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# Extralegal Bias in the United States Military in Sexual Assault Cases

Taylor F. Blackston

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EXTRALEGAL BIAS IN THE UNITED STATES MILITARY IN SEXUAL ASSAULT  
CASES

by

TAYLOR BLACKSTON

(Under the Direction of Cassandra Dodge)

ABSTRACT

By evaluating the case recommendations following a preliminary hearing from military sexual assault cases from fiscal years 2016-2018, this study aims to assess whether or not extralegal factors are influencing decisions of case recommendations of assigned convening authorities. Using secondary data from the Department of Defense's annual reports on sexual assault in the United States military (n=5,171), this study aims to answer the following questions: Do extralegal factors contribute to convening authorities' recommendations following Article 32 hearings? If so, what extralegal factors contribute to convening authority's decision on non-judicial hearing recommendations? The results of the following analyses identified several extralegal variables that significantly impacted Article 32 case recommendations, including victim and offender characteristics, such as branch of service, pay grade, and gender. By recognizing and resolving any extralegal bias factors, the military can implement even more changes to protect the victims of such crimes. Each factor evaluated showed bias in one, some, or all case recommendations.

INDEX WORDS: Military justice system, Uniform Code of Military Justice, Sexual assault, Convening Authority, Case recommendations, Judicial decision making, Extralegal Bias

EXTRALEGAL BIAS IN THE UNITED STATES MILITARY IN SEXUAL ASSAULT  
CASES

by

TAYLOR BLACKSTON

B.S., Georgia Southern University, 2022

A Thesis Submitted to the Graduate Faculty of Georgia Southern University

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MASTER OF SCIENCE

COLLEGE OF BEHAVIOR AND SOCIAL SCIENCES

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EXTRALEGAL BIAS IN THE UNITED STATES MILITARY IN SEXUAL ASSAULT

CASES

by

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Electronic Version Approved:  
July 2023

## DEDICATION

This paper is dedicated to all the men and women who are victims of military sexual assault. You are heard.

## ACKNOWLEDGMENTS

First and foremost, I would like to give all the glory and praise to Jesus Christ for giving me the ability to write this paper.

I would like to thank members of my committee Dr. Bossler, and Dr. St. Louis for helping me through this process. Thank you for being there every step of the way.

Thank you to my mom, for pushing me to get into graduate school. You will always be my favorite teacher and thank you for pushing me all these years to succeed, no matter what. Thank you for instilling a desire to learn and a strong work ethic. I love you so much.

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## CHAPTER 1

### INTRODUCTION

Since the beginning of the United States, the military has fought to protect and serve US civilians. The United States military has a record of high amounts of sexual assault which contradicts the major principles of honor and integrity (Morrall, Gore, & Schell, 2015). The military judicial system, over past centuries, has developed changes to potentially increase the ability for victims of sexual assault to have their story heard. These victims might have their offender sentenced based on factors such as alleged offense, but also categories of extralegal bias such as victim branch, victim paygrade, victim pay grade scale, victim gender, multiple victims, offender branch, offender pay grade, offender pay grade scale, and offender gender (NDAA22 also known as Pub. L. No. 117-81, 135 Stat. 1551). In the coming years, changes will be occurring to potentially minimize such bias.

The military judicial system strives to protect the core beliefs of the military while also protecting the victims of the alleged crime. Under the Fifth Amendment, the US Constitution does not allow military members access to grand jury or civil jury (Congressional Research Service, 2020). Therefore, there are different rules and procedures in place for members of the military to prove their innocence (Congressional Research Service, 2020). Congress, along with the help from military leaders, has enacted rules in place for service members. These rules can be found in the Uniform Code of Military Justice (UCMJ). The UCMJ, which “provides the basic framework for the military justice system and defines offenses subject to trial by court-martial” is conducted under the Manual for Courts-Martial (M.C.M.) which contain the Rules for Court-Martial (R.C.M.) and the Military Rules of Evidence (Mil. R. Evid.) (Congressional Research

Service, 2020, p. 2). A more in-depth analysis of the military judicial system will continue in Chapter 2.

