Supporting Victims of Sexual Misconduct: Three Judge Advocate General's Corps-Driven Solutions to Three Problems Revealed by the Fort Hood Independent Review Committee Report

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"*[T]his is us calling for help right now . . . we need help.*"[1]

I. A Call to Action

On November 6, 2020, the U.S. Army released findings contained within the Fort Hood Independent Review Committee Report (FHIRC Report).[2] The FHIRC Report was a culmination of a Department of Defense (DoD) directed investigation into concerns that Army leaders at Fort Hood, Texas were mishandling sexual misconduct cases.[3] In 2020, a year where the

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1. FORT HOOD INDEP. REV. COMM., REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE 40 (2020) [hereinafter FHIRC REPORT] (alteration in original) (quoting an anonymous Soldier interviewed by members of the committee).

2. *Id.* at iii.

3. *Id.* at 3 (stating that the Fort Hood Independent Review Committee (FHIRC), a multi-disciplinary team of experienced lawyers and investigators, were chartered to "review whether the relevant commands and units at Fort Hood were operating within the spirit of applicable DoD and Army policies and regulations regarding sexual assault prevention and response, sexual harassment, and equal opportunity").

United States struggled against a worldwide pandemic,[4] the FHIRC Report served as a sad exclamation mark to the end of an already dismal year. While the catalyst for the FHIRC Report was the tragic murder of Specialist Vanessa Guillen, the FHIRC Report revealed other troubling truths about how the Army handles sexual harassment and sexual abuse complaints.[5] These complaints targeted numerous issues, but the FHIRC Report's investigation and conclusions challenge the Army to do more for victims of sexual misconduct.[6] Indeed, the Uniform Code of Military Justice (UCMJ) had already been subject to years of substantial changes,[7] with many noteworthy enhancements in victims' rights.[8] Despite these advancements, the FHIRC Report concludes—in nine specific findings and seventy recommendations—that additional change is required.[9]

Specifically, the FHIRC Report found systemic failures in the Sexual Harassment/Assault Response and Prevention (SHARP) program at Fort Hood.[10] According to the FHIRC Report, numerous Army organizations bear responsibility for these wide-ranging failures.[11] These organizations include

4. *See generally COVID-19 Digital Press Kit*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/media/dpk/diseases-and-conditions/coronavirus/coronavirus-2020.html [https://perma.cc/XV26-CQ5S] (Feb. 3, 2022) (documenting the spread of COVID-19).

5. *See* FHIRC REPORT, *supra* note 1, at 27–29 (detailing "[u]niversal [f]ear of [r]etaliation, [e]xposure [a]nd [o]stracism [f]or [r]eporting SHARP [v]iolations"); *see, e.g.*, Johnny Diaz, Maria Cramer & Christina Morales, *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 [https://perma.cc/WAX7-C9K3] (reporting on the disappearance of Specialist Vanessa Guillen, which captivated the country and ultimately led to the FHIRC Report).

6. FHIRC REPORT, *supra* note 1, at iv.

7. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 548, 133 Stat. 1198, 1378 (2019) (expanding scope of Special Victims' Counsel (SVC) coverage to domestic violence clients); John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 532, 132 Stat. 1636, 1759 (2018) (creating a new domestic violence punitive article); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1716, 127 Stat. 672, 966–69 (2013) (authorizing and mandating each service branch provide SVC for eligible sexual assault victims); *see generally* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016) (substantially revising significant portions of the UCMJ, including post-trial processing).

8. *See, e.g.*, UCMJ art. 6b (2019) (expanding specific rights of victims to seek writs at the Court of Appeals for the Armed Forces). Sexual assault victims can, in most U.S. Army cases, elect to report their assaults as either restricted or unrestricted. Generally, restricted reports allow victims to receive medical care without public exposure, while unrestricted reports trigger a criminal investigation. U.S. DEP'T OF DEF., DIR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES encl. 4, para. 1(a)–(b) (Mar. 28, 2013) [hereinafter DODI 6495.02]. *See also*, Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO STATE. J. CRIM. L. 67, 72–73 (2015) (praising the military for its use of SVC and its dual reporting systems to restore agency to victims).

9. FHIRC REPORT, *supra* note 1, at iii, 6.

10. *Id.* at iii.

11. *Id.* at 17, 40–41, 53, 69–70, 76–77, 114.

SHARP, U.S. Army Criminal Investigation Command (CID), commanders, officers, non-commissioned officers, and the U.S. Army Judge Advocate General's Corps (JAGC). While there is no simple solution to the myriad problems identified in the FHIRC Report, this Essay will focus on three findings that are particularly relevant to the JAGC.

First, Soldiers continue to lack the necessary education about available SHARP resources, particularly the existence and role of Special Victims' Counsel (SVC)—attorneys assigned to represent victims of sexual assault and domestic violence.[12] Second, trust in the reporting process is eroded by victims feeling "in the dark" about both the status and ultimate outcome of their investigations.[13] Third, Soldiers have significant concerns about the overall adjudication process of sexual assault claims[14]—concerns substantiated by overall high acquittal rates.[15]

To that end, the JAGC should take three actions to begin addressing these deficiencies. First, the JAGC should develop an installation-level education program that utilizes judge advocates and paralegals to educate Soldiers at the company and battalion levels about the SVC program. Second, The Judge Advocate General (TJAG) of the Army should make two policy changes firmly establishing that victims have the right to confer with a trial counsel, Victim Witness Liaison (VWL), or other government representative after a no-probable-cause (No-PC) determination. Victims should also be entitled to know the specific outcomes of any administrative or punitive actions taken against their offenders. Third, TJAG should expand the role of the Special Victims' Prosecutor (SVP) from active-duty Soldiers to include civilians in order to maximize critical litigation experience, ensure continuity of case management, and ultimately improve chances for successful prosecutions at courts-martial. While executing these recommendations will not be easy, doing so is necessary to solve the problems raised by the FHIRC Report. This Essay will now explore each of the three problems and their respective solutions in greater detail.

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12. *Id.* at 24, 78.

13. *Id.* at 39 (emphasis omitted).

14. *Id.* at 67–68.

15. DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION & DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FY 2017 11–14 (2020) [hereinafter DAC-IPAD INVESTIGATIVE CASE FILE REPORT] (finding low conviction rates for penetrative sexual assault cases linked to low evidentiary standard required for referral). *See also* JUD. PROCS. PANEL, REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES 9, 48 (2017) (stating that from July to September 2016, the Judicial Proceedings Panel Subcommittee spoke with over 280 military counsel, representing 25 different military installations and all service branches, and noting that some counsel agreed that there were high acquittal rates for sexual offenses in the military).

II. Three Problems, Three Solutions

The three problems this Essay addresses will undoubtedly require the concerted energies of various organizations such as CID and SHARP in multiple continuous lines of effort.[16] However, the JAGC can unilaterally act now to start resolving these problems. Indeed, the JAGC already possesses the necessary components to act: skilled lawyers and paralegals trained and equipped to advise Soldiers, dependents, and commanders. Accordingly, education is the best way forward.

A. Lack of Knowledge in the Ranks Regarding SVC Requires JAGC-Driven Education Program

In its findings, the Fort Hood Independent Review Committee (FHIRC) identified that Soldiers widely lacked knowledge about basic SHARP reporting procedures, as well as the role of and right to SVC.[17] Based on a command climate survey conducted by the III Corps Headquarters at Fort Hood covering the period of July 1, 2018, to June 30, 2019, only 55% of the nearly 14,000 respondents possessed basic knowledge about key components of the SHARP program, such as how to report a sexual assault.[18] Another command climate survey from the same time period, this time from the largest unit at Fort Hood—the 1st Cavalry Division (1CD)—revealed that more than 50% of enlisted Soldiers lacked the same basic knowledge about SHARP, including pertinent information about the SVC program.[19] While this particular finding by the FHIRC is predominantly based on these Fort Hood surveys, the FHIRC Report demonstrates similar problems exist at other installations.[20] Therefore, there is little reason to believe this lack of knowledge about the SHARP and SVC programs is unique to Fort Hood.

There are several reasons Soldiers continue to be confused about the SVC role. First, an SVC does not fit the popular-culture image of an attorney. The average American likely gains his or her basic understanding of the legal system from various popular entertainment media, such as television, films,

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16. *See generally* JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT PLANNING, at IV-29 (16 June 2017) (defining lines of effort as linking multiple tasks and missions to achieve a single purpose and effect).

17. FHIRC REPORT, *supra* note 1, at 24–25.

18. *Id.* at 24.

19. *Id.* at 25.

20. *Id.* at 78, 79 fig.24 (finding similar data ranges of approximately 62 to 72 percent of Soldiers knowing about their right to SVC; larger installations had generally lower percentages); *see also* Sergeant Major Michael A. Grinston, General James C. McConville & Ryan D. McCarthy, *Army Senior Leader Message to the Force*, U.S. ARMY (Dec. 8, 2020), https://www.army.mil/article/241501/army_senior_leader_message_to_the_force [https://perma.cc/SDD8-RQMN] (stating, "[u]nfortunately, the issues at Fort Hood exist at other installations").

or podcasts.[21] It is fair to assume that Americans are familiar with the established roles in a criminal proceeding after decades of absorbing the fundamentals from popular broadcasts like *Perry Mason*[22] and *Law and Order*.[23] Similarly, the roles of prosecutor and defense counsel are well-known to the average Soldier. Less familiar is the concept of an attorney for the victim.[24] For this reason, every judge advocate and SVC is trained to answer the common initial question amongst victim clients: "why do I need an attorney?"[25]

The second reason Soldiers are confused about the role of the SVC is that Soldiers rarely interact with judge advocates. With the active component Army fluctuating between approximately 470,000 and 500,000 Soldiers,[26] most Soldier interactions with a judge advocate will be an occasional unit legal brief or the rare visit to legal assistance to create a will or power of attorney prior to deployment.[27] Thankfully, relatively few Soldiers will

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21. *See, e.g.*, *Ally McBeal* (20th Century Fox Television 1997–2002) (starring an attorney who ends up working alongside her ex-boyfriend in a fictional law firm with a highly sexualized environment after leaving her previous job due to sexual harassment); A FEW GOOD MEN (Columbia Pictures 1992) (depicting a dramatic courtroom thriller featuring stubborn marines who stand accused of murder and the JAG officers who defend them); *The Daily*, N.Y. TIMES, https://www.nytimes.com/column/the-daily [https://perma.cc/JD8U-JK7C] (covering national legal news, among other things).

22. *Perry Mason* (CBS Television Network 1957–1966); *Perry Mason* (HBO 2020–).

23. *Law and Order* (Studios USA Television 1990–).

24. *Cf.* Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 47 (1995) (discussing the evolution of American prosecutors from being privately funded by victims to publicly funded); William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 649–50 (1976) (examining colonial American jurisprudence where prosecutions were driven by private victims); *see generally* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 3.3 (28 June 2018) (expanding the duty of candor to clearly include SVCs as part of a major update to the Army professional rules of responsibility to, in part, account for the new role of SVC).

