525 of the 2021 NDAA requires the Secretary of Defense to provide the Committees of Armed Services of both chambers with a report of the number of former members of the armed forces who were discharged or dismissed on or after September 21, 2011, who applied for review of such discharge or dismissal and within that application for review, asserted there dismissal was connected to a Department of Defense policy regarding sex-related offenses. Section 539 and 539A of the 2021 NDAA creates a “Safe-to-Report” policy across all branches of the armed forces, which allows a victim of sexual assault to report the crime without fear of punishment for minor collateral offenses (i.e., underage drinking or breaking curfew). 2021 NDAA, § 525, 539, 539A, 134 Stat. at 3600, 3606–08; *see* 10 U.S.C. § 7461 note; 10 U.S.C. § 1561 note; Press Release, Sen. Kristen Gillibrand, Gillibrand Announces Final NDAA Will Include Safe to

seemingly insignificant when viewed independently, each is a building block from which something substantial may be formed. These NDAA provisions often revive and implement pieces of the dead legislation. For example, the Military Sexual Assault Prevention Act of 2012 included a section prohibiting service in the armed forces by an individual who had been convicted of a sexual offense.<sup>118</sup> Although that Senate bill died, the National Defense Authorization Act for Fiscal Year 2013 resurrected the provision prohibiting any individual convicted of a sexual offense from enlisting.<sup>119</sup>

The 2022 NDAA and its predecessors successfully transformed some of the military's sexual offense policies. These incremental changes have opened the door for legislators in favor of reform to create and push for small steps forward rather than massive bills unlikely to pass. Small steps, while not necessarily the fastest way to solve the military's problems, can be used to build on the provisions which already exist within past NDAs. While critics of this method may argue that it does not do enough,<sup>120</sup> the piecemeal approach allowed the 2022 NDAA

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Report and Key Amendments to Address Military Sexual Assault, (Dec. 10, 2020), <https://www.gillibrand.senate.gov/news/press/release/gillibrand-announces-final-ndaa-will-include-safe-to-report-and-key-amendments-to-address-military-sexual-assault>.

118. S. 3647, 112th Cong., § 2 (2012).

119. 2013 NDAA, § 523, 126 Stat. at 1723; *see* 10 U.S.C. § 504 note.

120. *See* Karoun Demirjian, *Broad Overhaul of Military Justice System Being Sidelined in Favor of Narrower Focus on Sexual Assault*, WASH. POST (Dec. 5, 2021, 6:00 AM), [https://www.washingtonpost.com/national-security/military-sexual-assault-reform/2021/12/04/5946b0cc-5455-11ec-9267-17ae3bde2f26\\_story.html](https://www.washingtonpost.com/national-security/military-sexual-assault-reform/2021/12/04/5946b0cc-5455-11ec-9267-17ae3bde2f26_story.html); Matthew Hay Brown, *Military Sex Assault Critics Want Justice Overhaul*, BALT. SUN (Dec. 19, 2013, 9:09 PM), <https://www.baltimoresun.com/maryland/bs-md-military-sexual-assault-chain-of-command-20131219-story.html>; Leo Shane III, *Victim Advocates Want Radical Overhaul in Handling of Military Sex Assaults*, STRIPES (Dec. 29, 2011), <https://www.stripes.com/blogs/stripes-central/stripes-central-1.8040/victim-advocates-want-radical-overhaul-in-handling-of-military-sex-assaults-1.164733> [<https://web.archive.org/web/20150920001929/https://www.stripes.com/blogs/stripes-central/stripes-central-1.8040/victim-advocates-want-radical-overhaul-in-handling-of-military-sex-assaults-1.164733>]; John M. Donnelly, *NDAA Envisions New Military Policies on Sexual Assaults*, ROLL CALL (Dec. 8, 2020, 11:13 AM), <https://www.rollcall.com/2020/12/>

provisions to fly under the radar and achieve what no other military legislation has been able to—get sexual offenses out of the hands of the chain of command.

B. *Getting to the Root of the Military's Sexual Violence Crisis*

Even in the wake of the 2022 NDAA's procedural success, the provisions themselves will likely fail to transform the military's approach to sexual offenses. The military's judicial system is plagued by the expansive authority held by commanders. And even with some power removed from the chain of command, the 2022 NDAA still allows overall control to lie within the armed forces. This system of self-regulation has failed time and time again, often exacerbating the crisis rather than remedying the problem.

1. Commander Discretion, a Plague on the Military Judicial System

Commander discretion and the military's self-regulation is a byproduct of Congress' enactment of the UCMJ. By creating a separate statutory and adjudicatory system meant only for the armed forces, Congress has left much of the military judicial system within the control of individual commanders. Commander discretion is one of the most criticized aspects of the military's approach to sexual offenses, due in large part to concerns over fundamental fairness and justice.<sup>121</sup> This Section explores the concept of

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08/ndaa-envisions-new-military-policies-on-sexual-assaults/.

121. Even though Article 37 of the UCMJ prohibits commanders from using their rank and position to unduly influence the course of a trial—referred to as unlawful command influence—concerns about impartiality and independence are frequently raised. Commanders have been accused of tainting military juries and interfering with witness testimony. See Dan Maurer, *The 'Shadow Report' on Commanders' Prosecutorial Powers Raises More Questions Than Answers*, LAWFARE (May 11, 2020, 11:07 AM), <https://www.lawfareblog.com/shadow-report-commanders-prosecutorial-powers-raises-more-questions-answers>; KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RSCH. SERV., MILITARY SEXUAL



commander discretion, the issues it raises, and its detrimental impact on the military's sexual violence crisis.

Commander discretion is intricately connected to every aspect and step of the military judicial process. While a completed investigation for sexual assault or harassment is reviewed for legal sufficiency by a military lawyer, or Staff Judge Advocate, they lack authority to bring forward any form of judicial, non-judicial, or administrative disciplinary action.<sup>122</sup> The Staff Judge Advocate can only recommend appropriate discipline, but the ultimate decision resides with the commander with court-martial convening authority.<sup>123</sup> After receiving the Staff Judge Advocate's legal advice, the commander may exercise authority over the matter, dismiss the allegations with no further action, or refer the matter to the next officer within the chain of command.<sup>124</sup>

In analyzing how an incident should proceed, commanders must evaluate the "interests of justice and good

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ASSAULT: A FRAMEWORK FOR CONGRESSIONAL OVERSIGHT 59–60 (2021) [hereinafter MILITARY SEXUAL ASSAULT: A FRAMEWORK]; Monu Bedi, *Unraveling Unlawful Command Influence*, 93 WASH. U. L. REV. 1401, 1401–02, 1417–20 (2016).

122. MILITARY SEXUAL ASSAULT: A FRAMEWORK, *supra* note 121, at 60; *see* 10 U.S.C. § 815 (stating that the commander has the authority to subject a service member in their command to non-judicial punishment); 10 U.S.C. § 822 (stating that the President of the United States, the Secretary of Defense, and the commanding officer of the particular armed force branch are the only individuals who can convene a general court-martial); 10 U.S.C. § 818 (stating that only general court martials have jurisdiction over § 920(a)–(b), rape and sexual assault).

