Practitioners and scholars have debated whether justice and discipline are opposing or mutually reinforcing goals of our nation’s military justice system. Both are essential to a legitimate system of military justice and are mutually reinforcing. What does seem clear is that in a democratic society citizen-soldiers must view their justice system as fair. The perception and reality of fairness is even more significant in the all-volunteer military of today. The Supreme Court “has long recognized that the military is, by necessity, a specialized society separate from civilian society… which has, again by necessity, developed laws and traditions of its own during its long history, [and these differences] result from the fact that ‘it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise’.” Despite this specialized society, our all-volunteer military, as a microcosm of our society, requires the military justice system to deal with the same pressures, problems, and countervailing interests as the civilian justice system. Congress, as the branch entrusted with the constitutional responsibility to “make Rules for the Government and Regulation of the land and naval forces” must balance the interests of victims, the rights of military defendants, and the overarching need to maintain a disciplined, effective fighting force to defend the nation when fulfilling this constitutional responsibility. Recent criticisms of the military’s prosecution of sexual assault allegations have resulted in new and significant amendments to the Uniform Code of Military Justice (UCMJ) that fundamentally reorder the balance among these competing interests—a rebalancing that will affect the attainment of both justice and discipline. Only experience will show whether these changes will adversely or positively affect either of these two goals, and more critically, the underlying requirement in a democratic society that the military justice system be perceived as fair, not only by the American public, but by the soldiers, sailors, airmen, and marines that form our all-volunteer military.

In May 1950, Congress enacted the UCMJ as a comprehensive system of military justice designed to incorporate and reflect the experiences and expectations of the sixteen million Americans who had served in the U.S. military during World War II. Recognizing the need to update the military justice system, which had persisted largely unchanged since the American Revolution, Congress, after years of studies and extensive legislative hearings, created the UCMJ to reflect the needs and expectations of a modern military serving a democratic nation. As part of the postwar reform of the entire national security structure, Congress made significant changes in the military justice system with the goal of bringing this system closer to the civilian justice systems the citizen-soldier was familiar with, and to remedy the abuses—such as immediate executions without appeal or draconian punishments with minimal due process—experienced during World War II. Central to these postwar debates was the focus on command influence in the military justice system, the legitimate exercise of which was considered necessary to the maintenance of good order and discipline in military units, but which if abused led to misgivings about the ability of the military justice system to achieve justice and provide due process to accused soldiers, sailors, airmen, and marines. The tensions and synchronicity between the provision of justice and the maintenance of good order and discipline continue to the present, and occupy a central role in the current debates over the military justice system.
The 1950 UCMJ, which became effective in 1951, made the system uniform across the five services (Army, Navy, Marine Corps, Coast Guard, and the newly created Air Force). It required increased participation in the military justice system by lawyers, as trial counsel (prosecutors), defense counsel, and critically, as law officers (who fulfilled the role of, and ultimately became, military judges). The UCMJ created the service Boards of Review to review all courts-martial that resulted in a punitive discharge or more than one year confinement, reposing a unique appellate authority in these boards, which ultimately became the Courts of Criminal Appeal of the Army, Navy–Marine Corps, Air Force, and Coast Guard. This broad appellate authority is described by Captain Christian L. Reismeier in his article on the appellate review of courts-martial as “awesome, plenary, and de novo.” Unlike any other appellate court, military Courts of Criminal Appeal review the factual sufficiency of any conviction de novo, and in so doing, “may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.”

This unique appellate authority was one mechanism used by Congress to enable these courts to act as a counterweight and protection against potential command abuse. The unique appellate authority of these courts has resulted in their interpretation and protection of servicemembers’ constitutional and statutory rights within the unique context of the demands of military service.

Finally, as its capstone, the UCMJ created the Court of Military Appeals (which is now called the United States Court of Appeals for the Armed Forces, CAAF), an Article I civilian appellate court to review courts-martial and to protect the constitutional and legal rights of servicemembers. The Court of Military Appeals was intended to reinforce the civilian control of the military so essential to the American system of government, and has in the past sixty years ably fulfilled this function. This, in addition to authorizing review by the Supreme Court of courts-martial cases, ensures the protection of servicemembers’ rights and continued civilian control of the military.