This study aims to evaluate whether the current prosecuting superior officers are allowing extralegal biases to influence their case recommendation after a sexual crime has been alleged. This study will analyze a sample of cases managed by the traditional prosecutorial body in order to gauge the impact of extralegal bias in their case recommendations. This study also aims to assess if convening authority members who are attached to their subordinate members can cause harm in the court system by allowing unnecessary bias within the court system.

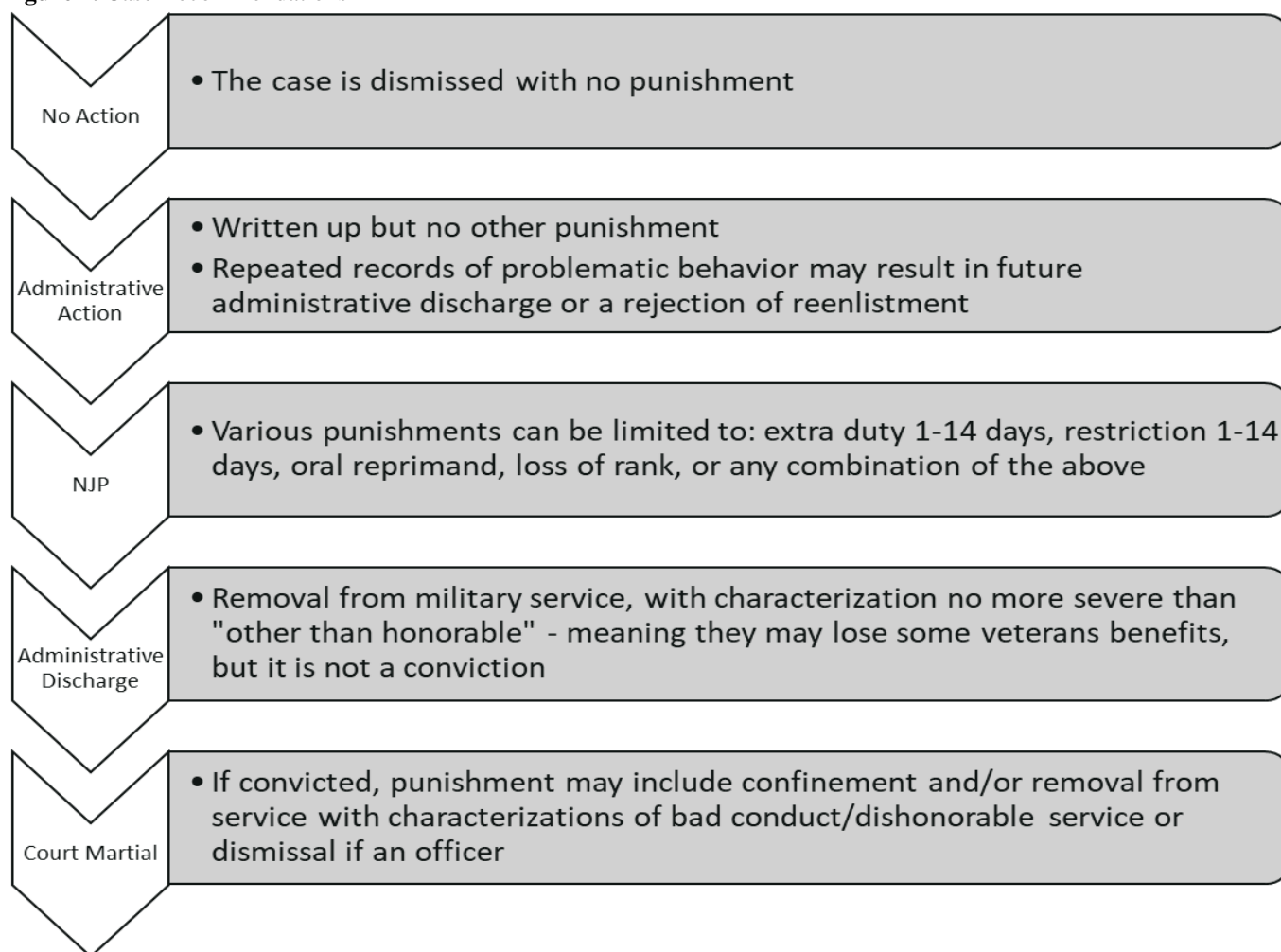
Through changes seen in previous and current legislation, the United States military is changing the way sexual assault cases are prosecuted and punished through transitions such as who has the authority to prosecute certain charges (Lewis, 2022). Historically, the superior officer of the accused functioned as a prosecutor in the case, known as the convening authority. The military judicial system currently is in the process of driving superior officers away from prosecution duties and allowing specialized prosecuting attorneys to fulfill that role (Lewis, 2022). This change occurred due to work from various members who pushed for changes in the leadership of convening authorities.