123. General-court martial convening authority refers to any individual who has the power to initiate a general court-martial. A general-court martial may be convened by the commanding officer of a unified or specified combatant command, the commanding officer of an Army Group, Corps, division, separate brigade, or a corresponding unit of the Army or Marine Corps; or any other commanding officer designated by the Secretary concerned. MILITARY SEXUAL ASSAULT: A FRAMEWORK, *supra* note 121, at 60; *U.S. Military Rank Insignia: Officer Insignia*, U.S. DEP'T OF DEF., <https://www.defense.gov/Resources/Insignia/#officer-insignia> (last visited May 28, 2022) (listing the different levels of rank for officers in the military, a colonel falls under the O-6 rank); MANUAL FOR COURTS-MARTIAL UNITED STATES r. 401, at II-35–36 (2019); 10 U.S.C. § 834.

124. MILITARY SEXUAL ASSAULT: A FRAMEWORK, *supra* note 121, at 60.

order and discipline.”<sup>125</sup> Such an evaluation requires the commander to look at a number of factors: whether the offense occurred in wartime; the effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command; the nature, seriousness, and circumstances of the offense and the accused’s culpability in connection with the offense; the accused’s willingness to cooperate in the investigation or prosecution of others; and the impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused’s potential for continued service and the responsibilities of the command.<sup>126</sup> Notably, these factors fail to deal directly with the well-being and protection of the victim, and instead revolve around the continued functioning, health and welfare of the military institution. This leaves victims in an environment where they are aware that they are not the priority, and that their commander holds all of the power.

Even with the new NDAA provisions, concerns still remain over commander discretion. While section 543 implements an independent investigator for formal complaints of sexual harassment, the provision itself fails to define what “independent” actually means.<sup>127</sup> Although currently viewed as someone outside of the chain of command, without a codified definition, the best clarification exists only in the form of a military memo stating the investigator must be outside the victim’s brigade.<sup>128</sup> The lack of an enforceable legal definition leaves the door open for the memo definition to be disregarded, or the potential for the

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125. MANUAL FOR COURTS-MARTIAL UNITED STATES app. 2.1, at A2.1-2 (2019).

126. *Id.*

127. Nowhere within section 543 or any of the other NDAA section that refer to the new office, standalone offense, or sexual harassment investigative procedures does it define who is an “independent” investigator. *See* 2022 NDAA, §§ 531, 532, 539D, 543, Pub. L. No. 117-81, 135 Stat. 1541, 1692–96, 1699–1700, 1709–10 (2021) (codified as amended at 10 U.S.C. §§ 824a, 1044f, 934 note, 1561).

128. *See supra* notes 87–88 and accompanying text.

military to revert back to its previous policy out of comfort and ease. Additionally, the NDAA's creation of a standalone offense for sexual harassment will still fall within commander control. Charged under Article 134, the crime of sexual harassment is not specifically listed as a "covered offense," and thus falls outside of the Special Trial Counsel's authority.<sup>129</sup> This allows commanders to maintain authority over charging and adjudicating sexual harassment.

Concerns over commander discretion also plague the reporting process. Following their disclosure, victims fear retaliation, professional reprimands, and a lack of confidentiality.<sup>130</sup> Military victims have stated that after reporting an incident of sexual assault or harassment they began to receive reprimands for minor infractions such as falling behind on a run or underage drinking.<sup>131</sup> These reprimands impact the service members career to such a degree that one Petty Officer stated, "I knew when I reported my career would be over."<sup>132</sup> Victims also reported hearing their commanders talk openly about their cases to others or seeing their case referenced in an email copied to people who should not have been privy to the information.<sup>133</sup> Despite

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129. The special trial counsel has authority to determine whether to charge an individual with a covered offense and whether to initiate a court-martial for covered offenses. Covered offenses include murder, manslaughter, kidnapping, assault, stalking, retaliation, rape, sexual assault, other sexual misconduct, child pornography, and any attempt, conspiracy, or solicitation to commit any covered offense. 2022 NDAA, §§ 531, 533, 135 Stat. at 1692–94, 1695–96; see 10 U.S.C. §§ 824a, 801.

130. *Embattled: Retaliation Against Sexual Assault Survivors in the US Military*, HUM. RTS. WATCH (May 18, 2015), <https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military> [hereinafter *Embattled*].

131. David L. Hudson, Jr., *Chilling Effect Overview*, FIRE (Feb. 15, 2017), <https://www.thefire.org/chilling-effect/>; Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 BOS. U. L. REV. 685, 685 (1978) (discussing the concept of the chilling effect as being "recognized most frequently and articulated most clearly in decisions chiefly concerned with the procedural aspects of free speech adjudication"); *Embattled*, *supra* note 130.

132. *Embattled*, *supra* note 130.

133. *Id.*

regulations which allow a Sexual Assault Response Coordinator to withhold information that could reasonably lead to personal identification of the victim, advocates report that in practice, in smaller units, it is too easy to figure out who the victim is.<sup>134</sup>

The 2022 NDAA provisions will not be able to assuage these concerns. Though outside the chain of command, each position created by the provisions is still held by an active-duty service member. As a foundational American institution with roots deeply dug into the country's past, present, and future, preservation of the military is of the utmost importance. Each service member is but one piece of the whole, with their first priority being the survival of the institution. Removing investigatory, prosecutorial, and adjudicatory authority out of the chain of command but still keeping the authority within the military fails to acknowledge this duty and its potential to bias one's decision-making process. History has shown that self-regulation breeds institutional self-preservation, in the end forcing a choice between institution and individual.

## 2. The Failed History of Institutional Self-Regulation

The creation of an independent office and investigator still within and involving those immersed in an institution's cultures and mores is insufficient to truly eradicate sexual misconduct within the military. Service members dedicate their lives to the institution they serve.<sup>135</sup> The dedication and commitment to that institution is all consuming, and the survival of the institution means the survival of the individual. Mottos of the branches of the armed forces include "*Non sibi sed patriae*," which is Latin for "Not self, but country," and "*Semper Fidelis*," which embodies the Marine Corps' eternal commitment to both their fellow

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134. *Id.*

135. Lynn K. Hall, *The Importance of Understanding Military Culture*, 50 SOC. WORK HEALTH CARE 4, 12, 15 (2011).

Marines and the United States.<sup>136</sup> The movie *A Few Good Men* references “the code” and the motto “Unit, Core, God, Country.”<sup>137</sup> While the movie is a fictional portrayal of military life, the phrase speaks to the lifelong commitment that soldiers make to their unit. Members of the armed forces are so enmeshed and attached to the institution itself that bias is inevitable, whether conscious or not. It may be that only a complete severing from the institution itself will be enough to end the sexual violence.