Major changes to the UCMJ occurred in 1968 and 1984, resulting in the institutionalization of the position of military judge, the requirement to have licensed attorneys as defense counsel in courts-martial, the development of the Military Rules of Evidence aligned with the Federal Rules of Evidence, and the provision of additional statutory rights designed to protect servicemembers. For example, Congress, in execution of its constitutional function to “make Rules for the Government and Regulation of the land and naval Forces,” provided a protective rights warning requirement in Article 31 of the UCMJ six years prior to the Supreme Court’s recognition of a more limited right in Miranda v. Arizona. The UCMJ also provides to all military defendants the right to representation by a defense counsel free of charge, regardless of ability to pay, a right that does not exist in the civilian sector. This right to free representation by an independent military defense counsel applies from when a servicemember is questioned as a suspect in an offense, through the pretrial investigation, trial, and throughout the appeal of any conviction and sentence, to the Supreme Court, if applicable.

As an overarching policy Congress has directed that the rules and procedures applicable in trials by courts-martial shall be in accordance with the principles of law and the rules of evidence generally recognized in federal criminal trials, unless the President determines that they are impracticable. Thus, Congress has left to the President the initial decision of whether civilian procedures are practicable, subject always to a congressional determination to the contrary. This alignment reflects Congress’s desire that military servicemembers enjoy the same procedural rights and protections as ordinary citizens, limited only by the needs of military service.

As described in Professor Victor Hansen’s article on the robust and dynamic system of military justice reform, Congress requires periodic review and consideration of the UCMJ to ensure its vitality, currency, and effectiveness at achieving both justice and discipline. The achievement of both goals was seen as necessary to ensure the national security of the United States. The Preamble to the Manual for Courts-Martial (MCM) reflects these goals:

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

The articles that are included in these Issues illustrate the rich history and development of the military justice system, particularly in the area of sentencing, which is quite different from the federal system and from that of the majority of states. As U.S. District Judge Mark Bennett’s opinion in the recent case of United States v. Shaffer recognizes, military courts-martial are courts of the United States, but they apply different rules and are created under different constitutional authorities. Focusing on
Among these were the changes to the UCMJ in the 2014 National Defense Authorization Act (2014 NDAA). These changes to the UCMJ also limit the ability of the convening authority to agree to certain sentence limitations described by the Supreme Court in various cases.  

Key to understanding many of these differences is understanding the relationship between leadership and discipline in military units. As described by Chief Judge James E. Baker in his excellent summary of the military justice system, good military commanders lead by example and by establishing a culture of fairness and mutual trust within their units. Although critical, the military justice system is only one component of this endeavor. Many disciplinary problems are handled by counseling, training, administrative procedures, or nonjudicial punishment, and these options exist as part of an integrated system designed to correct problems at the earliest and lowest level. In addition to being a key component of the military justice system, judge advocates (the lawyers and paralegals in the military) also advise the commanders and noncommissioned officers (NCOs) who lead our soldiers, sailors, airmen, and marines on a daily basis.13 The establishment of the bonds of trust between commanders, NCOs, and their legal advisors created by this daily interaction is another strength of the military justice system writ large. Military justice decisions made by commanders rely on the strength of these bonds, and routinely involve detailed legal advice on all the options available to commanders. As a side note, the trust and reliance developed between commanders, NCOs, and their legal advisors in this daily interaction also contribute to commanders’ willingness to consult and incorporate legal advisors when in combat, where compliance with the laws of war is critical to the legitimacy of the use of military force in a democratic nation. But it is the development of the bonds of mutual trust between a commander and his soldiers, sailors, airmen, or marines that remains at the core of the discipline essential to fight and win our nation’s wars. This is the true specialized society described by the Supreme Court, and is at the heart of many of the differences between military and civilian criminal practice.

In the last several years, the military justice system has been harshly criticized for its handling of sexual assault allegations. The role of the commander in the military justice system has become a focal point for this criticism. Currently, it is commanders who initiate (in military terms, “prefer”) criminal charges against a servicemember, albeit with extensive legal advice from judge advocates at all levels. Commanders also decide at what level of courts-martial the charges will be tried (“referral”), and if they will be tried at all.14 The articles in these Issues focus on military sentencing while describing various aspects of military justice procedure, from the investigation of misconduct, preferral and referral of charges, trial, plea negotiations, sentencing, the posttrial clemency process, the appellate process in the military, and the clemency and parole procedures used by the military services (another aspect of the system that remains different from the federal system). These Issues also include an article discussing veteran’s treatment courts, an innovation in civilian courts that attempts to account for the trauma experienced by many veterans that may have led to criminal acts, an endeavor endorsed by the Supreme Court, which has recognized a veteran’s record as relevant to sentencing considerations. Many of the authors of these articles have extensive experience as judge advocates, practitioners, and judges in the military justice, clemency, and parole systems, while others share their expertise in veterans’ issues.