25. Major David A. Thompson, History of Victims' Rights and SVC, at slide 2 (July 27, 2020) (unpublished PowerPoint presentation) (on file with author) (proposing that the value of SVCs includes the ability to answer common questions likely to be asked by a victim client); THE JUDGE ADVOCATE GEN.'S LEGAL CTR & SCH, U.S. ARMY, 212TH JUDGE ADVOCATE OFFICER BASIC COURSE CRIMINAL LAW: STUDENT GUIDE 22–23 (2020) (on file with author) (containing workshop where students, acting as SVC, are tasked with answering questions from hypothetical sexual assault victim in an initial consultation).

26. *See U.S. Military Force Numbers 2020, by Service Branch and Reserve Component*, STATISTA (June 21, 2022), https://web.archive.org/web/20220705215553/https://www.statista.com/statistics/232330/us-military-force-numbers-by-service-branch-and-reserve-component/ [https://perma.cc/8GXV-WR9G] (showing that there were 481,254 active-duty personnel in the U.S. Army in 2020).

27. *See generally* JUD. PROCS. PANEL, U.S. DEP'T. OF DEF., REPORT ON STATISTICAL DATA REGARDING MILITARY ADJUDICATION OF SEXUAL ASSAULT OFFENSES 25–26, 35 (2016) (finding that from fiscal years 2012 to 2014, the Army initiated 588 total courts-martial with sexual offenses

interact with judge advocates in the military justice process.[28] Therefore, it is understandable that most Soldiers lack a basic understanding about their right to an SVC.

The third and final reason for confusion is that eligible victims' rights to SVC are actually fairly complicated. For those Soldiers and eligible civilians who are aware of the SVC program, it is likely that they do not understand the scope of the program, nor how to access an SVC. While the Air Force was the first service to establish an SVC program, the Army quickly followed suit in late 2013.[29] Today, all military services have their own SVC or SVC-equivalent programs.[30] In the short nine years of the SVC program's existence, it has undergone many changes. A Soldier or dependent's right to SVC is based on certain conditions and triggers. These conditions have evolved over the years.[31] For example, the SVC program has expanded to include children,[32] domestic violence victims,[33] and certain

charged and 471 nonjudicial proceedings for non-penetrative offenses); *Legal Matters: Steps to Take Before Deployment*, PLAN MY DEPLOYMENT (May 24, 2021), https://planmydeployment.militaryonesource.mil/pre-deployment/service-members/legal-matters-steps-to-take-before-deployment/ [https://perma.cc/PN7N-5WYN] (providing general guidance on steps Soldiers should take regarding legal issues prior to deployment).

28. 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, 532 (2017) ("In 2015, the Army had a total of 1,010 cases, .2 percent of a strength of 491,363 [Soldiers] with 1,819 active duty judge advocates for an average of .47 percent general and special courts-martial per judge advocate.").

29. *See* Colonel Louis P. Yob, *The Special Victim Counsel Program at Five Years: An Overview of Its Origins and Development*, ARMY L., 2019, at 65, 65–66 (examining origins and evolution of U.S. Army SVC program).

30. The Navy and Marine Corps have Victims' Legal Counsel (VLC) who have identical roles as SVC. *Special Victims' Counsel/Victims' Legal Counsel*, U.S. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, https://sapr.mil/svc-vlc [https://perma.cc/7YEH-YFW8]. The newly established U.S. Space Force does not yet have its own SVC program or its own judge advocates. *See Join the U.S. Space Force*, U.S. SPACE FORCE, https://www.spaceforce.com/military-careers [https://perma.cc/98X6-2HQ9] (listing potential careers in the U.S. Space Force—which currently omits judge advocates or SVCs).

31. *See* U.S. ARMY SPECIAL VICTIMS' COUNSEL PROGRAM, SPECIAL VICTIMS' COUNSEL HANDBOOK 16–20 (5th ed. 2020) [hereinafter SVC HANDBOOK 5TH ED.] (describing process by which an eligible victim exercises the right to an SVC).

32. *See Special Victim Counsel (SVC) Program*, U.S. ARMY JAPAN, https://www.usarj.army.mil/staff/sja/svc/#:~:text=A%3A%20In%20general%2C%20if%20you,offender%20was%20in%20the%20military [https://perma.cc/ZX6X-LHH3] ("Children family members may also be represented by a SVC."); *see also* SVC HANDBOOK 5TH ED., *supra* note 31, at ch. 7 (providing guidance on representing children).

33. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 548, 133 Stat. 1198, 1378 (2019) (expanding 10 U.S.C. § 1044e to include domestic violence victim representation); Memorandum from The Judge Advoc. Gen., U.S. Army, to Judge Advoc. Legal Servs. Pers., subject: Domestic Violence Victim Representation Program—Policy Memorandum 20-03 (19 June 2020) (detailing authorization of legal services for domestic violence victims while also dividing responsibility between SVC and legal assistance programs).

Department of the Army civilians.[34] Then, in 2020 the program narrowed eligible clients to those victims whose offenders are subject to UCMJ jurisdiction.[35] While these changes were made for a variety reasons, such as ensuring that SVC caseloads are manageable,[36] it is understandable for Soldiers to not fully grasp the role and scope of an SVC.

Due to the complexities of both the UCMJ system and the aforementioned SVC program, no organization other than the JAGC is better suited to educate Soldiers. Therefore, the JAGC must immediately develop a JAGC-led education program at every major Army installation. The FHIRC Report recommends that the education must be delivered to the lowest echelons of the Army, which requires direct interaction with Soldiers at the company and battalion levels.[37] To accomplish this task, the JAGC will need a large number of personnel, including many serving in other duty roles. Currently, the JAGC consists of approximately 9,490 personnel.[38] Of those, approximately 4,900 are active-duty or permanent civilian staff (735 civilian attorneys), with 1,773 active-duty officers and 1,470 active paralegals.[39] Approximately 1,620 are National Guard, and 2,870 are Reserve.[40] The average captain in the JAGC serves a variety of roles, including legal assistance attorney, administrative law attorney, trial counsel, military justice adviser, operational law attorney, SVC, and defense counsel.[41]

With these numbers and responsibilities in mind, each Office of the Staff Judge Advocate (OSJA) should develop a monthly on-call schedule.

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34. 10 U.S.C. § 1044e(a)(2)(C); U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 7-7 (26 Mar. 2020) (detailing eligibility for SVC services despite absence of authority for legal assistance services).

35. SVC HANDBOOK 5TH ED., *supra* note 31, at 14.

36. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 541(g), 133 Stat. 1198, 1374 (2019) (adding subsection (g) to 10 U.S.C. § 1044e to mandate that later than four years after enactment (Dec. 20, 2019) "the average caseload of a Special Victims' Counsel [will] not exceed, to the extent practicable, 25 cases any given time").

37. FHIRC REPORT, *supra* note 1, at 25. Only 41% of junior enlisted Soldiers surveyed in the FHIRC Report answered correctly about their right to an SVC. *Id.* "These are dismal figures and should have alerted the command that basic knowledge of the SHARP Program was lacking in these units, and especially within the junior enlisted ranks." *Id.*

38. Email from Lieutenant Colonel Tiffany Pond, Personnel, Plans, and Training Office, Office of The Judge Advocate Gen., U.S. Army, Quarterly Strength Report (FY21 1st Quarter), at slide 1, (Feb. 8, 2021) (unpublished PowerPoint presentation) (on file with the author).

39. *Id.*

40. *Id.*

41. *See* OFF. OF THE JUDGE ADVOC. GEN., U.S. ARMY, JALS PUB. 1-1, PERSONNEL POLICIES fig.5-1, para. 6-1(e)(1) (June 2020) [hereinafter PUB. 1-1] (establishing typical company grade judge advocate assignments); *see also* Memorandum from The Judge Advoc. Gen., U.S. Army, to Judge Advoc. Legal Servs. Pers., subject: Military Justice Redesign—Policy Memorandum 19-01 (18 July 2019) [hereinafter TJAG Memo 19-01] (reorganizing and restructuring judge advocate roles to incorporate more specialized trial counsel as well as the new role of military justice adviser).

Each week, a different attorney and paralegal would be tasked with conducting fifty-minute briefings to various companies and battalions at the installation. To ensure consistency in quality and content, these briefings should be developed and approved by the Army SVC program. Local SVC or regional SVC supervisors would then teach the material annually to the entire OSJA. Additionally, a new position at the Division or Corps Staff Judge Advocate (SJA) level should be created (manned by either a civilian or a senior noncommissioned officer paralegal) to coordinate the unit trainings with the various unit SHARP representatives. For larger installations like Fort Hood, Reserve and National Guard judge advocates should be activated to assist in this important responsibility. While this will undoubtedly be a challenging task for every OSJA, it will not only provide crucial education about the SVC program but also promote the strengths of the JAGC and the entire military justice process.

Despite the regular criticism the military receives regarding its response, or alleged lack thereof, to the sexual assault problem,[42] the SVC programs are a success story for the Department of Defense.[43] Therefore, the role of and right to the SVC should and must be relentlessly promoted to

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42. *See, e.g.*, THE INVISIBLE WAR (Chain Camera Pictures 2012) (investigating sexual assault in the military in a documentary that contributed to congressional reform of military justice); Dave Philipps, *'This Is Unacceptable.' Military Reports a Surge of Sexual Assaults in the Ranks*, N.Y. TIMES (May 2, 2019), https://www.nytimes.com/2019/05/02/us/military-sexual-assault.html [https://perma.cc/4WYD-AZUR] (detailing rise in the number of sexual assaults reported over the course of two years). California Representative Jackie Speier is quoted by a reporter as saying: "We've thrown about $200 million at this [sexual assault] problem for eight to 10 years, and this report suggests it's not working." *Id. See also* DEF. ADVISORY COMM. ON INVESTIGATION, PROS., AND DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, THIRD ANNUAL REPORT 52 (2019) (finding that there is "significant confusion among investigators, judge advocates, and commanders as to what the terms 'probable cause' (reasonable grounds to believe) and 'unfounded' (false or baseless) mean, when and by whom probable cause and unfounded determinations are made, and how they are documented throughout the investigative process"); DAC-IPAD INVESTIGATIVE CASE FILE REPORT, *supra* note 15, at 3 ("There is a systemic problem with the referral of penetrative sexual offense charges to trial by general court-martial when there is not sufficient admissible evidence to obtain and sustain a conviction on the charged offense.").