Self-preservation and the failure of self-regulation is by no means unique to the military alone. In today’s society, government, religion, and education are three pillars of American life. And each of these culturally and socially engrained institutions share the same sexual violence crisis and the same failure to act. In the Catholic Church, the system for reporting and investigating sex-related offenses is similar in many ways to the military’s procedures. Through canonical law, the Church, like the armed forces, adopts its own institutional regulations,<sup>138</sup> binding on all Roman Catholics.<sup>139</sup> Canon law labels sexual abuse of a minor to be a grave crime, just as the UCMJ considers sexual assault a serious offense.<sup>140</sup> Yet even with strictly defined laws, both

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136. *What Are the Mottos of the 6 Branches of the Military?*, USO (Feb. 10, 2021), <https://www.uso.org/stories/2990-what-are-the-mottos-of-the-6-branches-of-the-u-s-military>; *Marine Corps Values*, MARINES, <https://www.marines.com/life-as-a-marine/standards/values.html> (last visited May 28, 2022).

137. *A FEW GOOD MEN* (Castle Rock Ent. 1992).

138. *Canon Law*, U.S. CONF. CATH. BISHOPS, <https://www.usccb.org/beliefs-and-teachings/what-we-believe/canon-law> (last visited May 28, 2022).

139. John J. Coughlin, *Canon Law and the Clergy Sex Abuse Crisis: The Failure of the Rule of Law* (Notre Dame L. Sch. Legal Stud. Rsch. Paper No. 09-21, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1397584](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1397584).

140. John J. Coughlin, *The Clergy Sexual Abuse Crisis and the Spirit of Canon Law*, 44 B.C. L. REV. 977, 980 (2003) (“Canon 1395 of the 1983 *Codex Iuris Canonici* (the ‘1983 Code’) establishes that sexual contact with a minor qualifies as one of four classifications of sexual offenses for which a man may be permanently removed from the clerical state.”). Under the UCMJ, sexual assault or rape can be charged under Article 120. 10 U.S.C. § 920. Sexual assault or rape can result in a punishment of life imprisonment or even death. *See* 10 U.S.C.

institutions rarely turn to their harshest judicial options.<sup>141</sup>

Reported child abuse at the hands of Catholic priests began in the 1950s,<sup>142</sup> though the pervasive extent of abuse was unknown until early 2002.<sup>143</sup> In priest sexual abuse cases, victims commonly report abuse to another priest or cleric.<sup>144</sup> Often times that cleric passes the report up the chain to the head of the specific church, a bishop or archbishop, or even a cardinal.<sup>145</sup> In some cases, Church

§ 843; 10 U.S.C. § 856.

141. In Fiscal Year 2019, 5,699 unrestricted reports of sexual assault were filed, of those 3,716 had completed dispositions meaning the offender could receive possible disciplinary action, of those it was determined that 1,630 cases warranted discipline, of those 795 were brought to a court martial, and of those only 264 resulted in a conviction of at least one charge at court-martial. DEP'T DEF. ANN. REP. ON SEXUAL ASSAULT IN MIL., app. B, 7, 17, 20–21 (2019); Andrew Tilghman, *Military Sexual Assault Claims: 1 in 20 Lead to Jail Time*, MIL. TIMES (May 13, 2015), <https://www.militarytimes.com/2015/05/13/military-sexual-assault-claims-1-in-20-lead-to-jail-time/>; Coughlin, *supra* note 140, at 981–82 (“I am unaware of a single case in the United States during the past several decades in which a priest was dismissed from the clerical state as a result of the diocesan penal process stipulated in canon law.”).

142. *Catholic Church Child Sexual Abuse Scandal*, BBC (Oct. 5, 2021), <https://www.bbc.com/news/world-44209971>. In 1985, Louisiana Priest Gilbert J. Gauthé was convicted of molesting at least thirty-nine children between 1972 and 1983, and in the late 1990s reports of widespread sexual abuse began to come out of Ireland. Tara Isabella Burton, *The Decades-Long Catholic Priest Child Sex Abuse Crisis, Explained*, VOX (Sept. 4, 2018, 7:10 AM), <https://www.vox.com/2018/9/4/17767744/catholic-child-clerical-sex-abuse-priest-pope-francis-crisis-explained>; *Factbox: Reports into Abuses in the Irish Catholic Church*, REUTERS (Jan. 12, 2021, 7:36 AM), <https://www.reuters.com/article/us-ireland-church-abuses-factbox/factbox-reports-into-abuses-in-the-irish-catholic-church-idUSKBN29H1JJ>.

143. The Catholic Church sexual abuse scandal unraveled in 2002, when the Boston Globe released its first of dozens of stories revealing the widespread sexual abuse by priests in and around Boston. Michael Rezendez et al., *Church Allowed Abuse by Priest for Years*, BOS. GLOBE (Jan. 6, 2002, 5:50 PM), <https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTIrAT25qKGvBuDNM/story.html>; Thomas Farragher, *Church Cloaked in Culture of Silence*, BOS. GLOBE (Feb. 24, 2002), <https://www.bostonglobe.com/news/special-reports/2002/02/24/church-cloaked-culture-silence/88cLKuodvSiHjvg0dfz24L/story.html>.

144. Burton, *supra* note 142; Rezendez et al., *supra* note 143; Farragher, *supra* note 143.

145. Burton, *supra* note 142; Rezendez et al., *supra* note 143; Farragher, *supra*

leaders are even aware of previous instances of abuse reported against the same cleric.<sup>146</sup> Accusations of sexual abuse seldom result in removal from the clerical state, even though Canon law renders it the proper punishment.<sup>147</sup> Instead, the priest is placed on “sick leave” and ordered to receive psychiatric treatment.<sup>148</sup> In many instances, however, the priest is merely reassigned to another parish with unsuspecting families and children.<sup>149</sup> Even when the church provides a settlement, it demands the victim’s secrecy about the abuse.<sup>150</sup>

Though the Church provides excuses for the conduct of its clerics,<sup>151</sup> the truth is far more simple.<sup>152</sup> The Church’s response to abuse has long been plagued by self-preservation to the detriment of child protection.<sup>153</sup> The Church’s culture reflects a long-standing rigid adherence to Canon law principles which have the effect of prioritizing offending clergy over all others.<sup>154</sup> The Church imposed “pontifical

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note 143.

146. Burton, *supra* note 142; Rezendez et al., *supra* note 143; Farragher, *supra* note 143.

147. See *supra* note 139–140 and accompanying text; Associated Press, *Vatican Reveals How Many Priests Defrocked for Sex Abuse Since 2004*, CBS NEWS (May 7, 2014, 10:14 AM), <https://www.cbsnews.com/news/vatican-reveals-how-many-priests-defrocked-for-sex-abuse-since-2004/>.

148. Rezendez et al., *supra* note 143; Burton, *supra* note 142.

149. Burton, *supra* note 142.

150. Rezendez et al., *supra* note 143.

151. Rezendez et al., *supra* note 143 (“The church’s likely legal defense . . . will be that doctors deemed Geoghan rehabilitated. . . . In 1984, there were still some clinicians who believed child molesters could be cured. But other specialists had long since warned Catholic bishops of the high risk that priests who had abused children would become repeat offenders.”).