What is apparent from most of the articles presented here is that the military justice system, established so carefully in 1950, and amended and updated over time, is in flux. Congress, reacting to the crisis in the military’s handling of sexual assault cases, itself a contentious issue, passed significant changes to UCMJ in the 2014 National Defense Authorization Act (2014 NDAA). Among these were the addition of mandatory minimum sentences, specifically punitive discharges, to certain sexual assault offenses; changes to the authority of the commander to grant posttrial clemency by eliminating the power to affect the findings of a courts-martial for the bulk of serious criminal offenses and for all sexual assault convictions; and limiting the convening authority’s ability to disapprove or reduce the punitive discharge or adjudged confinement in excess of one year in mandatory minimum sexual assault cases. These changes to the UCMJ also limit the ability of the convening authority to agree to certain sentence limitations in exchange for guilty pleas in sexual assault cases. Significantly, this legislation also converted the Article 32 pretrial investigation (required before referring a case to a general courts-martial), which provided substantial rights to the accused unparalleled in the civilian sector, into a much more limited preliminary hearing, while providing enhanced protections and rights for victims of crimes in military courts-martial. These victim rights include the right to a special victims’ counsel to act on the victim’s behalf in courts-martial, the right to testify, and the right to submit matters to the convening authority during the posttrial clemency process. Most of these changes have taken effect only since June.
or December 2014, so the articles do not discuss the experience of implementing these complex rule changes in practice. Instead, the authors point out the effects that they anticipate in the military justice system of the near future, as well as the potential consequences for the goals of justice and discipline.

One thing that does become apparent in reading these articles is that the UCMJ created a unified system of military justice, with interlocking procedures and rules that worked together as a system to assure the orderly trial of criminal cases in the military. The changes implemented by Congress in the 2014 NDAA are piecemeal and complex, and often affect other parts of the process arguably not intended or considered by Congress. The UCMJ and the Manual for Courts-Martial are a complete set of criminal laws and procedures created by Congress after exhaustive study and hearings, and usually amended with the same in-depth consideration. One benefit of this coherent approach to legislating is that the resulting Code was clear and efficient. Much controversy exists over the value or wisdom of the recently enacted changes, with strong advocates on both sides of the debate. Their ultimate consequences, however, remain to be experienced. But what is clear is that the recent changes have resulted in a much more complex system, with the convening authority having different authorities depending on both the specific charges preferred and the specific charges of which the accused is found guilty. The plea bargaining process has also been made much more complex by Congress’s limitation of the convening authority’s clemency powers under Article 60. Such complication is likely to generate many more issues on appeal, and to create risk to the sustainability of convictions obtained. Such an outcome is not to the benefit of victims of crime.

In any criminal justice system, the interests of the victims of crime must be considered and respected. The military has long used victim-witness liaisons to provide support and information to victims (and witnesses) in understanding and participating in courts-martial procedures, and any good trial counsel (military prosecutor) works long and hard to support, protect, and educate the victims of crime as well, through the use of Military Rule of Evidence 412 (the military rape shield rule) motions in limine in sexual assault prosecutions, or otherwise. Many of the additional rights provided by Congress to victims of crime in the military are welcome additions, and codify practices already used by good Staff Judge Advocates and by trial and defense counsels. But what cannot be forgotten—by Congress or the American public—is that counterbalancing the interests of the victim are the interests of the nation in ensuring that every accused person receives due process and a fair trial in the adjudication of the charges against him or her.