43. *See, e.g.*, Email from Nathan W. Gablreath, Deputy Dir., Dep't of Def. Sexual Assault Prevention & Response Off., to Major David Thompson, Assoc. Professor, Crim. L. Dep't. (Apr. 4, 2021, 3:43 PM) (on file with author) (describing sexual assault victims' satisfaction with SVC according to a 2018 Workplace and Gender Relations Survey, which revealed over 70% of reported sexual assault victims were satisfied with SVC services); U.S. DEP'T. OF DEF., REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL annex A at 150 (2014) ("The Subcommittee is cautiously optimistic about the success of the SVC to hold offenders appropriately accountable."); *id.* at annex C, 3 ("Early victim surveys and victim testimony suggests the SVC program is a valuable tool for victims, and effective in providing victims support and clarity throughout the military justice process."); *id.* at annex C, 13 ("Early survey results and victim testimony indicate the SVC program is an invaluable tool for victims. This program instills confidence in the victim and helps him or her better understand the military justice process and his or her rights under the Code.").

Soldiers and the outside world. Every Soldier should know that SVC exist and that the SVC's sole duty is to provide confidential advice while zealously advocating for their clients' interests.[44] The SVC are also pivotal in partially solving another problem detailed by the FHIRC Report: the lack of transparency and access to information about victims' cases.

B. Lack of Transparency and Access to Information for Victims During Case Investigation and Disposition Requires That TJAG Amend Current Policy.

The second problem raised by the FHIRC is the lack of transparency and access to information for victims about their cases. While mobilizing OSJAs worldwide to educate Soldiers on the role of the SVC is ambitious, a simpler solution exists for the second problem. Specifically, victim frustration with lack of access and transparency regarding their case status can be, at least partially, remedied by amending current JAGC policy. To this end, TJAG should amend current policy memoranda to expand the amount of information disclosed to victims at critical case-determination points. Namely, victims should be provided specific case-disposition information when nonjudicial punishment or administrative action is taken against an accused, and victims should be entitled to confer with a government representative, preferably a trial counsel, after a no-probable-cause determination is made.

1. Victims Need to Know, and Are Entitled to Know, Details of Final Disposition Actions Taken Against an Accused.—The FHIRC Report finds that many victims were kept "in the dark"[45] about the status of their cases, as well as the ultimate disposition of their reports.[46] Generally, victim frustration about lack of information stems from long delays in case investigations and government counsel's fear of revealing protected information. While the FHIRC Report does not cite to any specific statistics to support this conclusion regarding victims' feelings, anecdotal interviews

44. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 17-7(c) (20 Nov. 2020) [hereinafter AR 27-10 (2020)]:

> SVC provide legal representation to eligible clients who report they are victims of a sex-related offense. SVC services are authorized by 10 USC 1044e(b), 10 USC 806b, and by the Secretary of the Army pursuant to 10 USC 3013(g). An SVC's primary duty is to zealously represent the desires of their client as required by the attorney-client relationship, even if their client's desires do not align with those of other interested parties, to include the United States government.

45. FHIRC REPORT, *supra* note 1, at 39 (emphasis omitted).

46. *Id.* at 77.

conducted by the FHIRC seem to support such a finding.[47] While speeding up the disposition of sexual assault cases is unlikely due to the time needed for thorough investigations, the JAGC can improve victims' satisfaction in the government's handling of cases by providing transparency and greater detail to victims about the status of their cases. This is especially true as it pertains to final case disposition. Importantly, JAGC concerns about legal restrictions preventing the disclosure of this information are overblown and can be safely mitigated.

Ironically, the FHIRC Report uses the absence of certain data to illustrate its point about time length as a negative for victims. In particular, the FHIRC Report notes the failure of Fort Hood OSJAs to track the length of time from case initiation to case disposition.[48] This length of time likely contributes to victims feeling that sense of being in the dark. One data point that is available is the length of time from initial receipt of a sexual assault report by CID to issuance of a legal opinion by government counsel. For example, from Fiscal Year 2016 to 2020, approximately 77% of sexual assault cases at Fort Hood took over 120 days from initiation of CID investigation to issuance of final opinion by a trial counsel or military justice adviser.[49] It then took an average of 209 days to go from initial preferral of charges (the UCMJ version of indictment) to trial completion.[50] These timelines do not include any data about the average length of time it took to go from probable cause opinion to final disposition, whether it be preferral, administrative action (potentially separating Soldier from Army), or nonjudicial punishment. For some additional context, in 2011 the National Center for State Courts and Conference of State Courts Administrators published its Model Time Standards for State Trial Courts.[51] This model was intended to establish a "reasonable set of expectations" for disposition times in state courts.[52] According to this model, felony cases generally took 180 days from filing of charges to entry of judgment; however, there was no assessment of the investigation time period.[53] Together, these data points reinforce that victims, regardless of jurisdiction, face substantial delays in the resolution of their cases.

47. *See id.* at 67, 77–78 (discussing victims' reports of being uninformed about the disposition of their complaints due to ambiguity surrounding when it is permissible for counsel to share that information).

48. *Id.* at 68.

49. *Id.* at 72; *see also* TJAG Memo 19-01, *supra* note 41, at 4 (detailing duties of military justice adviser).

50. FHIRC REPORT, *supra* note 1, at 74–75.

51. NAT'L CTR. FOR STATE CTS., MODEL TIME STANDARDS FOR STATE TRIAL COURTS (2011).

52. *Id.* at 1.

53. *Id.* at 3.

While the FHIRC Report recognizes that justice can be inherently slow, it identifies several factors contributing to this delay. These nonexhaustive factors include: insufficient number of CID agents, poor training, frequent follow-up requests from trial counsel for further investigation delaying probable cause opinions, delays in forensic examinations, and insufficient availability and number of SVC.[54] Additionally, while not stated in the FHIRC Report, most victim or SVC requests for case status updates from CID will, in practice, be met with generic, nondescript statements such as "the case is still being investigated."[55] Of course, there are many legitimate reasons to limit victim access to case information. Some of these reasons include avoiding negative impacts to witness credibility, protecting privacy interests of the accused and other witnesses, and not contaminating a witnesses' personal knowledge regarding the case.[56] Nevertheless, this reluctance to provide substantive updates diminishes victim confidence in the system. Moreover, one specific fact that should always be provided to victims—yet has been frequently denied—is the ultimate outcome of the case. Victims are frequently left in the dark as to specifics of final outcomes because OSJAs are understandably concerned about violating the Freedom of Information Act (FOIA) as well as the Privacy Act.[57]

The FHIRC Report accurately captures this ambiguity and tension between FOIA and the Privacy Act, and victims' rights to case information. Both victims and accused—through various statutes, regulations, and policies—are protected from unauthorized disclosure of certain

54. FHIRC REPORT, *supra* note 1, at 53–54, 64–65, 70 ("This Review determined that the Fort Hood based 43rd Criminal Investigation Division (CID) detachment Special Agent workforce was unstable, under-experienced, over-assigned and under-resourced leading to inefficiencies that had an adverse impact on investigations, especially complex cases involving sex crimes and Soldier deaths.").

55. This assertion is based on the author's two years of experience as an SVC (June 2016–July 2018), two years as a trial counsel (June 2010–June 2012), two years as a defense counsel (July 2012–July 2014), and two years teaching at various SVC courses at The Judge Advocate General's Legal Center and School [hereinafter Professional Experiences]. Over two years, I represented over 100 clients, and this was the standard response to monthly requests for updates.

56. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(a)(6) (2019) [hereinafter MCM] (mandating disclosure to defense of evidence that reasonably tends to adversely affect the credibility of any government witness, which underscores the necessity of avoiding such risks by oversharing information with victims); *id.* M.R.E. 613, 615 (permitting use of extrinsic evidence of inconsistent statements for impeachment purposes and requiring exclusion of witnesses at trial—except for victims unless there is clear and convincing evidence that testimony would be materially altered); AR 27-10 (2020), *supra* note 44, para. 17-15(b) ("Consultation may be limited when justified by the circumstances, such as to avoid endangering the safety of a victim or a witness, jeopardizing an ongoing investigation, disclosing classified or privileged information, or unduly delaying the disposition of an offense.").

57. *See* AR 27-10 (2020), *supra* note 44, para. 17-26 ("The SJA will ensure that victims' and witnesses' requests for investigative reports or other documents are processed under applicable Freedom of Information Act or Privacy Act procedures.").

information.[58] The Freedom of Information Act serves as a means by which members of the public can gain access to certain federal records,[59] whereas the Privacy Act protects against the unauthorized release of personnel records.[60] In most instances, a victim's right to specific information depends on the status of the case and the government's choice of disposition.[61] When the government chooses to resolve a case through nonjudicial punishment or administrative separation, those dispositions result in written records which are retained in a system of records. Thus, government counsel may fear that disclosure of any information within that system of records, absent consent of the accused, would be a potential FOIA or Privacy Act violation. However, the law permits disclosure under certain exemptions such as for law

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58. DODI 6495.02, *supra* note 8, at 4. Protecting disclosure of victims' information, the instructions note:

> Improper disclosure of confidential communications under Restricted Reporting or improper release of medical information are prohibited and may result in disciplinary action pursuant to the UCMJ or other adverse personnel or administrative actions. . . . Information regarding Unrestricted Reports should only be released to personnel with an official need to know or as authorized by law.

Id. Protecting disclosure of the accused's information, the regulation notes:

> The imposition of NJP may be announced at the next unit formation after punishment is imposed or, if appealed, after the decision on the appeal. Commanders may also elect to post NJP results on the unit bulletin board. In every case, the social security number of the punished Soldier, as well as all other personally identifying information (PII) about any individual, will be deleted before NJP results are announced or posted.

AR 27-10 (2020), *supra* note 44, para. 3-22; *see* Pol'y Memorandum 17-08, The Judge Advoc. Gen., U.S. Army, subject: Disclosure of Information to Crime Victims (1 Dec. 2017) [hereinafter TJAG Memo 17-08] (detailing types of evidence crime victims are entitled to at various stages of the investigative process).

59. Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)–(b) (providing public access to governmental agency records unless disclosure would harm an interest protected by one of the enumerated exemptions).

60. Privacy Act of 1974, 5 U.S.C. § 552a(b). Protecting against disclosure of personnel records, the statute states:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record [is permitted by one of twelve exceptions].

Id. The Privacy Act also details when an individual is entitled to records pertaining to themselves, and when an agency is exempted from disclosure. *Id.* § 552a(d), (j), (k).

61. *See, e.g.*, AR 27-10 (2020), *supra* note 44, para. 5-45 (detailing the process by which victims were entitled to receive parts of the court-martial record); *see generally* U.S. DEP'T OF DEF., INSTR. 5400.11, DOD PRIVACY AND CIVIL LIBERTY PROGRAMS § 5.1, at 17 (29 Jan. 2019) (C1, 8 Dec. 2020) (establishing general rules of conduct for the DoD in managing records pursuant to the Privacy Act); U.S. DEP'T OF DEF., 5400.11-R, DOD PRIVACY PROGRAM para. C4.2.1.1.1 (14 May 2007) (permitting disclosure of records to DoD employees with a need to know as part of his or her official duties); U.S. DEP'T OF DEF., DIR. 5400.07, DOD FREEDOM OF INFORMATION ACT (FOIA) PROGRAM para. 1-2 (5 Apr. 2019) (establishing the DoD's FOIA policy).

enforcement purposes and to DoD employees with a need to know as part of their official duties.[62] Additionally, providing victims with general case disposition information, which they are already familiar with, is unlikely to constitute disclosure of a protected record.[63] Case disposition information, such as the results of unit nonjudicial punishment, is also the type of information that the Army permits to be published publicly to units so long as personally identifiable information (PII) is redacted.[64] That being said, the government's concern about unlawful disclosures is less of an issue when a case proceeds to court-martial.