152. Peter Stanford, *The Catholic Church Is Still Making Excuses for Pedophilia*, GUARDIAN (Feb. 17, 2019, 2:00 AM), <https://www.theguardian.com/world/2019/feb/17/catholic-church-still-making-excuses-paedophilia-pope>.

153. Tony Foley, *Changing Institutional Culture in the Wake of Clerical Abuse – The Essentials of Restorative and Legal Regulation*, 22 CONTEMP. JUST. REV. 171, 173 (2019).

154. *Id.* at 175.

secrecy” on its investigations of abuse and forbade clerics from reporting to police or civil authorities.<sup>155</sup> Even by July 2020—decades after learning of the scale of abuse—the Church still refuses to acknowledge any legal obligation to report allegations to police or civil authorities.<sup>156</sup>

Under Canon law, the Church is responsible for conducting the investigation into any allegations of sexual abuse.<sup>157</sup> Once a bishop or superior receives an allegation against one of his priests, he is supposed to conduct a preliminary investigation. If the claim has a “semblance of truth” he sends the case to the Vatican to the Congregation for the Doctrine of the Faith for review.<sup>158</sup> The Congregation staff consists of seventeen Canon lawyers who process the cases.<sup>159</sup> The Congregation typically sends the case back to the bishop to investigate the allegation fully, either through

155. *Id.*

156. In July 2020, the Church released a document, the *Vademecum*, which states that even in cases where there is no explicit legal obligation to do so, the ecclesiastical authorities should make a report to competent civil authorities. However, the *Vademecum* does not promulgate a new law, and is being described instead as an “instruction manual,” with most of its language frequently using words such as “should” rather than “must.” David Welna, *New Vatican Guidance Urges Clergy to Report Cases of Sexual Abuse*, NPR (July 16, 2020, 4:24 PM), <https://www.npr.org/2020/07/16/891977309/vatican-urges-reporting-of-sexual-abuse-in-new-how-to-handbook-for-clergy>. There is also concern at the lack of transparency by priests due to the clergy privilege that exists in the United States. All fifty states and the District of Columbia have some form of privilege protecting clerics from disclosing statements, which often includes statements relaying instances of abuse. Christine P. Bartholomew, *Exorcising the Clergy Privilege*, 103 VA. L. REV. 1015, 1020–21, 1054–55 (2017). Though this privilege is rarely successfully asserted, it provides an added avenue for protection of the institution by those who are beholden to it. *See id.* at 1054–55.

157. *Canon Law Guides Church’s Response to Clergy Sexual Abuse*, ARCHDIOCESE OF BALT. (Jan. 19, 2012), <https://www.archbalt.org/canon-law-guides-churchs-response-to-clergy-sexual-abuse/>; Nicole Winfield, *Vatican’s Legal Procedures for Handling Sex Abuse, Explained*, AP (Feb. 21, 2019), <https://apnews.com/article/826b0d5ec24340cd866993fa150ce38b>.

158. Winfield, *supra* note 157; Stacy Meichtry, *Vatican Scrambles to Clarify Policy on Abuse Claims*, WALL ST. J. (Apr. 13, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052702303828304575179421838222464>.

159. Winfield, *supra* note 157.



a full canonical trial or via an expedited administrative process.<sup>160</sup> The Congregation has the authority to instruct the bishop to prosecute the alleged abuser in a local tribunal, where the Congregation serves as an appellate court before a potential defrocking—removal from the priesthood—is carried out.<sup>161</sup> The Congregation is also empowered to dispense with a Church trial and refer a case directly to the Pope for defrocking when the evidence is overwhelming.<sup>162</sup>

While the Congregation is an independent investigatory and adjudicatory unit with no direct authority over the offenders, cleric sexual abuse cases are still cropping up all over the world.<sup>163</sup> The Church's sexual offense procedures closely parallel the changes implemented by the 2022 NDAA. Both include independent but internal institutional offices for investigating and prosecuting sexual offenses. Both include a male-dominated hierarchy, with clear superiors.<sup>164</sup>

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160. Winfield, *supra* note 157; Meichtry, *supra* note 158.

161. Meichtry, *supra* note 158.

162. Winfield, *supra* note 157; Meichtry, *supra* note 158.

163. Jay Tokasz, *Buffalo Diocese Hit with 900 Abuse Claims in Bankruptcy Court, More Than Any Diocese*, BUFF. NEWS (Aug. 16, 2021), [https://buffalonews.com/news/local/buffalo-diocese-hit-with-900-abuse-claims-in-bankruptcy-court-more-than-any-diocese/article\\_e31cc530-feaa-11eb-9703-ebc280569a5c.html](https://buffalonews.com/news/local/buffalo-diocese-hit-with-900-abuse-claims-in-bankruptcy-court-more-than-any-diocese/article_e31cc530-feaa-11eb-9703-ebc280569a5c.html); Aurelien Breeden, *Over 200,000 Minors Abused by Clergy in France Since 1950, Report Estimates*, N.Y. TIMES (Oct. 5, 2021), <https://www.nytimes.com/2021/10/05/world/europe/france-catholic-church-abuse.html>; Associated Press, *A New Jersey Catholic Diocese Agrees to Pay \$87.5M to Settle Sex Abuse Lawsuits*, NPR (Apr. 20, 2022, 11:15 AM), <https://www.npr.org/2022/04/20/1093740385/catholic-church-new-jersey-sex-abuse-settlement>; *Catholic Church in Spain Faces Major Abuse Investigation – El Pais Newspaper*, REUTERS (Dec. 19, 2021, 8:45 AM), <https://www.reuters.com/world/europe/catholic-church-spain-faces-major-abuse-investigation-el-pais-newspaper-2021-12-19/>; Claire Giangravé, *Time's Up For Catholic Church in Italy to Reckon with Clerical Abuse, Survivor Group Says*, RELIGION NEWS SERV. (Feb. 22, 2022), <https://religionnews.com/2022/02/22/times-up-for-catholic-church-in-italy-to-reckon-with-clerical-abuse-survivor-group-says/>.

164. Women make up between 20 to 29 percent of the active duty officers in each branch of the military, except for the Marine Corps where they make up around 9 percent. *Gender Distribution of Active Duty Officers in the U.S. Department of Defense in 2020, by Service Branch*, STATISTA, <https://www.statista.com/statistics/232608/gender-of-us-dod-officers-in-2010-by-service-branch/>

And each involves individuals who dedicate their lives to the institutions they serve.<sup>165</sup> They are not viewed as a profession but as a way of life.

Institutions of higher education also engage in internal investigatory and adjudicatory processes that aid in the cover-up of sex-related crimes, as well as the same commitment to institutional self-preservation. When a student conveys an instance of sexual assault to an administrator, their first job and duty, just as Catholic priests and service members, is to protect the institution—not the student—from harm.<sup>166</sup> For decades many colleges have chosen to handle most sexual crime allegations on campuses themselves rather than reporting them to local police.<sup>167</sup> Such actions often lead to college students believing that university officials and campus security officers are more interested in protecting the university's reputation than in helping police and prosecutors aggressively pursue allegations of sexual assault.