The trial of sexual assault crimes are among the hardest crimes for which to assure the balance between due process and victims’ rights. Although no system of justice is perfect, the military justice system does treat these allegations seriously. Given recent public debates, many people are familiar with the statistics claiming to capture the rising number of sexual assaults in the military, but the prevalent statistics include allegations that are not crimes in any state or federal criminal system. Comparison of the rates of prosecution of sexual assault cases, when equivalently defined, in the military versus the civilian sector shows that the Army prosecutes more than 56 percent of its sexual assault cases versus 12 to 14 percent in the civilian sector.16 The enhanced scrutiny by Congress and the American public has resulted in increased command attention at all levels and locations of the military to appropriately charge and prosecute sexual assault allegations. This is a good result. One possible reason for the increase in the number of sexual assault allegations may be that victims feel increased confidence that their allegations will be treated seriously. One hopes that it is not because of an increased incidence of criminal sexual assaults in the military. One of the recommendations made by the congressional Sexual Assault Response Panel was to consider changing the unitary nature of military sentences in order to enable capture and evaluation of sentencing statistics (as well recommendations to align the definition of sexual assault crimes in the military with the definitions used by the U.S. Department of Justice).17

As discussed in Lt. Colonel Dru Brenner-Beck’s article on Assessing Guidelines and Sentencing Disparity in the Military, military courts-martial assess a single sentence for all the charges of which an accused in found guilty. As opposed to civilian criminal trials, which limit the joinder of separate criminal charges in one trial to those of a same or similar nature, or which are part of the same transaction or scheme, military courts-martial allow unlimited joinder of all known charges, no matter how unrelated. In exchange for this unlimited joinder practice (which increases the efficiency of courts-martial by allowing all known charges to be tried in a single proceeding), the military imposes a single unitary sentence for all convicted charges. This practice has complicated the ability to analyze sentencing data in the military. Furthermore, the transparency of the military justice system in general remains a work in progress. Although some records are available on line, the military justice system has no
comparative system to the federal Public Access to Court Electronic Records (PACER) or similar state systems. Statistics can be requested through the Freedom of Information Act process, but their availability varies by service, and the FOIA process is not swift. Key to the implementation of the UCMJ in 1950, and to its systemic changes in 1968 and 1984, was an understanding of the issues that needed to be addressed. Although our entire society is dealing with ensuring appropriate responses to sexual assault allegations by all justice systems—a problem acknowledged by all to be serious and pervasive—a more precise understanding of the actual incidences of sexual assault and sexual assault prosecutions would significantly aid any future legislative response. But as in any comprehensive system, changes in the form of the sentence will affect the practicalities of panel sentencing, appeal rights, and clemency and parole considerations, at a very minimum.

The articles in these Issues can enhance the American public’s and legal profession’s understanding of the unique aspects, procedures, and goals of the military justice system, particularly its sentencing procedures. One important justification for the continuation of a separate justice system for the military is the requirement to deal swiftly with criminal allegations in a deployed environment overseas. From September 11, 2001, to 2011, the Army has conducted over 850 courts-martial overseas, particularly when foreign national victims and witnesses would have had difficulty traveling to the United States to testify. The Air Force conducted ten trials in Iraq and three in Afghanistan, and the Navy and Marine Corps tried eight cases in Afghanistan and 34 in Iraq. An unofficial Department of Defense (DoD) study estimates that twice that number, approximately 1600 cases, were begun in theater (either in Afghanistan) and completed at home station. The ability to conduct Article 32 investigations (prior to the 2014 NDAA) provided needed flexibility by allowing the military to commence courts-martial cases in theater where both affected military units and foreign national victims could participate, and where testimony could be memorialized through an adversarial process that meets Sixth Amendment requirements. This capability, eliminated by the 2014 NDAA UCMJ changes, is critical in COIN (counter-insurgency) operations where the credibility of the military’s response to serious criminal allegations is key to winning the respect and trust of the population. Retaining the ability to conduct fair trials, trials that meet American standards of due process, in these challenging environments is yet another consideration that should be weighed by Congress as it fulfills its constitutional role. Swift justice is essential to the maintenance of discipline in the armed forces.

Fewer and fewer members of Congress have served in the military, and it is estimated that less than 1 percent of the American population has served or is serving in its military. Increased understanding of the system will allow more informed participation in the continuing reform and improvement of the American military justice system, which must continue to meet the requirements for both justice and discipline. As noted in Chief Judge Baker’s article on the military justice system, much of the future debate will center on the role of the commander as the convening authority in the military system, and the continued viability of the “separate military society” of mutual trust that he or she creates and fosters in the unit. The articles touching on the continuation of jury (in the military, called the “panel”) sentencing in military courts-martial, its unique procedures and voting requirements, and the viability or desirability of sentencing guidelines or judge-alone sentencing are also important issues that center on the legitimacy and viability of the judgment of the military community in determining the appropriate sentence. Professor Geoffrey Corn’s article describes the procedures used in the sentencing phase of a military courts-martial. Judge Robert Holland discusses the actual instructions given to a military panel for sentencing purposes, and the voting procedures used to arrive at an appropriate sentence, while Lt. Colonel Brenner-Beck’s article compares the military system with the literature analyzing jury sentencing, and the practice in the six states that still use jury sentencing in civilian criminal courts. Key to the debates on retaining panel (jury) sentencing is its ability to directly reflect the community’s view of the seriousness of the offense in conjunction with an understanding of the individual being sentenced.