Generally, a victim's right to information expands if and when a case progresses towards trial. When a victim's report culminates in a court-martial, numerous procedural safeguards exist to ensure victims remain adequately informed. For example, trial proceedings are generally open to the public[65] and there are enumerated procedural rights for victims within Article 6b, UCMJ, and various Rules for Courts-Martial (RCM) which provide victims notice and opportunities to be heard.[66] However, when commanders decline to move forward with a court-martial, whether due to lack of evidence or victim preference—to name only a few potential reasons—they will frequently turn to either nonjudicial punishment authorized by Article 15, UCMJ, or administrative action to address otherwise substantiated misconduct. In these cases, many judge advocates have historically taken the position that a victim cannot be told the specific outcome of these actions because to do so would violate the rights of the

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62. 5 U.S.C. § 552(b) (listing nine exemptions from disclosure, with exemptions (b)(2), (3), and (7) serving as the most frequent basis for denial of law enforcement records); *id.* § 552a(b)(1) (permitting disclosure of records to "those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties"). While beyond the scope of this Essay, courts must "construe the Privacy Act and the Freedom of Information Act separately and independently so that exemption from disclosure under the Privacy Act does not exempt disclosure under the Freedom of Information Act, and *vice versa*." Shapiro v. Drug Enf't Admin., 762 F.2d 611, 612 (7th Cir. 1985).

63. *See* Krowitz v. Dep't of Agric., 641 F. Supp. 1536, 1545 (W.D. Mich. 1986), *aff'd per curiam*, 826 F.2d 1063 (6th Cir. 1987) (holding employer's disclosures of government employee's work performance problems did not violate the Privacy Act when disclosures were made to individuals with pre-existing general knowledge of the issues and were largely based on personal knowledge and observations rather than a protected record retrieved from a system of records).

64. AR 27-10 (2020), *supra* note 44, para. 3-22.

65. *See* MCM, *supra* note 56, R.C.M. 806(a)–(b) (providing that court-martial proceedings are generally open to the public and victims absent compelling reasons to close them).

66. *See* UCMJ art. 6b(a)(2)–(3) (2019) (detailing victims' rights to timely notice of specific court-martial proceedings, such as notice of a pretrial confinement hearing); MCM, *supra* note 56, R.C.M. 806(b)3, 1001(a)(3)(A) (stating, respectively, that victims have the right to be present during trial unless "clear and convincing evidence" is presented that testimony will be "materially altered," and the military judge is required to inform the court that victims have the right and opportunity to be heard at presentencing).

accused or other personnel pursuant to the Privacy Act, and the information is otherwise exempted from disclosure pursuant to FOIA.[67]

Recent developments in federal law as well as policy changes by TJAG—both detailed below—show positive movement in this regard, but further action is necessary. As the FHIRC Report points out, Section 549 of the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020) required that commanders notify victims of the final determinations of their cases.[68] Notably, Army Regulation 600-20[69] and Department of Defense Directive 6495.02,[70] which were in effect long before the passing of NDAA 2020, already included this obligation. However, as documented in the FHIRC Report, commanders—and by extension the judge advocates advising those commanders—still failed to adequately notify victims as to final case disposition.[71] Accordingly, Congress enacted Section 549 to specifically include nonjudicial punishment and administrative actions within this conferral requirement.[72]

Despite Congress explicitly providing for these additional notification requirements, the Army did not amend its victim notification policies to include this specific information. As an apparent result of the Army's

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67. FHIRC REPORT, *supra* note 1, at 77.

68. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 549, 133 Stat. 1198, 1379 (2019).

69. *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 7-5(t)(11) (24 July 2020). The regulation states that an installation's senior commander must:

> Ensure a victim's *immediate commander* provides monthly updates to victims of a sexual assault who filed an unrestricted report regarding the current status of any ongoing investigative, medical, legal, or any other request made by the victim, or command proceedings regarding the sexual assault until the final disposition of the reported assault. This is a non-delegable commander duty.

Id. (emphasis added). Senior commanders will also ensure that the "victim is informed of all case dispositions, including those disposed of by nonjudicial punishment, within 2 business days of the final disposition decision." *Id.* at app. F, para. F-5(b)(7)(b). A previous version of the regulation stated that a senior commander must:

> Ensure feedback on case status is provided to victims of a sexual assault. The *battalion commander* will update the victim 14 calendar days after the initial report. Thereafter, *battalion commanders* will ensure, at a minimum, a monthly update is provided to the victim (if report is unrestricted) on the current status of any ongoing investigative, medical, legal, or command proceedings regarding the assault. Monthly updates will continue until the final disposition of the reported assault (that is, the conclusion of any judicial, non-judicial, and administrative actions (including separation) taken in response to the offense, whichever is later in time).

U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 8-5(o)(30) (6 Nov. 2014) (emphasis added).

70. DODI 6495.02, *supra* note 8, at 17.

71. FHIRC REPORT, *supra* note 1, at 77–78.

72. *Id.*; National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 549, 133 Stat. 1198, 1379 (2019).

organizational inertia to provide this information, or perhaps simply a recognition of the ambiguity in the law, Congress passed National Defense Authorization Act for Fiscal Year 2022 (NDAA 2022) Section 545.[73] Section 545 amended Section 549 by expanding the disposition notification requirement to include victims of any "alleged sex-related offense" (from the more limited definition of only victims of "alleged sexual assault").[74] Section 545 also now explicitly requires commanders to include in the notification "the type of action taken on such case, the outcome of the action (*including any punishments assigned or characterization of service, as applicable*), and such other information as the commander determines to be relevant."[75] This Essay argues that Section 545 requires such notice to include actual details of the findings and action taken against the Soldier. Mere notice that an Article 15 or administrative action was taken is insufficient. Moreover, TJAG's recent policy changes to reflect Section 549—detailed below—while positive for victims, require further clarification to avoid any confusion by practitioners in the field. Moreover, it is essential Army policy be explicit in order to overcome the historical organizational inertia related to victim disclosures.

Despite past reluctance to provide disposition information to victims, there are a number of authorities which empower further action by TJAG. These authorities include NDAA 2020, Sec. 549; NDAA 2022, Sec. 542; existing FOIA and Privacy Act exemptions; the broad victim rights within Article 6b, UCMJ;[76] Army Regulation (AR) 27-10 (2020);[77] and TJAG Policy Memorandum 22-07, Disclosure of Information to Crime Victims.[78] This combination of statutes and Army policies enables TJAG to take action and change Army notification policies. A careful review of current and past

73. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 545, 135 Stat. 1541 (2022).

74. *Id.* § 545(1).

75. *Id.* § 545(4) (emphasis added).

76. UCMJ art. 6b (2019).

77. AR 27-10 (2020), *supra* note 44, para. 17 (detailing comprehensive victim services and rights in the Army military justice system).

78. Memorandum from The Judge Advoc. Gen., U.S. Army, to Judge Advoc. Legal Servs. Pers., subject: Policy Memorandum 22-07—Disclosure of Information to Crime Victims, at 2, 3 (1 Mar. 2022) [hereinafter TJAG Memo 22-07] (replacing and updating TJAG Memo 17-08 to explicitly account for NDAA 2020, Sections 538 and 549, which required disclosure of information for dispositions other than court-martial). Paragraph 5(c) goes further and explicitly states that it is not a Privacy Act violation to disclose information about command's decision on the disposition of cases with a qualifying victim, including NJP, administrative separation, or other administrative actions. *Id.* at 2. *See also* TJAG Memo 17-08, *supra* note 58, at 1 (identifying what type of case information victims are entitled to at various stages of the court-martial process).

TJAG policy memoranda pertaining to victim disclosures is necessary to understanding how further change is still warranted.

On March 1, 2022, TJAG Policy 22-07 superseded TJAG Policy Memorandum 17-08, Disclosure of Information to Crime Victims, which had—prior to the passing of NDAA 2020—previously expanded victim access to case records beyond any then-existing statutory requirements. TJAG Policy 22-07 is, other than two major additions detailed below, identical in substance to TJAG Policy 17-08. It is common military practice for new TJAGs to review and simply re-sign or reissue previous TJAG memos upon being appointed TJAG.

Regardless, pursuant to both TJAG Policy 17-08 and now TJAG Policy 22-07, victims are entitled to a number of disclosures not specifically provided for by statute. For example, they are entitled to a summarized transcript, when it is complete, of their Article 32 preliminary hearing testimony (UCMJ equivalent of a grand jury), as well as (upon preferral) any sworn statements or documentary evidence they provided the government.[79] This degree of access and transparency is not required under the UCMJ, and therefore these policies actually expand victim rights. Furthermore, Army policy does not prevent commanders from publicly releasing the results of nonjudicial punishment. To the contrary, current policy authorizes commanders to announce nonjudicial punishment sentences to the entire unit so long as names and PII are redacted.[80] Despite these limitations, it would presumably not be terribly difficult for Soldiers to understand from such a redacted public release who the accused and victim actually were. The Army permits the release of redacted nonjudicial punishments because it shows the military community that justice was done and can help prevent perceptions of unfairness of punishment. The practice also serves as deterrence to future misconduct within the military community.[81] If the broader military community is entitled to know specific punishments for a specific offense by some unnamed Soldier in the unit, then arguably a specific victim of the

79. TJAG Memo 17-08, *supra* note 58, at 1–2. *Cf.* MCM, *supra* note 56, R.C.M. 405(j)(5) (requiring government counsel to provide the victim with requested access to a recording or transcript of the preliminary hearing within a reasonable time after charges are dismissed, unless the charges are dismissed due to rereferral or court-martial adjournment).

80. AR 27-10 (2020), *supra* note 44, at para. 3-22 (permitting the announcement of nonjudicial punishment at the unit formation or by posting it on the unit bulletin board but requiring that "relevant privacy information" be redacted); *see* FHIRC REPORT, *supra* note 1, at 67 (describing flaws in Fort Hood's Sexual Harassment/Assault Response Prevention Program in part due to a lack of public notification, including victims remaining uninformed about their cases and a lack of "deterrent value," and comparing this ineffective status quo to other Army installations where such information was made public).

81. AR 27-10 (2020), *supra* note 44, at para. 3-22.

offense should be entitled to information about the nonjudicial punishment as well.