A 2019 Association of American University survey on sexual assault and misconduct polled over 150,000 students at twenty-seven universities.<sup>168</sup> Data revealed a 13 percent

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(last visited May 28, 2022). In 2019, there were approximately 31,350 Catholic nuns, compared to 35,513 priests. Hollie McKay, *Keeping the Sisterhood from Extinction: The Struggle to Save Nuns in America*, FOX NEWS (Jan. 27, 2020, 10:56 AM), <https://www.foxnews.com/us/keeping-the-sisterhood-from-extinction-the-struggle-to-save-nuns-in-america>; *Frequently Requested Church Statistics*, CTR. FOR APPLIED RSCH. IN THE APOSTOLATE, <https://cara.georgetown.edu/frequently-requested-church-statistics/> (last visited May 28, 2022). While not necessarily an extreme difference, women are unable to hold positions of authority within the church such as a bishop, cardinal, or the Pope. Tia Ghose, *Why Can't a Woman Be Pope?*, LIVE SCI. (Mar. 9, 2013), <https://www.livescience.com/27751-why-women-cant-be-pope.html>.

165. *How to Become a Priest*, BRESCIA UNIV. (Sept. 11, 2013), <https://www.brescia.edu/2013/09/how-to-become-a-priest/>; Hall, *supra* note 135, at 12, 15.

166. THE HUNTING GROUND (Weinstein Co. 2015).

167. Editorial Board, *Campus Rape? Call the Police.*, CHI. TRIB. (July 16, 2017, 9:32 AM), <https://www.chicagotribune.com/opinion/editorials/ct-edit-campus-devos-sexual-assault-0716-jm-20170714-story.html>.

168. *Understanding Sexual Assault on College Campuses*, BEST COLLS., <https://www.bestcolleges.com/resources/sexual-assault-on-campus/> (last visited

nonconsensual sexual conduct rate.<sup>169</sup> Statistics provided by the Rape, Abuse, and Incest National Network also indicated that male college students between ages eighteen to twenty-four are five times more likely to experience sexual violence than non-students.<sup>170</sup> Even with these high numbers of sexual crimes, colleges and universities do not accurately report what is happening on their campuses.<sup>171</sup> In 2016, 89 percent of the approximately 11,000 college and university campuses that participate in federal financial aid programs reported zero instances of rape that year.<sup>172</sup> Similar to both the military and the Church, the reasons behind these low report numbers have to do with the processes that are in place to deal with sex-related crimes and the overwhelming commitment to keep the institution's image intact.

Under Title IX, colleges and universities are required to address cases of sexual violence as to not discriminate against women even if law enforcement will not.<sup>173</sup> Although the law requires colleges and universities investigate and manage these cases, how to do so is left largely up to the institutions themselves.<sup>174</sup> Many institutions follow similar policies and procedures which give the victim the right to an

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May 28, 2022).

169. *Id.*

170. *Id.*

171. Colleges and universities which participate in federal financial aid programs are required to report campus crime statistics and security information under the federal Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the "Clery Act"). *Id.*; see also 20 U.S.C. § 1092(f).

172. *An Underreported Problem: Campus Sexual Misconduct*, AAUW, <https://www.aauw.org/resources/article/underreported-sexual-misconduct/> (last visited May 28, 2022); *Schools Are Still Underreporting Sexual Harassment and Assault*, AAUW (Nov. 2, 2018), <https://ww3.aauw.org/article/schools-still-under-reporting-sexual-harassment-and-assault/>.

173. 20 U.S.C. § 1681(a); *Vice: Evolution of a Plague & Campus Coverup* (Home Box Off. broadcast June 5, 2015); *Know Your Rights at School: Sexual Assault & Sexual Harassment*, EQUAL RTS. ADVOCS., <https://www.equalrights.org/issue/equality-in-schools-universities/sexual-harassment/> (last visited May 28, 2022).

174. *Vice: Evolution of a Plague & Campus Coverup* (Home Box Off. broadcast June 5, 2015).

investigation, and if the investigation shows there is sufficient evidence to support the complaint, a hearing is required.<sup>175</sup> However, the hearing stage is often referred to as a “kangaroo court,” where adjudicators can be a panel of students, professors, or outside investigators.<sup>176</sup> Frequently panelists will ask inappropriate questions, make up policies and procedures on the spot, and blame the victim rather than the accused.<sup>177</sup> Often times even within the investigation stage the person who made the report is more harshly scrutinized than the alleged abuser.<sup>178</sup> As for punishments that are rendered when an individual is found guilty of sexual assault, rape, or sexual misconduct on a college or university campus, the reprimand is just as minimal as cases involving service members and priests.<sup>179</sup> Students are more likely to get expelled for cheating or other honor code violations than for a sex-related crime. Even worse, schools often defer such expulsions until after graduation so as to have no real impact on abusers.<sup>180</sup> All of these issues result

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175. *Id.*

176. *Id.* at 19:25 (statement of Laura Dunn).

177. *Id.*

178. *Id.*

179. Punishments for service members can range but often include the lowering of rank, being moved to a different base, a decrease in pay, fine, or letter of reprimand. Priests found guilty of sexual abuse can be placed on “sick leave” and must receive psychiatric treatment or are just moved to another parish. *See supra* notes 19–20, 50–51, 72, 140–141, 147–150 and accompanying text.

180. In one case at the University of Arkansas, the student was found guilty of sexual misconduct and ordered expelled immediately. However, after an appeal, the expulsion date was moved until after the student’s graduation. The victim’s advocate demanded a harsher punishment which the school refused to do. It was not until a news outlet in the area inquired about the case that the school reinstated the initial punishment of immediate expulsion, claiming the change to a delayed expulsion was an internal error. *Vice: Evolution of a Plague & Campus Coverup* (Home Box Off. broadcast June 5, 2015). The data of actual reports versus expulsions is staggering. From 2009 to 2013, Harvard had 135 reports of sexual assault which resulted in ten expulsions. From 1996 to 2013, Stanford had 250 reports of sexual assault with one expulsion, and from 1998 to 2013, the University of Virginia had 205 reports of sexual assault and zero expulsion. However, within that time frame, 183 students were expelled for cheating and other honor board violations. *See THE HUNTING GROUND* (Weinstein Co. 2015).

in a process that frequently fails to deliver justice for the victims.<sup>181</sup>

The root cause of the failure to punish or even report is largely because the schools do not want these cases coming to light.<sup>182</sup> Schools cover up or neglect to report cases of sexual violence because the criminal statistics that follow such reporting would likely result in negative publicity, fewer student applications, and ultimately less money for the institution.<sup>183</sup> Parents do not want to send their seventeen- or eighteen-year-old child to a campus with rampant sexual violence.<sup>184</sup> Administrators are protecting a brand and product they are selling, and are more concerned with their lawyer's advice, or their insurer's recommendation, or the guidance of their public relations specialist than the danger to the victims.<sup>185</sup> Schools would rather cover up rape or sexual assault than endure the bad press, or be known as a rape school, which would hurt admissions and the institutions reputation.<sup>186</sup> Self-preservation is of the utmost importance.