The military’s focus on individualized sentencing that considers the circumstances of both the crime and its effect on the victim and on society, and is based on a full understanding of the person being sentenced, is reflective of the trend in federal sentencing. In the last year, a majority of federal sentences have fallen outside of the Guidelines range, perhaps reflecting more reliance by sentencing judges on increased consideration of offender characteristics. Professor Kristine Huskey’s article on veterans’ treatment courts, currently numbering over 168 in the United States, illustrates an increased willingness by society to at least widen the concept of criminal responsibility to account for the traumatic effects of military combat service, and the contribution of post-traumatic stress disorder (PTSD), TBI (traumatic brain injury), or other mental health illnesses to veterans’ commission of crimes. Professor Huskey argues that these specialized courts alter the traditional view of criminal responsibility when combat
trauma contributes to the commission of a crime. Even if one evaluates these veterans’ treatment courts differently, their existence evidences society’s legitimation of the consideration of the value of a defendant’s military service to the nation in determining the “appropriate sentence” as punishment for a crime. In a death penalty case, the Supreme Court has endorsed the prospect of affording leniency to a veteran based on his or her military service, as well as the consideration of any trauma experienced in combat as a mitigating factor. The United States Sentencing Guidelines themselves consider distinctive military service as a basis for a departure from the Guidelines range, and federal judges have exercised leniency in sentencing veterans based on consideration of their military service. This movement is in accord with courts-martial’s consideration of the entire person—a soldier, sailor, airman, or marine—in all phases of the trial and sentencing of military defendants.

Paula McCarron, the Chief of the Air Force Clemency, Corrections and Officer Review Division of the Air Force Legal Operations Agency, explains how the military’s clemency and parole systems differ from its civilian counterparts in its commitment to reintegrating military convicts back into society. The demographics of military prisoners are also distinct: the majority of military prisoners are first-time offenders and not career criminals; all military members have a high school diploma, and many have college degrees. Congress exempted the military correctional system from the abolition of parole in the rest of the federal system. The retention of parole, as well as the additional options of executive clemency, mandatory supervised release, and return to duty provide enhanced opportunities for the military to optimize a military defendant’s return to a productive role in society and, in some circumstances, in the military. These authorities are integrated into the military justice system, and their use is controlled through law and regulation. As part of their process, the Clemency and Parole Boards also consider victim statements when making their determinations. With the recent limitations on the convening authority’s posttrial clemency powers, we may see an increased incidence of the grant of posttrial clemency by the services’ Clemency and Parole Board for appropriate cases, but this is another area where we await the effects of the recent statutory changes on the system.

Colonel Jeffrey Bovarnick’s article explaining military plea bargaining—to include the increased and more defendant-protective requirements for guilty pleas in military practice (Alford pleas are not allowed and the providence inquiry is substantive, extensive, and detailed) and their effect on sentencing practice—also adds useful viewpoints on the overall functioning of the military justice system. It is estimated that in the early 2000s, over 95 percent of state and federal criminal trials were disposed of through negotiated guilty pleas, with only 75 percent of military courts-martial being so concluded. Even though less common than in federal and state civilian courts, guilty pleas play an important role in the military justice system. The enhanced protections in plea negotiations with the associated limits on allowable rights waivers in the military (military defendants are not permitted to waive their right to postclemency review or appeal) show statutory and judicial protections designed to counteract the hierarchical structure and learned obedience in the military and protect the rights of accused service-members. The military defendant who pleads guilty also retains his or her right to a full adversarial sentencing proceeding. The enhanced requirements for a guilty plea providence inquiry have been seen as contributing to the accused’s taking more responsibility for their crimes, which can have a positive impact for victims. As in any other justice system, the form, substance, and procedures for guilty pleas form a significant portion of the true operation of the system.