To the Army's credit, previous TJAGs have already shown a willingness to enact additional victims' rights protections via policy memoranda and therefore should do so again to tackle this specific problem.[82] As mentioned above, TJAG Policy 22-07 is nearly identical to TJAG Policy 17-08 with two major exceptions that are pertinent to this issue. TJAG Policy 22-07 adds paragraph 5(a), which specifically cites to the notification requirements of both NDAA 2020, Section 549, and NDAA 2022, Section 545, and states, "[p]rosecutors and applicable practitioners will comply with all of these notification requirements."[83] Additionally, paragraph 5(c) states:

> Privacy Act. It is not a violation of the Privacy Act to share information about the command's decision on the disposition of cases, to include disposition other than court-martial, with a qualifying victim, consistent with Sections 538 and 549 of the FY20 NDAA . . . as amended by Section 545 of the FY22 NDAA. Dispositions other than court-martial include nonjudicial punishment under Article 15 of the UCMJ, administrative separation, or other administrative actions.[84]

TJAG's amended policy attempts to reflect the notice requirements imposed by NDAA 2020, Section 549, and NDAA 2022, Section 545, and mostly succeeds in doing so. Now, consistent with congressional intent, it is clear that qualifying victims are entitled to know of command disposition decisions if their cases do not proceed to court-martial. Indeed, TJAG Policy 22-07 states that this victim right to information as to command disposition decisions explicitly includes nonjudicial punishment actions and any administrative actions taken against an accused.[85] Furthermore, the policy makes clear that it is not a violation of the Privacy Act to share information about the command's decision on the disposition of cases.[86] This is a strong step in the right direction for victims' rights.

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82. *See* TJAG Memo 17-08, *supra* note 58, at 1 (stating that after charges are preferred, a victim is entitled to a redacted copy of the charge sheet as well as all statements and documentary evidence he or she previously provided in the course of the investigation); *see also* TJAG Memo 22-07, *supra* note 78, at 1–2 (reiterating the aforementioned requirements of TJAG Memo 17-08 and additionally citing to NDAA 2020, Section 549 and NDAA 2022, Section 545, requiring that prosecutors and other applicable practitioners follow these notification requirements, and disclaiming that sharing case dispositions does not violate the Privacy Act).

83. TJAG Memo 22-07, *supra* note 78, at 2.

84. *Id.*

85. *See id.* (defining the dispositions of which victims must be notified as including nonjudicial punishment, administrative separation, and other administrative actions).

86. *Id.*

However, the language of the policy as written—while citing to Sections 545 and 549—does not specifically state that victims are entitled to know the specific findings and recommendations of any administrative action (such as a separation board or separation action), as well as any findings or sentence of nonjudicial punishment. Thus, while the law is no longer ambiguous as to the notification requirements, TJAG policy does not yet expressly track the law's requirements. Unfortunately, unless these requirements are spelled out in the policy, commanders and judge advocates may still neglect to provide sufficient notification to eligible victims as required by law. The Army's previous organizational inertia and failure to meet notification requirements imposed by Congress shows that TJAG cannot risk any ambiguity in policy. Commanders and judge advocates might read TJAG Policy 22-07 and believe they are meeting their requirements by simply informing a victim that the accused received nonjudicial punishment or was separated from the Army, without providing any specific details (such as the amount of punishment or what characterization of service the accused received upon discharge). While there was, as noted by the FHIRC Report,[87] previously some ambiguity in the law as it pertains to FOIA and the Privacy Act, that ambiguity has been resolved by Congress.[88] While TJAG Policy 22-07 appropriately recognizes the changes in law, TJAG should further amend the policy to leave no room for ambiguity as to the requirements of Sections 545 and 549.

Victims should not be left wondering what happened with their cases. They should know the results of their reports. To allow otherwise lends weight to victims' fears that the Army is somehow covering up their allegations.[89] This means that commanders, when talking with victims about final dispositions, must tell the victims what punishment or adverse action, if any, was taken against the offending Soldier. Such a requirement will further reinforce the importance of commanders' role in the execution of justice and

87. FHIRC REPORT, *supra* note 1, at 77–78.

88. *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. 117-81, § 545, 135 Stat. 1541, 1711–12 (2021) (amending NDAA 2020 to override the Privacy Act by providing that this provision operates "[n]otwithstanding section 552a of title 5, United States Code" and requiring that the commander notify the victim "of the type of action taken on such case, the outcome of the action (including any punishments assigned or characterization of service, as applicable), and such other information as the commander determines to be relevant").

89. *See, e.g.*, Meghann Myers, *Fort Sill Sexual Assault Case Stirs Up the Worst Kind of Deja Vu*, MIL. TIMES (Apr. 13, 2021), https://www.militarytimes.com/news/your-military/2021/04/13/fort-sill-sexual-assault-case-stirs-up-the-worst-kind-of-deja-vu/ [https://perma.cc/4KHA-QFWL] (quoting sexual assault survivor, Specialist (ret.) Natasha Woodruff, as stating, "The part that I think that messes with me the most wasn't the actual assault[.] . . . It was the hazing and the cover-up, and the fact that nobody got any sort of punishment for that. . . . [T]hose people are out there being leaders and they shouldn't be.").

good order and discipline.[90] Commanders will have to steel themselves for the difficult conversation that comes with explaining to victims the commander's final decision. However, in consideration of FOIA and the Privacy Act, victims would not be entitled to the release of any specific records pertaining to those proceedings. For example, they would not receive a copy or be permitted to review the actual Article 15 documentation or administrative adverse action paperwork (e.g., reprimands or separation memoranda).[91] Providing final disposition details would significantly help solve victim concerns about transparency. However, another transparency issue still exists for victims in the military justice process, and that is their right to information after a no-probable-cause determination by government counsel.

2. Victims Are Entitled to Confer with a Government Representative After No-Probable-Cause Determinations.—Resolving the transparency issue still requires addressing another problem: potential government refusal to confer with victims after No-PC determinations. To be clear, the FHIRC Report did not specifically identify lack of conferral with government counsel regarding No-PC determinations as a concern. But considering the underlying information deficit detailed by the findings, this particular military justice practice of non-conferral in No-PC determinations nevertheless contributes to the problem.

To better appreciate the right to confer regarding No-PC determinations, one first must understand the evolution of Army policy regarding victims' right to confer with government counsel. In 2019, Interim Army Regulation 27-10, *Military Justice*, provided that a crime victim had a right to confer with the government in several specific circumstances.[92] One of the more significant rights of a victim to confer was established by

90. *See, e.g.*, Lindsy Nicole Alleman, *Who Is In Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMPAR. & INT'L L. 169, 170, 189–92 (2006) (comparing U.S. Army commanders' role in military justice with other nations' militaries and concluding that the differences in the U.S. military justice system still warrant commander control, while recommending commanders be further limited in the panel selection process).

91. *See* AR 27-10 (2020), *supra* note 44, paras. 3-3, 3-17 (providing respectively, "Commanding officers have authority to give admonitions or reprimands either as an administrative measure or as NJP[,]" and, "All [NJP] entries will be recorded on DA Form 2627"); U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 1-14(a) (19 Dec. 2016) ("When separation is ordered, the approved proceedings will be sent to the commander who has the Soldier's records for separation processing per AR 635–10. The original copy of the proceedings will be filed in the permanent section of the Soldier's MPRJ or local file, as appropriate . . . .").

92. U.S. DEP'T OF ARMY, INTERIM REG. 27-10, MILITARY JUSTICE paras. 17-14–17-15 (1 Jan. 2019) [hereinafter INTERIM AR 27-10 (2019)].

paragraph 17-14(a)(3), which was triggered when the government decided to not prefer charges or to dismiss previously preferred charges.[93] Notably, pursuant to both paragraphs 17-14(a) and 17-15(a), the right to confer did not require a trial counsel to confer with the victim, but the conferral could be completed by the Victim Witness Liaison or "other government representative."[94]

In November 2020, AR 27-10 was revised.[95] AR 27-10 now provides that conferral must be completed by trial counsel; previous language permitting VWLs or other government representatives to confer was deleted.[96] This change was presumably intended to identify the important role of trial counsel in conferring with victims at the difficult case determination point of nonpreferral. Unfortunately, the revised language still does not address what obligation the government has to confer with a victim when a No-PC finding is made. This is problematic because judge advocates can reasonably take the position that a No-PC determination is not the same as a nonpreferral decision, and thus conferral is not required. Some government counsel argue that a No-PC determination means the government has decided the complaining witness is not actually a qualified victim and therefore no longer entitled to victims' rights.[97] However, victims are entitled to a wide range of rights upon immediate reporting of a crime, and there is no provision which explicitly strips victims of victim status after a No-PC determination.[98] Finally, a No-PC decision is arguably a de facto nonpreferral decision and

93. *Id.* at para. 17-14(a)(3).

94. *Id.* at paras. 17-14(a), 17-15(a).

95. AR 27-10 (2020), *supra* note 44, paras. 17-14(a), 17-15(a).

96. *Id.*; U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 17-15 (11 May 2016).

97. *See generally* The Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, 35 Op. O.L.C. 1, 4, 16 (2010) (arguing that victims of federal crimes have no Crime Victims' Rights Act (CVRA) rights during a federal criminal investigation, and that rights under the CVRA do not apply until prosecutors formally initiate criminal proceedings by filing a complaint, information, or indictment). *But see In re* Dean, 527 F.3d 391, 395 (5th Cir. 2008) (holding that victims do have specific rights prior to government charging decisions); Paul G. Cassell, Nathanael J. Mitchell & Bradley J. Edwards, *Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges Are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59, 68–71 (2014) (arguing that the CVRA right to conferral extends to the prefiling juncture of a criminal case).

98. *Cf.* DODI 6495.02, *supra* note 8, at 37–38 (establishing a "presumption . . . in favor of transferring a Service member" following a credible report of sexual assault and mandating that the appropriate authority "make a credible report determination . . . after considering the advice of the supporting judge advocate, or other legal advisor concerned, and the available evidence based on an MCIO's investigation's information (if available)"). The determination must include the authority's reasons for approving or disapproving the transfer, and a victim's ability to receive an expedited transfer to another installation or unit can be lost if his or her report is later found to not be credible. *Id.* at 39.

should be treated as such. This is especially true in light of the FHIRC Report's findings.[99]

When considering if and how to disclose to victims that a No-PC determination was made, it must be stated that the JAGC has an interest in preventing an alleged victim from experiencing additional emotional trauma.[100] To that end, disclosure of the factual basis for a No-PC determination may actually inflict additional trauma on a victim. For example, one potential reason for a No-PC determination is that the complaining witness lacks credibility. Perhaps the evidence suggests, and the government counsel personally believes, the victim may be lying.[101] The alleged victim's story may contain too many inconsistencies, or a significant motive to fabricate may exist.[102] The decision to relay any of these hard truths may anger a victim or cause pronounced damage to an already difficult situation.[103]

Additionally, OSJAs may, pursuant to AR 27-10, limit a victim's right to conferral and access to information if it would interfere with the investigation, the rights of accused, or other witnesses.[104] However, conferral with a victim after a No-PC determination is made is unlikely to interfere with any investigation because any investigation should be complete by this

99. FHIRC REPORT, *supra* note 1, at 77–78.

100. *See generally* U.S. DEP'T OF DEF., INSTR. 6400.09, DOD POLICY ON INTEGRATED PRIMARY PREVENTION OF SELF-DIRECTED HARM AND PROHIBITED ABUSE OR HARM (11 Sept. 2020) (describing new DoD policy by which leaders are instructed to proactively play a role in the prevention of self-harm). To further the goal of preventing self-harm, leaders must "[a]ddress[] the needs of high-risk groups . . . including those at risk for re-victimization or who have been affected by multiple self-directed harm and prohibited abusive or harmful acts (e.g., sexual assault survivor at risk for suicide)." *Id.* at 17.