“Any time you have an institutional bias where it prefers to protect the institution over the individual that's when justice is not possible.”<sup>187</sup> Though the 2022 NDAA provisions remove control from the chain of command, history shows us

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181. *Vice: Evolution of a Plague & Campus Coverup* (Home Box Off. broadcast June 5, 2015).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. In an episode of *Vice* the Emmy-awarding winning documentary series, New York Senator Kirsten Gillibrand stated that she thinks “there are many cases where a school would rather cover up rape or sexual assault than endure the bad press—then have to be known as a rape school. It obviously would hurt admissions; it would hurt their reputation. And anytime you have an institutional bias where it prefers to protect the institution over the individual that's when justice is not possible.” *Id.* at 22:30–22:50.

187. *Vice: Evolution of a Plague & Campus Coverup* at 22:43 (Home Box Off. broadcast June 5, 2015) (statement of Sen. Kristen Gillibrand).

that is not enough. The sexual violence crises across these three institutions prove that self-regulation does not work. The military, Catholic Church, and institutions of higher education all allow internal investigations and adjudications, and all involve individuals who have committed themselves and their lives to the institution. This commitment instills a duty to protect the institution and ensure its survival. Through this duty an implicit bias is born, one which leads to victim-blaming, inadequate punishment, and a lack of justice for victims. The only way to effectively end sexual violence within these institutions is to take judicial control away from them entirely.

### III. THE REMEDY TO ERADICATE MILITARY SEXUAL VIOLENCE

The 2022 NDAA took the most politically realistic approach to passage by utilizing a piecemeal method. Though it provided an opportunity to alter the military's approach to sexual offenses, it failed to take full advantage of this chance and fell short of implementing measures that will truly spark change. It is evident that with an institution whose history and roots lie deep within American culture, there is no one solution that can remedy the decades long issue of sexual violence in the military. There are a number of incremental changes that can be made to put the military on a better path forward. However, if eradication of sexual violence is the goal, one change—taking the military out of the equation altogether—would be the most transformative measure in the military's long history.

The existence of the military judicial system was never one intended by the Framers.<sup>188</sup> The creation of a military tribunal is merely implied in the Fifth Amendment's Grand Jury Clause rendering a grand jury indictment unnecessary

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188. See Michel Paradis, *Is a Major Change to Military Justice in the Works?*, LAWFARE (May 4, 2020, 11:30 AM), <https://www.lawfareblog.com/major-change-military-justice-works>.

when “in actual service in time of War or public danger.”<sup>189</sup> The Supreme Court eventually upheld the constitutionality of military tribunals on the strength of Congress’s power “to make Rules for the Government and Regulation of the land and naval Forces.”<sup>190</sup> Though the United States still separates the military and civilian judicial systems, substantial precedent exists across the globe for removing adjudicatory authority not only out of the chain of command, but out of the armed forces entirely.

The United Kingdom currently has a system which parallels the one implemented by the 2022 NDAA. Prior to 2006, crimes of murder, manslaughter, and rape in the UK committed by service personnel were automatically heard in civilian court.<sup>191</sup> In 2009, the UK created a Court Martial as a permanent standing court for military matters.<sup>192</sup> “The Royal Military Police with its Royal Navy and Royal Air Force counterparts, known collectively as the Service Police, investigate criminal offenses, including allegations of sexual assault within the [UK] military.”<sup>193</sup> “The Service Police’s role is investigative, and they operate independently of the chain of command and the Ministry of Defence.”<sup>194</sup> When the Service Police “determine there is enough evidence to charge the suspect with a Schedule 2 offense,”<sup>195</sup> “the case must be referred to the DSP [(Director of Service Prosecutions)]

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189. *Id.*; U.S. CONST. amend. V.

190. U.S. CONST. art. I, § 8, cl. 14; *see also* *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 71 (1858).

191. DEFENCE SELECT COMM., PROTECTING THOSE WHO PROTECT US: WOMEN IN THE ARMED FORCES FROM RECRUITMENT TO CIVILIAN LIFE ¶ 156 (2021), <https://publications.parliament.uk/pa/cm5802/cmselect/cmdfence/154/15402.htm>.

192. *See* L. LIBR. OF CONG., MILITARY JUSTICE: ADJUDICATION OF SEXUAL OFFENSES 55 (2013) [hereinafter *Adjudication of Sexual Offenses*], <https://tile.loc.gov/storage-services/service/l1/l1glrd/2013404869/2013404869.pdf>.

193. *Id.* at 62 (footnote omitted).

194. *Id.*

195. A Schedule 2 offense includes rape and assault by penetration but does not include other sexual offenses including sexual assault, exposure, or voyeurism. *Id.* at 63.

...<sup>196</sup> This effectively removes a commander's authority. The DSP is outside of the chain of command, is appointed by the Queen, and may even be a civilian lawyer.<sup>197</sup> The DSP has the authority to charge an offender and convene a court-martial.<sup>198</sup>

Even with this system in place, however, the United Kingdom's sexual violence problem is still at crisis levels.<sup>199</sup> Removing control out of the chain of command has failed to such a degree that in December 2021 the House of Commons debated a bill which would have reevaluated the military's judicial control over sexual offenses, potentially moving them back into the civilian system.<sup>200</sup> The UK system provides a

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196. *Id.*

197. *Id.* at 58.

198. *Id.* at 63–64.

199. See DEFENCE SELECT COMM., *supra* note 191, ¶¶ 38–40 (“The [UK] Army’s Sexual Harassment survey of 2018 (the latest available data) recorded that 8% of servicemen and 21% servicewomen had either experienced or witnessed sexual harassment at work in the previous 12 months. Servicewomen were more likely to report personally experiencing most types of ‘targeted’ sexual behaviour, including unwelcome comments about their appearance, body or sexual activities (34% of women versus 21% men), being touched in a way that made them uncomfortable (13% versus 3%), being sexually touched without consent (7% versus 3%), sexual assault (2% versus 1%) and rape (1% versus 0%). The Royal Navy/Marines survey of 2015 (latest available) also indicated Naval servicewomen were more likely to have experienced most types of targeted sexual behaviours. For criminal sexual offences, women were a majority (137, or 76%) of the 180 victims within the 161 investigations dealt with wholly by the Service Justice System in 2020.”); see also Isobel Thompson, *Should the UK Military Be Removed from Handling Sexual Violence Cases?*, OPEN DEMOCRACY (Dec. 4, 2021, 10:33 AM), <https://www.opendemocracy.net/en/5050/uk-military-sexual-violence/>.

200. See DEFENCE SELECT COMM., *supra* note 191, ¶¶ 155, 160–61 (“The Government’s Armed Forces Bill 2021 does not directly implement the recommendations to move these sexual offences, domestic violence and child abuse outside the Service Justice System (SJS), if perpetrated in the UK. Instead the Government is introducing ‘clearer guidance for prosecutors’ on how serious crimes should be handled, with a Duty on the Director of Service Prosecutions and the Director of Public Prosecutions in England and Wales to agree to a protocol on where cases will be heard if there is concurrent jurisdiction. If the prosecutors are unable to resolve a dispute over where a case should be heard, the civilian prosecutors will ‘have the final say.’”); see also Thompson, *supra* note 199.



cautionary tale through which the 2022 NDAA provisions can and should be viewed.