In Major Elizabeth Hernandez’s article on mandatory minimum sentences in the military justice system, which were expanded in the 2014 NDAA to impose mandatory dishonorable discharges for qualifying sexual assault convictions, one can see alternative means Congress can use to influence the military justice system beyond altering procedural rules. The use of mandatory minimum sentences reflects Congress’s views of the seriousness of certain criminal behavior in the military, and its determination that these sexual assault convictions reflect, in all cases, conditions of dishonor deserving of the opprobrium of the military and society. Such a determination applicable in all cases, however, operates in tension with the history and tradition of individualized sentencing in the military—a sentencing consideration that accounts for the contributions made by the accused to the military and to the nation’s defense. It is certainly within Congress’s prerogatives to impose such a sanction, but the unintended consequences of such an exercise of congressional judgment are yet to be experienced. Major Hernandez’s article describes some of the potential complications that may arise from this recent statutory change.

The effect of the recent change in the Article 32 investigation, which was designed to, and did, enforce information symmetry between the prosecution and the defense at an early stage in the proceedings, may affect plea negotiations as much as the newly enacted limits on the convening authority’s clemency
power, although the military’s open discovery procedures and practice may militate against any functional alteration in plea willingness. Major Troy Stabenow’s article examines the unintended consequences that may arise out of the recent significant changes to the Article 32 pretrial investigation, and provision of additional rights to victims in military courts-martial. A much more limited preliminary inquiry has replaced the Article 32 investigations that previously provided military defendants protection against unwarranted prosecutions as well as the opportunity for under-resourced defense attorneys to question witnesses and victims on the record. Statutory changes affecting a crime victim’s rights in military courts-martial, although providing victims with a special victim’s counsel to protect their rights and interests, also allows the victim to be present in the courtroom for the entire case, grants the right to testify to the victim and empowers the victim to refuse to be interviewed by defense counsel.26 Major Stabenow’s article outlines how these well-intentioned changes implemented by Congress may nevertheless have significant impacts on the due process rights of accused servicemembers. In enacting these changes, Congress did not provide military defendants any offsetting ability to ensure the defendant’s ability to prepare his or her defense, nor did it consider the effect within the sentencing phase of the court-martial of a victim’s testimony that may, in some cases, violate the due process rights of the accused, particularly if the testimony transgresses what is allowed by the rules of evidence applicable at the sentencing hearing. Because the sentencing process in the military is different than that in federal courts in many particulars, procedures that function in a federal system with judge-alone sentencing and a sentencing proceeding not controlled by the rules of evidence may not function well in military courts-martial. Analysis and examination of the effects of these changes remains essential if Congress is to continue to improve functioning of the system. Professor Chris Jenks’ article on the difficulty of prosecuting and sentencing in national security cases reflects the difficulties that classified evidence can pose in any trial, and the particular difficulties presented in the adversarial sentencing process used in courts-martial.

The military justice system has always been, and remains, dynamic and flexible. As described by Professor Victor Hansen’s article, numerous ongoing and cyclic mechanisms operate to evaluate and improve its operations, with input from stakeholders within the military, the courts, Congress, the President, the academy, and most importantly, the public. Every aspect of the military justice system has been examined by the military appellate courts, including the civilian CAAF and, at important junctures, the Supreme Court. The jurisprudence generated by these courts continues to contribute to the improvement and refinement of the system and the rights of American servicemembers. When creating the UCMJ, Congress required in Article 146 the annual consideration of the operation of the UCMJ by the Code Committee, an organization consisting of the judges of CAAF, and the Judge Advocate Generals of the Army, Navy, Air Force, and Coast Guard, and the Marine Corps’ Staff Judge Advocate, as well as two members of the public appointed by the Secretary of Defense.

Additionally, Article 36, discussed above and in several of the articles, requires the President to align the rules and procedures of courts-martial with those of federal criminal courts to the extent the President determines they are practicable. This alignment maintains the link between the reforms present in the federal system and future military justice reforms. Finally, the Joint Service Committee meets annually to draft the annual Executive Order promulgated by the President to enact changes to the Manual for Courts-Martial recommended under Article 36. This committee is composed of both working and voting members and incorporates input from all of the Department of Defense, to include the services, attorneys within DoD, the Joint Chiefs of Staff, and CAAF. Prior to its finalization, the draft Executive Order is published, and public input and comment is solicited. Changes requiring legislative action are submitted to the appropriate committee of Congress. These cyclic evaluation and improvement processes operate to assure a military justice system that is adaptable, current, and well-studied.