101. *See, e.g.*, United States v. Ellerbrock, 70 M.J. 314, 320 (C.A.A.F. 2011) (not permitting exclusion of evidence of prior affair by key witness in sexual assault case because it was relevant and probative of witness's credibility).

102. *See, e.g.*, United States v. Stellato, 74 M.J. 473, 488 (C.A.A.F. 2015) (holding that military judge did not abuse discretion by dismissing with prejudice a child sexual assault case when government failed to preserve and disclose to defense material evidence such as inconsistent victim statements).

103. *But see* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 297–98 (arguing that victims should "determine for themselves whether active participation will minimize, or contribute to, secondary harm"). Additionally, lack of communication with victims is a frequent point of interest with both Congress and the media, which can lead to perceptions that victims' cases are being ignored or disregarded. *See, e.g.*, *Military Justice Improvement Act: Quotes You Should Read*, KIRSTEN GILLIBRAND: UNITED STATES SENATOR FOR NEW YORK, https://www.gillibrand.senate.gov/mjia/quotes [https://perma.cc/G3ET-MMS3] (quoting a victim on a senator's website as saying, "[t]he thing that makes me the most angry is not even the rape itself; it's the commanders that were complicit in covering up everything that happened").

104. AR 27-10 (2020), *supra* note 44, para. 17-14(a)(1).

point.[105] The accused's rights are not violated by the mere fact of a conferral meeting, assuming no PII or protected records are provided to the victim.[106] A government representative could also limit the information provided, such as not discussing the names of any witnesses nor disclosing the specifics of any statements provided by said witnesses.

Despite these concerns, the FHIRC Report makes it clear that Soldiers and victims want and need greater transparency.[107] The FHIRC Report states that "a very large number of Soldiers" believed "investigations were extremely drawn out," and "[v]ictims seldom saw the outcome of their cases, and there was minimal deterrent value derived from the cases."[108] If some subsequent report suggests that victims would actually prefer less information, then the JAGC could always further adjust. Furthermore, despite the aforementioned strengths of the SVC role, it must be a government representative—preferably a government prosecutor (known as a trial counsel in the military)—who confers with a victim after a No-PC determination. SVCs are rarely equipped to explain why the government found No-PC. The SVC, at least in the Army,[109] is generally not entitled to the investigation file and is thus ill-suited to discuss the facts of the case in any meaningful way.[110] The SVC's lack of both information and access to case files makes it an inadequate substitute for a fully informed government representative. More importantly, the absence of a final conferral point after a pivotal moment in the case process may leave many victims wondering why their case was not treated seriously.[111] Therefore, a government

105. Memorandum of Agreement Between Off. of The Judge Advoc. Gen. and U.S. Army Crim. Investigation Command (CID), subject: Legal Coordination for CID Law Enforcement Reports 2–4 (5 June 2018) (explaining that a probable cause opine is issued by a judge legal advocate first before a final report opine is issued later after "all reasonable investigative activity has been completed and all reasonable leads have been exhausted").

106. Freedom of Information Act (FOIA), 5 U.S.C. § 552 (preventing disclosure of PII); Privacy Act, 5 U.S.C. § 552a (preventing disclosure of protected records).

107. FHIRC REPORT, *supra* note 1, at 62.

108. *Id.*

109. U.S. DEPT. OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE 53 (18 Jan. 2019) (instructing that in the Air Force, requests from SVCs for client-related records are "properly addressed as 'official use' requests under the Privacy Act and Freedom of Information Act" and that the SVC is responsible for protecting any released information). Air Force SVCs are thus entitled to receive parts of the trial counsel's case file to better represent clients but are not permitted to share with their clients. *Id.*

110. *See* TJAG Memo 17-08, *supra* note 58 at para. 3 (explaining the policy behind prosecutors sharing crime-related information with victims).

111. *See* Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 854 (2018) (arguing that one reason for the underreporting of sexual assault crimes is lack of interest and inaction by law enforcement, which "undermines the system's efficacy if citizens decline to report victimization or otherwise decline to cooperate with

representative, preferably a trial counsel or military justice adviser familiar with the case, should speak with the victim about a No-PC determination.

In these No-PC determinations, the JAGC should apply the 2019 Interim AR 27-10 conferral requirement, which permitted a Victim Witness Liaison or some other government representative to execute the conferral.[112] To be clear, it is preferable that trial counsel or a military justice adviser—due to their legal expertise and familiarity with the specific determinative facts of the case—confer with victims in a No-PC decision. Moreover, it is fair to assume that VWLs or other government representatives will be unable to provide the same legal context to a No-PC determination as government counsel. However, the victim conferral requirement after a No-PC decision is made is less about explaining complicated legal analysis and more about ensuring victims have some degree of closure and respect from the government. The above solution, using the 2019 Interim AR 27-10 conferral requirement, recognizes the need for a victim to have a final opportunity to confer in No-PC determinations. However, the degree and right to conferral should be less demanding on a particular OSJA, and in instances where government counsel is not available for the conferral, specially trained personnel like special VWLs[113] can be utilized to lessen the impact. While difficult, ensuring these conversations take place will provide victims full recognition in the process from start to finish. Ultimately, these changes are essential to guaranteeing that the Article 6b right to be treated with dignity and respect is more than just advisory. Such a conferral requirement will also motivate trial counsel to keep the victims' interests in mind as they evaluate cases.[114] However, greater conferral rights will not solve the third problem: improving Soldier confidence in case dispositions.

law enforcement officials" because law enforcement is not seen as legitimate). *See also* FHIRC REPORT, *supra* note 1, 42–43 (finding that there was a relationship between lack of confidence and underreporting of SHARP violations).

112. INTERIM AR 27-10 (2019), *supra* note 92, para. 17-15(a).

113. AR 27-10 (2020), *supra* note 44, para. 17-7 (describing the role of VWLs and special VWLs, who serve as critical coordinators and facilitators of victim services).

114. *See generally* 10 U.S.C. § 833 (requiring the President to direct the Secretary of Defense to provide commanders for all services with nonbinding disposition guidance regarding factors that commanders should take into account when disposing of charges and specifications); MCM, *supra* note 56, R.C.M. 306, 406(a) (providing different options, considerations, and advice that commanders must consider when deciding how to dispose of a case); *id.* at app. 2.1 (detailing nonbinding disposition guidance for convening authorities to consider when weighing how to dispose of charges and specifications—including disposition preference of the victim).

C. *Soldier Lack of Confidence in SHARP Is Exacerbated by Low Conviction Rates for Sexual Assault Claims, and Permanent Civilian Special Victims Prosecutors Are the Remedy.*

The last of the three problems—Soldiers lacking confidence in the military justice process—may be the hardest to resolve. Unfortunately, Soldiers have a number of reasons for lacking confidence in the system. In addition to the previously discussed problems in reporting, education, and transparency, the FHIRC Report suggests that Soldiers were dismayed at the length of time used to conclude investigations and reach final dispositions, potentially leading to distrust stemming from the poor overall results obtained through the delayed and slow justice process.[115] Specifically, the FHIRC Report found evidence that sexual assault cases at Fort Hood were insufficiently investigated and plagued by significant acquittal rates.[116] While the FHIRC Report largely frames this problem in the context of failings by victim advocates, CID, and commanders, the issue is fundamentally deeper. The JAGC cannot ignore additional significant data that further informs this issue. Specifically, in October 2020, the Defense Advisory Commission on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) found that commanders were referring courts-martial that were insufficiently supported by the evidence.[117] This willingness to refer weak cases led to lower conviction rates.[118] While numerous potential solutions exist, such as strengthening the Article 32 preliminary hearing or modifying the sufficiency of evidence required for referral, a more practical

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115. FHIRC REPORT, *supra* note 1, at 62.

116. *Id.* at 64. After contacting an FHIRC member and other knowledgeable JAG interview sources, a knowledgeable CID source stated:

> [A] large number of sexual assault cases were lost or dismissed at court-martial partially due to investigations that are rote and lack essential evidence. This Review obtained data from the Fort Hood OSJA which showed that there were 75 Courts-Martial convened between 2018 and 2020 that involved at least one sex crime specification. In these cases, there were 85 total *not guilty* verdicts out of a total of 306 specifications preferred.

Id.

117. DAC-IPAD INVESTIGATIVE CASE FILE REPORT, *supra* note 15, at 13–14. *See also* JUD. PROCS. PANEL SUBCOMM., U.S. DEP'T OF DEF., REPORT ON BARRIERS TO THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES 2 (2017) [hereinafter JPP BARRIERS REPORT] ("[T]o respond to public criticism and right past wrongs, commanders . . . feel pressure to resolve great numbers of sexual assault allegations at courts-martial, regardless of the relative merits of the case or the likelihood of conviction. The result . . . has been a dramatic increase in acquittals . . . .").

118. JPP BARRIERS REPORT, *supra* note 117, at 2.

solution exists without reforming the underlying system: adding civilian support or "civilianizing"[119] the role of Special Victims Prosecutors.

The SVP role is currently served by active-duty judge advocates.[120] The SVP is a specially trained judge advocate that typically serves as lead prosecutor on penetrative sexual offenses and other challenging special victim cases, such as child and domestic violence victim cases.[121] SVPs are personally selected by TJAG based on their military justice experience and normally serve for three years.[122] This position was established in 2009 by order of the Secretary of the Army.[123] The program started with fifteen SVPs but later expanded to twenty-three in the Army.[124] SVPs range in rank from

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119. Civilianization of military law, or the process by which military law has become more like civilian practice, has been widely discussed and argued in the last century. *See, e.g.*, Lederer, *supra* note 28, at 512. ("[T]he modern history of military criminal law largely is defined by its increasing civilianization."); Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 28 (1987) ("Probably the most frequently heard criticism of the system is that it has become too civilianized."); Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 5 (1970) ("The World War I movement for civilianization was led by General Samuel T. Ansell, the acting Judge Advocate General of the Army.").