Though the UK system and 2022 NDAA only remove control out of the chain of command, other countries have taken it even further. Since the Second World War, German civilian courts control military justice.<sup>201</sup> In 1956, the debate as to whether Germany should reinstitute military courts was addressed, and it was decided that soldiers had to be treated as ordinary citizens in criminal prosecutions and trials.<sup>202</sup> “All criminal offenses perpetrated by [German] soldiers are adjudicated by the courts of ordinary jurisdiction, and the ordinary rules for jurisdiction and venue apply.”<sup>203</sup>

Germany is not alone in its approach.<sup>204</sup> While not entirely controlled by civilian courts, French military personnel who commit a felony or misdemeanor during peace time are adjudicated through the civilian system.<sup>205</sup> French civilians and military personnel are treated as equals under the law and are subject to the same investigative and preliminary hearing procedural rules. Thus, the majority of military criminal matters are addressed by civilian courts.<sup>206</sup> There is only one special military court in Paris which is competent only to try transgressions committed abroad by members of the armed forces.<sup>207</sup> Only in times of war do

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201. *Adjudication of Sexual Offenses*, *supra* note 192, at 37.

202. *Id.*; *Military Justice in Germany*, GERMAN CULTURE, <https://german.culture.com.ua/germany-facts/military-justice-in-germany/> (last visited May 28, 2022).

203. *Adjudication of Sexual Offenses*, *supra* note 192, at 40.

204. EDITH PALMER, L. LIBR. OF CONG., FRANCE: MILITARY JUSTICE SYSTEM 6 (2013), <https://tile.loc.gov/storage-services/service/l1/l1glrd/2018298762/2018298762.pdf>.

205. *Id.*

206. *Id.*

207. See Jörg Gerkrath, *Military Law in France*, in EUROPEAN MILITARY LAW SYSTEMS 275, 324–25 (Georg Nolte ed., 2003), <https://core.ac.uk/download/pdf/11860081.pdf>.

civilian courts lose jurisdiction over matters involving military personnel.<sup>208</sup>

Other countries have followed Germany and France's lead by removing adjudicatory authority out of the armed forces and into the hands of civilian courts.<sup>209</sup> Whether completely severing control for all charges, only charges of sexual misconduct, or only in times of peace, each of these countries establishes that the civilianization of the military judicial system is possible.

While some support removing adjudication of sexual assault out of the military entirely or at least out of the chain of command,<sup>210</sup> there has also been significant pushback for

208. *Id.*; PALMER, *supra* note 204.

209. Countries such as Austria, Belgium, Denmark, Slovenia, Estonia, Sweden, Norway, the Netherlands, and Portugal have put authority over crimes committed by military personnel back in the hands of civilian courts to some degree. See Edward F. Sherman, *Military Justice Without Military Control*, 82 *YALE L.J.* 1398, 1398 & n.4 (1973); Daniela Cotelea et al., *The Role of Military Courts Across Europe: A Comparative Understanding of Military Justice Systems*, *FINABEL* 13 (2021), <https://finabel.org/wp-content/uploads/2021/06/20.-The-role-of-Military-Courts-across-Europ.pdf>; Mindia Vashakmadze, *Understanding Military Justice*, *GENEVA CTR. FOR DEMOCRATIC CONTROL ARMED FORCES* 12–14 (2010), [https://www.dcaf.ch/sites/default/files/publications/documents/Milit.Justice\\_Guidebook\\_ENG.pdf](https://www.dcaf.ch/sites/default/files/publications/documents/Milit.Justice_Guidebook_ENG.pdf); *The Netherlands*, *UNITED NATIONS PEACEKEEPING*, [https://peacekeeping.un.org/sites/default/files/the\\_netherlands\\_december\\_2016.pdf](https://peacekeeping.un.org/sites/default/files/the_netherlands_december_2016.pdf) (Nov. 3, 2016); see, e.g., *Austria Military Justice*, PHOSTIUS, [https://photius.com/countries/austria/national\\_security/austria\\_national\\_security\\_military\\_justice.html](https://photius.com/countries/austria/national_security/austria_national_security_military_justice.html) (last visited May 28, 2022) (“Sections 533 to 684 of Austria’s national criminal code deal with military offenses; there is no separate military code of justice and there is no legal (judge advocate) organization in the armed forces. All actions in serious criminal cases involving military personnel, except those related to breaches of military discipline, are remanded to civil courts.”). Canada has also made the decision to remove investigatory and prosecutorial authority of sexual misconduct cases to the civil police and courts. Ian Austen & Jennifer Steinhauer, *Canada Turns Over Military Sexual Assault Cases to Civilian Courts*, *N.Y. TIMES* (Nov. 4, 2021), <https://www.nytimes.com/2021/11/04/world/canada/canada-military-sexual-assault.html>.

210. See Edward F. Sherman, *The Civilianization of Military Law*, 22 *ME. L. REV.* 3, 4–5 (1970) [hereinafter Sherman, *Civilianization of Military Law*]; Paradis, *supra* note 187; James Joyner & James W. Weirick, *Sexual Assault in the Military and the Unlawful Command Influence Catch-22*, *WAR ON THE ROCKS* (Oct. 7, 2015), <https://warontherocks.com/2015/10/sexual-assault-in-the-military-and-the-unlawful-command-influence-catch-22/>; Charles Dunlap, *Civilianizing*

such ideas.<sup>211</sup> Critics may argue that smaller, internal structural changes might be more useful such as increased training or greater victim support. However, both of these have already been suggested and implemented, but with no significant success.<sup>212</sup> The problem is not due to a lack of

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*Military Justice? Sorry, It Can't—and Shouldn't—Work*, WAR ON THE ROCKS (Oct. 8, 2015), <https://warontherocks.com/2015/10/civilianizing-military-justice-sorry-it-cant-and-shouldnt-work/>; Kirsten Gillibrand, *Why Taking Sexual Assault Cases Out of the Chain of Command Protects Our Troops*, DEF. ONE (Nov. 10, 2013), <https://www.defenseone.com/ideas/2013/11/why-taking-sexual-assault-cases-out-chain-command-protects-troops/73559/> (discussing the different associations, veterans groups, and survivors who support the removal of the chain of command out of the decision-making process, even quoting one survivor as saying “Having someone within your direct chain of command doesn’t make any sense, it’s like getting raped by your brother and having your dad decide the case”).

211. David A. Schlueter & Lisa M. Schenck, *Taking Charge of Court-Martial Charges: The Important Role of the Commander in the American Military Justice System*, 14 N.Y.U. J.L. & LIBERTY 529, 531–32 (2020); see also Frederic I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MIL. L. REV. 512, 512 (2017); Dunlap, *supra* note 210; Elliott C. McLaughlin, *Military Chiefs Oppose Removing Commanders from Sexual Assault Probes*, CNN (June 5, 2013, 10:31 AM), <https://www.cnn.com/2013/06/04/politics/senate-hearing-military-sexual-assault/>; Helene Cooper, *Senate Rejects Blocking Military Commanders from Sexual Assault Cases*, N.Y. TIMES (Mar. 6, 2014), <https://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html>.