Finally, in 2014, as a result of the criticism and concern over operation of the military justice system in the last several years, Secretary of Defense Chuck Hagel ordered a complete evaluation of the entire military justice system by the Military Justice Review Group (MJRG) headed by a retired Chief Judge of CAAF. Public comment was solicited as part of that review as well, and the MJRG’s conclusions and recommended statutory changes are due in March 2015, with recommended regulatory changes due in September of 2015. Still another federal advisory panel, the Judicial Proceedings Panel, was established by the Department of Defense in 2014 to conduct an independent review and assessment of judicial proceedings conducted under the UCMJ involving adult sexual assault and related offenses since the earlier amendments made to the UCMJ in 2012. Additionally, Congress created the Response Systems to Adult Sexual Assault Crimes Panel to examine and make recommendations concerning the military’s
response to adult sexual assault crimes in the military, and this group issued their report in June 2014.
Thus by the end of 2015, Congress will have the results of the normal cyclic review of the UCMJ, as well as the results of three concurrent reviews of the UCMJ, when it considers the necessity of any further changes to the military justice system or any recalibration of recently enacted changes.

Rather than a static and rigid system, the UCMJ remains dynamic and responsive. The UCMJ was enacted as a complete system oriented on providing justice and discipline. Coherence and clarity are even more important in a global military justice system upon which the effectiveness of our modern armed forces depends. It is clear that we are in a period of transition where Congress, the American public, and the military itself are evaluating the system against its goals. Although opinions differ about what changes are needed, it remains essential that legislation to update the UCMJ be considered holistically. Congress is the entity entrusted by the Constitution with the responsibility "[t]o make Rules for the Government and Regulation of the land and naval Forces," and it is Congress that must balance justice, discipline, and the protection of victims’ rights. This is a complex task, and one that is critical to the national security of our nation, which depends on a disciplined fighting force for its defense. Yet, fundamental to any justice system is the guarantee of due process of law. Thus, any changes to the UCMJ must protect the due process rights of accused soldiers, sailors, airmen, and marines—the other 1 percent—when accused of a crime.

Notes
3. The terms "soldiers," "sailors," "airmen," and" marines" include all our servicemembers, whether male or female.
5. Article 66(b)(2), UCMJ, 10 U.S.C. § 866(b)(2). This authority is unique to appellate courts, requires de novo review of the record, and is not a power given to the next higher level military appellate court, the Court of Appeals for the Armed Forces (CAAF), the successor to the Court of Military Appeals.
7. UCMJ art. 31. 18 U.S.C. § 831 ("(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him. (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial. (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him. (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.")
9. UCMJ art. 36(a).
13. Modern military operations require that military leaders understand and incorporate a broad spectrum of laws, including environmental, labor, fiscal, constitutional, torts, contractual, and international humanitarian law, to mention only a few.
14. Commanders routinely must decide if they will dispose of allegations of misconduct, criminal or otherwise, through the courts-martial process, or if they will instead use extra training, counseling, nonjudicial punishment, or administrative alternatives, which can include administrative discharges, reductions in rank, bars to reinstatement, or rehabilitative transfers to other units, among many others.
Remarks of LTG Flora Darpino and Prof. Rachel VanLandingham, at the 24th Annual Review of the Field of National Security Law, supra note 15. Both LTC Darpino and Prof. VanLandingham argued that the military system is, and must be, “portable, efficient, and effective,” and must be flexible.


Alford pleas are guilty pleas where the defendant pleads guilty without acknowledging or accepting guilt or the truthfulness of the accusations against him or her, instead admitting that the prosecution’s evidence would be likely to persuade the fact-finder to find the defendant guilty beyond a reasonable doubt.

Military appellate courts have upheld the right of the defense to depose a victim who refused to complete her Article 32 investigation testimony after completing her testimony for the government and refusing to respond to defense cross-examination. This case occurred prior to the changes in the 2014 NDAA, and the changes in the statutory purposes of the Article 32 preliminary inquiry may limit the ability of the defense to depose a resistant victim, with some arguable effect on the due process rights of the defense. See blogpost of Zachary D. Spilman, Deposing the Alleged Victim, Now and in the Future, NIMJ-CAAFLog (Aug. 18, 2014), available at http://www.cAAFlog.com/?s=depositions-in+sexual+assault+cases.