120. UCMJ art. 27 (2019) ("Trial counsel . . . detailed for a general court-martial—[]must be a judge advocate . . . or must be a member of the bar of a Federal court or of the highest court of a State; and []must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which [they are] a member."). The UCMJ appears to permit civilian counsel in the role of trial counsel or defense counsel so long as they are otherwise qualified. *See* PUB. 1-1, *supra* note 41, at fig.1-2 (discussing SVP duty as possible part of judge advocate's career). *Cf.* AR 27-10 (2020), *supra* note 44, at para. 5-6 (discussing current Army policy, which allows TJAG to detail commissioned officers, who are not judge advocates but are legally qualified, to the role of trial counsel. Otherwise, civilian counsel is presently only contemplated in the role of defense counsel).

121. *See generally* Memorandum from The Judge Advoc. Gen., U.S. Army, to Judge Advoc. Legal Servs. Pers., subject: Special Victim Prosecution Program—Policy Memorandum 17-05 (1 Dec. 2017) [hereinafter TJAG Memo 17-05] (detailing the specific role and responsibilities of SVPs as well as their organizational status in the OSJA). *See also* AR 27-10 (2020), *supra* note 44, at para. 21-4 ("All SVPs will attend Trial Advocacy Level 3 (Sexual Assault Trial Advocacy Course)."); C. Todd Lopez, *Army's Special Victim Prosecutors Bring Enhanced Expertise to Courtroom*, U.S. ARMY (Oct. 17, 2013), https://www.army.mil/article/113253/armys_special_victims_prosecutors_bring_enhanced_expertise_to_courtroom [https://perma.cc/8BQ3-3R3Q] (quoting a Trial Counsel Assistance Program deputy as stating, "[SVPs] differ from the trial counsel in that all the SVPs are much more senior and experienced; they are nominated for the positions, and then they go through specialized training in addition to that").

122. PUB. 1-1, *supra* note 41, at 20 ("The Chief, PPTO is responsible for recommending field grade assignments to TJAG, unless otherwise delegated or directed."); *id.* at 22 (discussing how the average tour length is three years); *see also id.* at 21 (explaining that "TJAG makes the final decision on all field grade JA assignments").

123. TJAG Memo 17-05, *supra* note 121, at para. 2.

124. *Id. See also* Interview with Lieutenant Colonel Rebecca Farrell, Chair, Crim. L. Dep't, The Judge Advoc. Gen.'s Legal Ctr. & Sch. (Apr. 1, 2021) [hereinafter Interview with LTC Farrell] ("OSJAs can informally expand the number of SVPs by reassigning local personnel as assistant SVPs"). Lieutenant Colonel Farrell served as an SVP for three years at Fort Riley. *Id.* Additionally,

Captain to Lieutenant Colonel[125] with most serving in the rank of Major. Most SVPs have significant prior military justice experience as a trial counsel, defense counsel, SVC, or some combination thereof. SVPs typically work closely with CID agents during the investigative phase (often colocated at the local CID office) and serve as important mentors for less experienced judge advocates.

Establishing the role of SVPs was an important step in providing greater expertise in challenging sexual offense cases.[126] However, SVPs—like all active-duty personnel—only serve in the role for a limited period of time before being reassigned or being ordered to move to a new duty location, otherwise known as a Permanent Change of Station (PCS).[127] Most SVPs serve in the role for three years.[128] This means that installation prosecution offices and victims with pending cases are continually subject to turnover. Frequent turnover leads to delay in case adjudication and an ongoing, institutional loss of accumulated expertise. As noted in the FHIRC Report, victims are already subject to "delays in assignment or the workload of the SVCs" and resulting turnover during the life of a case.[129] And as discussed previously, victims are frustrated by the length of time it takes for cases to be adjudicated. Ensuring that a continuous, singular SVP is managing cases will help remedy these deficiencies.

For a variety of practical and professional reasons (outside the scope of this Essay), the JAGC cannot commit to placing active-duty personnel in a permanent SVP duty position. Therefore, to ensure steady, persistent case management, the SVP role must be expanded to include permanently stationed civilian attorneys. As Congress grows closer to potentially removing commanders entirely from the military justice process, and debate continues as to whether the UCMJ should be turned over entirely to a civilian

at larger installations, there are now special victim trial counsel pursuant to TJAG's military justice redesign program. TJAG Memo 19-01, *supra* note 41, at Bus. Rules para. 1(b)(2).

125. TJAG Memo 17-05, *supra* note 121, at para. 5.

126. *See, e.g.*, Major Jeffrey A. Gilberg, *The Secret to Military Justice Success: Maximizing Experience*, 220 MIL. L. REV. 1, 7–8 (2014) (examining data which reveals that military justice practitioners suffer from an overall lack of litigation experience); Major Derrick W. Grace, *Sharpening the Quill and Sword: Maximizing Experience in Military Justice*, THE ARMY LAW., Dec. 2010, at 24–34 (arguing the Army suffers from lack of litigation experience and recommending specific military justice career tracks similar to the Navy's JAGC program).

127. *See generally PCS: The Basics About Permanent Change of Station*, MIL. ONESOURCE (July 8, 2022, 8:05 AM), https://www.militaryonesource.mil/moving-pcs/plan-to-move/pcs-the-basics-about-permanent-change-of-station/ [https://perma.cc/74EW-8YXW] (explaining the basics of PCS and the time range for these assignments).

128. *See* TJAG Memo 17-05, *supra* note 121, at para. 6 (noting that most SVPs serve in the role for three years); *see also* Grace, *supra* note 126, at 30 ("The SVPs operate in an interesting paradigm. They are stationed for a period of three years at major installations . . . .").

129. FHIRC REPORT, *supra* note 1, at 70.

system, civilianizing the SVP role provides a reasonable middle ground.[130] A civilian SVP will ensure that the victims and OSJAs have a single experienced prosecutor to help manage cases from start to finish. This would provide the additional benefit of limiting the number of times victims need to retell their traumatic stories to different prosecutors.[131] It would also give OSJAs continuity of cases across a wide spectrum, ensuring cases are not overlooked or lost in the PCS cycle. Finally, establishing civilian SVPs is consistent with U.S. Secretary of Defense Lloyd Austin's 2021 mandate that the DoD work with Congress and create dedicated offices within each of the services for prosecuting special crimes.[132]

While the current military SVPs are well-trained and arguably some of the best litigators in the Army, they are still subject to the JAGC's need for broadening assignments.[133] Moreover, even the best attorneys need time to acclimate and grow into new roles. Active-duty SVCs may also be subject to peer and rank disparity issues. For example, some Staff Judge Advocates must balance rating SVPs (either in a rater or senior rater role, depending on the rank of the SVP) with other judge advocates in office.[134] As SVPs generally operate more independently from the OSJA than other attorneys, this can cause potential rating issues. For example, SVPs are inherently less visible to their normal senior raters—the Staff Judge Advocate—due to being

130. *See, e.g.*, John M. Donnelly, *Lawmakers Near Big Response to Military 'Rape Epidemic'*, ROLL CALL (Feb. 4, 2021, 6:30 AM), https://www.rollcall.com/2021/02/04/lawmakers-near-big-response-to-military-rape-epidemic/ [https://perma.cc/WR3J-9QH9] ("Members of the Senate Armed Services Committee are increasingly receptive to a long-standing proposal by New York Democrat Kirsten Gillibrand . . . to move responsibility for prosecuting sexual assault, and perhaps other major crimes, from military commanders to independent prosecutors.").

131. *See, e.g.*, Carolyn S. Salisbury, *From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in a Children's Law Clinic*, 17 ST. THOMAS L. REV. 623, 636 (2005) ("[I]t is well-known that rape victims who help prosecute their rapists in criminal trials often feel as if they have been raped once again within the legal system . . . .").

132. Memorandum from Sec'y of Def. to Senior Pentagon Leadership et al., subject: Department of Defense Actions and Implementation Guidance to Address Sexual Assault and Sexual Harassment in the Military 1 (1 July 2021); *see also* INDEP. REV. COMM'N ON SEXUAL ASSAULT IN THE MIL., U.S. DEP'T OF DEF., HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY 3, 7 (Sept. 23, 2021) (setting forth more than eighty recommendations for change, including creation of the Office of the Special Victim Prosecutor in the Office of the Secretary of Defense).

133. PUB. 1-1, *supra* note 41, at 3, 21 ("Officers with functional expertise must continue to seek diverse assignments of increasing responsibility, inside and outside their area of expertise, to remain the most competitive for promotion, schooling, and assignments."); *cf.* OFF. OF THE JUDGE ADVOC. GEN., JUDGE ADVOC. LEGAL SERV., PUB. 1-1, PERSONNEL POLICIES para. 5-1(b) (1 May 2018) ("The Army and the JAGC develop, employ, and retain *Broadly Skilled* Judge Advocates. Broadly Skilled Judge Advocates are capable of performing successfully in any core legal discipline, at any location, in roles appropriate for their grades." (emphasis added)).

134. TJAG Memo 17-05, *supra* note 121, at 2.

located at offices at CID, being in trial, or frequently traveling for regional responsibilities. SVPs are also accountable to both SJAs and the Chief of Trial Counsel Assistance Program.[135] Both of these facts can potentially undervalue SVPs when compared to other roles in the OSJA like Chief of Justice or Chief of Administrative Law. Additionally, SVPs in the rank of captain may struggle in their dual role as mentors to trial counsel of the same grade and rank.[136]

No matter how skilled current SVPs are, they must eventually move on from the role. With civilian attorneys added to the Army's SVP roster, the Army could hire only the best qualified SVPs.[137] Realistically, these hires would likely be skilled former judge advocates or former specialized civilian prosecutors. These civilian SVPs would not be subject to PCS moves, and their expertise would have the opportunity to continually improve and develop over time. This expertise would not be lost due to PCS moves or reassignments.

Permanently stationed civilian SVPs would continue to be supported by uniformed judge advocate SVP, trial counsel, and paralegals.[138] Thus, judge advocates would still gain critical military justice experience while serving as crucial connections to commanders and panel members.[139] More importantly, the JAGC would not be fundamentally abandoning its statutory mission of military justice by wholesale turning over the military justice process to civilians. In 2019, TJAG mandated a substantial military justice redesign in how OSJAs were structured and staffed.[140] A shift to include civilian SVPs would simply be another evolution of this redesign effort.

Expanding the role of SVP to include civilians as part of the military justice redesign would have its own issues that cannot be disregarded. For example, like any permanent civilian role, OSJAs may struggle with the administrative requirements that come with removing SVPs with poor

135. *Id.*

136. *Id.* at 1; *see also* Interview with LTC Farrell, *supra* note 124 (describing her efforts, while serving as a Lieutenant Colonel SVP, at mentoring captain SVPs who were struggling to manage professional relationships with peers). The author also had numerous conversations with SVPs in the rank of captain who shared similar frustrations. Professional Experiences, *supra* note 55.

137. *See* U.S. DEP'T OF ARMY, REG. 690-300, EMPLOYMENT para. 9-1 (3 Apr. 2019) (authorizing civilian attorneys in Army JAGC).

138. *See* TJAG Memo 17-05, *supra* note 121, at 1 (describing the personnel support for SVP program).