212. Harassment prevention and response training and education programs are required to be established at all levels of professional military development from the accession point to the assumption of senior leader grade. DEPT OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE: PROGRAM PROCEDURES, INSTRUCTION 1020.03, at 16 (2018), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/102003p.PDF?ver=DAAzonEUeFb8kUWRbT9Epw%3D%3D>. “Commanders, supervisors, and managers at all levels are responsible for the effective implementation of the SAPR [Sexual Assault Prevention & Response] Program. Military and DoD civilian officials at each management level shall advocate a robust SAPR program and provide education and training that shall enable them to prevent and appropriately respond to incidents of sexual assault.” 32 C.F.R. § 105.14(a)(1)–(2) (2016) (This was removed on Sept. 17, 2020, see Sexual Assault Prevention and Response Program Procedures, 85 Fed. Reg. 57,967 (Sept. 17, 2020), and the revised July 15, 2020 DoD SAPR Program rule is the only existing rule.). “[A] Sexual Assault Response Coordinator (SARC) first addresses the victim’s immediate safety needs and assigns a SAPR victim advocate. The SAPR victim advocate provides advocacy and assistance throughout the medical, investigative, and legal processes, as appropriate.” The SAPR victim advocates will inform the victim of his/her option to make a

training or support but lies more so in the military culture and perceptions and stereotypes that it perpetuates. In 2010, the Director of the military's Sexual Assault Prevention and Response Office (SAPRO) stated, "We're talking about changing the way people think and the way people feel. . . . [T]he research tells us it takes eight to ten years to change the culture."<sup>213</sup> In the eleven intervening years, little has changed.

Though lauded as a success, the implementation of the SHARP Program has been ineffective and has failed at every level.<sup>214</sup> While on the surface it appeared the SHARP Program's framework was sufficient, in reality it was hollow and lacking in leadership attention, day-to-day implementation, broad acceptance by the enlisted soldiers, and full inculcation into the culture and character of the military community.<sup>215</sup> Additionally, workplace hostility and systemic gender discrimination abound due to differing physical fitness standards, female inaccessibility to certain

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restricted or unrestricted report. *Meet Professionals from Each Military Service Who Are Ready to Help Sexual Assault Survivors*, DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE OFF. (Sept. 22, 2020), [https://www.sapr.mil/sites/default/files/public/docs/press/20200922\\_SAPR\\_VA\\_Highlights\\_FINAL.pdf](https://www.sapr.mil/sites/default/files/public/docs/press/20200922_SAPR_VA_Highlights_FINAL.pdf);

Both the SARC and SAPR victim advocate must undergo extensive training on the reporting and investigating processes, the medical forensic examination (SAFE Kit), issues in victimology, healthcare management of sexual assault and medical resources, etc. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE: PROGRAM PROCEDURES, INSTRUCTION 6495.02, at 107–11 (2013), [https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649502\\_vol1.PDF](https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649502_vol1.PDF).

213. Michael Isikoff, *Lawsuit Claims Pentagon Ignored Military Rape Victims*, NBC NEWS (Feb. 15, 2011), [https://www.nbcbayarea.com/news/politics/did\\_pentagon\\_turn\\_blind\\_eye\\_to\\_rape\\_victims\\_1909120/](https://www.nbcbayarea.com/news/politics/did_pentagon_turn_blind_eye_to_rape_victims_1909120/); see also IRC REPORT, *supra* note 54, at 11.

214. *Cf.* CHRIS SWECKER ET AL., U.S. ARMY, REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE 17 (2020), [https://www.army.mil/e2/downloads/rv7/forthoodreview/2020-12-03\\_FHIRC\\_report\\_redacted.pdf](https://www.army.mil/e2/downloads/rv7/forthoodreview/2020-12-03_FHIRC_report_redacted.pdf) (addressing the ineffectiveness of the SHARP Program at Fort Hood); Justin-Ryan C. Abueg, *The Influence of the Sexual Harassment and Assault Response and Prevention Program on Norms and Society in the United States Army* (2016) (B.A. honors thesis, Boston University), <https://open.bu.edu/handle/2144/16115>.

215. SWECKER ET AL., *supra* note 214, at 17–19.

jobs, and leadership favoritism over one gender.<sup>216</sup> Not to mention the gendered “perception[s] that female service members manipulate male service members and/or military systems to get ahead or avoid deployment.”<sup>217</sup> In the current military culture, increased training and greater victim support will not be enough to sufficiently resolve the military’s sexual violence crisis.

As a result of global precedent and past and present military failures, the “civilianization” of the military judicial system seems the most effective way to provide military victims with greater justice.<sup>218</sup> The significant problems with institutional self-regulation and self-preservation make it nearly impossible to effectively implement change and still allow the military to maintain its expansive judicial control. Though removal of authority out of the chain of command is a step in the right direction it does not go far enough. Current military systems which parallel the 2022 NDAA provisions illustrate its ineffectiveness at transforming the military’s approach to sexual violence, because it fails to alter the deeply ingrained military culture. Until the military changes this culture plagued by gender discrimination, false perceptions, and stereotypes, the only way to effectuate reform is to release the military’s grasp over the entire judicial process.

### CONCLUSION

Vanessa Guillén’s death reignited the debate over the military’s sexual violence crisis. Though the Act created in her honor has yet to be voted on, change has occurred but on

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216. Meghann Myers, *A Culture That Fosters Sexual Assaults and Sexual Harassment Persists Despite Prevention Efforts, a New Pentagon Study Shows*, MIL. TIMES (Apr. 30, 2020), <https://www.militarytimes.com/news/your-military/2020/04/30/a-culture-that-fosters-sexual-assaults-and-sexual-harassment-persists-despite-prevention-efforts-a-new-pentagon-study-shows/>.

217. *Id.*

218. Sherman, *Civilianization of Military Law*, *supra* note 210, at 103.

a smaller scale. The 2022 NDAA provisions utilized a successful method to bring about reform, particularly in the divided and politically polarized world of today. However, the 2022 NDAA failed to capitalize on its success. The military's culture breeds resentment and systemic gender discrimination. Such a culture is ill-equipped to effectuate any substantive change. As this Comment has outlined, until the military culture itself is disassembled, rebuilt, and remodeled, the only path towards reform is severing the military's hold over the judicial process.

The military's track record has left much to be desired regarding its approach to sexual violence. Its failure to make any meaningful change over the last thirty years, despite tragedy after tragedy and scandal after scandal, highlights the need for a new judicial framework. Removing this core function of the military's judicial construct will assist in eliminating the significant impact of both institutional and individual implicit bias. Ideally, neutral decisionmakers who have not dedicated their entire lives to the military will be in a better place to protect the individual over the institution. This solution will not fix the problem overnight. But realigning the institution's fundamental objective to protect and support all victims of sexual violence will begin the long process of rebuilding confidence and faith in the military's judicial system.