139. *See* LIEUTENANT GENERAL CHARLES N. PEDE & MAJOR GENERAL STUART W. RISCH, TJAG & DJAG, VOL. 40-11, BUILDING EXPERT AND VERSATILE JUDGE ADVOCATES—THE REVISED SKILL IDENTIFIER PROGRAM (June 2019) ("One of our most important strategic objectives as a Corps is developing legal professionals who are both expert and versatile in their craft.").

140. TJAG Memo 19-01, *supra* note 41, at 1.

performance records.[141] Presently, active-duty personnel who struggle in the SVP role can be more easily replaced. Despite these concerns, the JAGC already employs civilian lawyers, and OSJAs should be familiar with the legal nuances of managing civilian attorneys. Furthermore, most OSJAs have specially trained labor employment attorneys to help navigate any administrative hurdles.

Civilian SVPs would also be subject to the vicarious trauma inherent in prosecuting difficult sexual assault cases.[142] Establishing permanent civilian prosecutors means OSJAs will need to more carefully monitor the mental health of these SVPs as they prosecute cases for many years beyond the current two- to three-year standard. It's possible overall performance could also diminish as long-practicing civilian SVPs might suffer from burnout.[143] Unfortunately, this concern already exists for current-practicing SVPs, and OSJAs should already be taking steps to monitor the well-being of their personnel. Notwithstanding this challenge, the benefits of a more experienced litigator staying longer in the SVP position remain.

Another potential issue is whether civilians practicing in the courtroom on the government side could impact panel verdicts. Civilian government counsel arguing to a panel—in suits, not dress uniforms—might take some acclimating, at least at first.[144] It is possible some panels could view civilian

141. 5 U.S.C. § 4303 (listing statutory requirements to remove nonprobationary federal government employee due to unacceptable performance); *see also* 5 C.F.R. § 432.101 (2021) (detailing negative administrative action available for poor performance); 5 C.F.R. § 752.203 (2021) (discussing procedures for addressing adverse action for employee misconduct); U.S. DEP'T OF DEF., INSTR. 1400.25, DOD CIVILIAN PERSONNEL MANAGEMENT SYSTEM: PERFORMANCE MANAGEMENT AND APPRAISAL PROGRAM vol. 431, sec. 3.1 (4 Feb. 2016) (C3, 10 Jan. 2022) (describing the purpose of DoD Performance Management and Appraisal Program and establishing DoD policy on managing civilian employee performance); *cf.* Exec. Order No. 13,839 of May 25, 2018, 83 Fed. Reg. 25,343, 25,343 (June 1, 2018) ("Removing unacceptable performers should be a straightforward process that minimizes the burden on supervisors. Agencies should limit opportunity periods to demonstrate acceptable performance . . . to the amount of time that provides sufficient opportunity to demonstrate acceptable performance.")

142. Major Rebecca A. Blood, *Preventing Burnout in the JAG Corps*, ARMY LAW., 2019, at 39, 40 ("Repeated exposure to sex crimes or child pornography can lead to an accumulation of material that is difficult to process. Furthermore, attorneys who are directly interacting with victims of sex-related crimes may begin to internalize the emotional response and symptoms of the victim.").

143. *Id.* at 39 ("Compassion fatigue is the development of posttraumatic stress symptoms subsequent to frequent exposure to sexual assault survivors. Burnout and compassion fatigue are examples of vicarious traumatization.").

144. *See* Lederer, *supra* note 28, at 525–26 (describing how military traditionalists initially feared the creation of the civilian Court of Military Appeals, later rebranded in 1994 as the United States Court of Appeals for the Armed Forces); Sherman, *supra* note 119, at 60 ("There has always been a tendency within the military to exalt the virtues of the present military justice system and to discount the need for reform.").

SVP as less persuasive, and vice versa.[145] However, if true, this argument should be equally applicable for civilian defense counsel arguing to panel members, versus military defense counsel. Civilian defense counsel have long been permitted in courts-martial.[146] To that point, there is no clear data to show any statistical difference in court-martial results when civilian defense counsel are present versus detailed military defense counsel. Conversely, it's not uncommon for Army defense counsel to have more time in service than trial counsel and thus have more decorations and awards displayed than their government counterparts.[147] Of course, the opposite is true when a more senior SVP is prosecuting a case against a lower ranked defense counsel. It is (and always has been) possible that a higher ranked or more decorated advocate might be more persuasive to some panels. To the extent decorations or rank matters—and they should not—a civilian SVP would still be joined by uniformed military co-counsel. While an interesting argument, a more experienced civilian SVP should be sufficiently trained to overcome any such reservations by a panel. Any JAGC reluctance to include civilian SVPs is more likely to be based on broader political concerns.

The JAGC might be reasonably concerned that allowing civilian prosecutors into the SVP role would only embolden critics demanding complete civilianization of the military justice process.[148] However, the JAGC has previously turned to civilian attorneys in various legal arenas, such as contracts, claims, and post-trial action, to bolster mission execution by providing continuity and specialized legal expertise. Likewise, establishing civilians in the SVP role will bring a similar benefit and will ultimately provide more confidence to Soldiers who report. More experienced civilian SVPs will also be less subject to political pressures and will more carefully

145. *See generally* THOMAS A. MAUET, TRIAL TECHNIQUES 19 (6th ed. 2002) ("Jurors prefer witnesses and lawyers who are likeable and attractive, both physically and personally. They are more influenced by people they like and who appear to be much like themselves.").

146. *See* 10 U.S.C. § 827(b)(1) (1964) (original version of art. 27 of the UCMJ) (allowing military personnel and civilians who pass the bar to serve as defense counsel).

147. *See* PUB. 1-1, *supra* note 41, at para. 5–10(c) ("As a general rule, JAs graduating from the JAOBC will not be assigned to TDS as their initial assignment. Exceptions will be made based on individual qualifications and the [Army's needs]. To ensure necessary training and supervision, any assignment of JAOBC graduates to TDS will be carefully monitored."). *See generally* U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 22 (26 Jan. 2021) (detailing Army policy on the wear of awards); U.S. DEP'T OF ARMY, REG. 600-8-22, MILITARY AWARDS paras. 1-18, 1-19 (5 Mar. 2019) (stating that most meritorious awards should have a start and end point, thereby frequently linking awards to Soldier PCS moves).

148. *See* Lederer, *supra* note 28, at 535 ("In short, military law continues the civilianization process but apparently more slowly than some would prefer."); Anthony J. Ghiotto, *Back to the Future with the Uniform Code of Military Justice: The Need to Recalibrate the Relationship Between the Military Justice System, Due Process, and Good Order and Discipline*, 90 N. DAKOTA L. REV. 485, 503 (2014) ("[C]ritics argued for further civilianization of the military justice system with an increased role for attorneys and less authority for commanders.").

and skillfully examine which cases go forward to court-martial. Indeed, members of Congress continue to express interest in substantially reforming the UCMJ.[149]

On December 27, 2021, the National Defense Authorization Act for Fiscal Year 2022 became law.[150] Effective two years from the date of enactment, NDAA 2022 brings new paradigm shifts to the UCMJ.[151] Specifically, it changes—among other things—how the military investigates and prosecutes certain covered offenses (such as domestic violence and sexual assault allegations).[152] NDAA 2022 also establishes the new positions, for each of the military services, of Special Trial Counsel and Lead Special Trial Counsel (in the grade of O-7, or a General Officer in the Army).[153] Special Trial Counsel, independent of the military chains of command of both the victims and those accused of covered offenses, will have exclusive authority to determine which allegations constitute covered offenses, investigate those offenses, and ultimately dispose of those covered offenses.[154] In short, attorneys—versus commanders—will have sole discretion to determine whether covered offenses should go forward to trial.[155] Despite these major changes, the JAGC will continue to struggle—at least in the short term—to provide sufficient, experienced prosecutors who can actually review and more reliably earn convictions in these cases.

Moreover, Army lawyers serving as Special Trial Counsel will still be subject to the Army's needs to periodically relocate, as well as the Army JAGC's institutional interest in producing "versatile" (e.g., nonspecialized) attorneys.[156] Ultimately, the need for permanent expertise in the SVP role will remain. If the JAGC embraces the use of civilian SVPs—alongside the new Special Trial Counsel—it's more likely that case investigations will improve, stronger cases will be referred, and allegations more effectively

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149. *See, e.g.*, Rose L. Thayer, *Four Senators Argue Military Justice Reforms Included in NDAA Fall Short of True Justice for Victims of Sex Crimes*, STARS & STRIPES (Dec. 8, 2021), https://www.stripes.com/theaters/us/2021-12-08/military-justice-reforms-senate-ndaa-gillibrand-ernst-3900129.html [https://perma.cc/NL98-R9CP] (reporting on congressional frustration amongst some senators, particularly Senator Kirsten Gillibrand, that the negotiated military justice reform in the NDAA 2022 was insufficient).

150. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117–81, 135 Stat. 1541 (2021).

151. *Id.* § 539C(a) (stating date of effectiveness); *id.* § 531–32 (amending sections of the UCMJ to include special policies for prosecuting sexual assault claims).

152. *Id.* §§ 532–33.

153. *Id.* § 531.

154. *Id.*

155. *See id.* (stating that Special Trial Counsel have exclusive authority over prosecutions instead of commanders).

156. *See* PUB. 1-1, *supra* note 41, at fig.1-1, para. 5-1(k) (stating the JAGC's core objective of developing versatile advocates and to distribute officers throughout the United States).

prosecuted. In turn, conviction rates should improve, and Soldiers will ultimately have greater confidence in the system.

Conclusion

The FHIRC Report was a shocking wake-up call for not only the Army but the entire DoD. While primarily focused on problems at Fort Hood, its findings resonate with U.S. military leaders throughout the world. Army and DoD leadership, appropriately so, are actively emphasizing the results of the FHIRC Report and demanding potential solutions.[157] While these solutions will require numerous lines of effort from multiple agencies, the JAGC has a pivotal role in resolving many of the issues raised.

The JAGC can act swiftly and immediately to educate Soldiers about the role of and their right to SVC. The JAGC can also make immediate policy decisions to expand victims' access to case information and ensure victims do not remain in the dark. Finally, expanding the role of SVPs to include civilian attorneys will ensure cases have greater continuity and expertise. In turn, this should result in higher conviction rates.

Military justice requires an increasingly delicate balance between the pursuit of justice and the need for good order and discipline.[158] Both priorities must account for the needs and rights of the accused, victims, and the Army. The JAGC must rise to the occasion and take bold action now.

157. Grinston et al., *supra* note 20 ("We will not tolerate these behaviors. We need your help to ensure we hold leaders accountable for their unit culture and their care for each Soldier. Our previous efforts are not working. We need creative solutions to get after these leadership issues.").

158. Ghiotto, *supra* note 148, at 494 ("If one narrative stretches throughout the history of military justice, however, it is the increased role of due process. At its inception, military justice was not a trinity, but consisted of a military justice system designed solely to effectuate good order and discipline.").