The dependent variable of this study is case outcomes of an Article 32 hearing. An Article 32 hearing is similar to a grand jury in the civilian world in which the suspect is informed of the charges against him/her, with recommendation(s) of punishment following the hearing. The smallest result of a hearing is a no action outcome. This case is dismissed with no punishment. Next, other adverse action is a formal write up. One write up is not an ending to a career, but multiple over a period of time can be. Next, a non-judicial punishment is a harsher punishment that can even include loss of rank. Next, an administrative discharge is one in which

a service member is removed from service with a discharge at maximum of “Other than honorable discharge.” This causes some to lose veteran benefits. Lastly is a court martial in which a service member will go to court.

The sample used in this evaluation is derived from data collected by the Department of Defense between fiscal years 2016 and 2018 (Department of Defense, 2017-2019). The military’s fiscal year runs from October 1 - September 30. The data documents synopsis of most cases, to include victim statistics, offender statistics, and outcome statistics. The questions that are going to be presented are: Do extralegal factors contribute to convening authorities’ recommendations following Article 32 hearings? If so, what extralegal factors contribute to

**Figure 1.** Case Recommendations



convening authority's decision on non-judicial hearing recommendations? The questions will be answered by using a logistic regression analysis.

This study includes various chapters on different aspects of the influence of extralegal biases in the United States Military. The literature review entails previous research conducted regarding military sexual assault, structures of the military judicial system, and extralegal bias. Next, the methodology states how the study is conducted. Finally, results and discussion chapters will follow. Through these chapters, this research aims to show if there is a correlation between extralegal biases and convening authority's decision.

## CHAPTER 2

### LITERATURE REVIEW

#### **Introduction**

The United States military thrives on being well-equipped for any challenges. There is one challenge, however, the military has a challenging time overcoming. This area is the rising number of sexual assault cases. Due to these numbers, changes to the military judicial system are being implemented to potentially decrease such numbers.

#### **Military Sexual Assaults**

In the US military, service men and women alike experience sexual harassment and assaults with a resounding small number of convictions occurring (Morral, Gore, and Schell, 2015). For servicewomen, sexual assault has been recorded since 1942 when women were allowed to join the military (Arnold, 235). “In 2021, women made up 17.3% of the active-duty force, totaling 231,741 members; and 21.4% of the National Guard and reserves at 171,000 members” (U.S. Department of Defense, 2022, para. 3). These statistics cause concern for men and women alike who serve in the military. Because these numbers directly impact potential recruitment, awareness and changes should be monitored.

Military sexual assault encompasses many forms of civilian sexual crimes such as sexual assault, rape, sexual harassment, sexual battery, etc. (U.S. Department of Veterans Affairs, 2022).

Because of the statistics revolving military sexual assault, the military has noticed the issue as a widespread national problem (Sadler, Mengeling, Booth, O’Shea, & Torner, 2017).

Rape and general sexual assault issues fall within the Uniform Code of Military Justice (UCMJ) Article 120. Article 120 defines rape as:

Any person subject to this chapter who commits a sexual act upon another person



by—(1) using unlawful force against that other Person; (2) using force for causing or likely to cause death or grievous bodily harm to any person; (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping; (4) first rendering that other person unconscious; or (5) administering to that person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court martial may direct (Office of Law Revision Counsel, 2022 para. 1).

Meanwhile sexual assault is defined as

(b) Sexual Assault.-Any person subject to this chapter who- (1) commits a sexual act upon another person by- (A) threatening or placing that other person in fear; (B) making a fraudulent representation that the sexual act serves a professional purpose; or (C) inducing a belief by any artifice, pretense, or concealment that the person is another person; (2) commits a sexual act upon another person- (A) without the consent of the other person; or (B) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or (3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to- (A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or (B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person; is guilty of sexual assault and shall be punished as a court-martial may direct. (Office of Law Revision Counsel, 2022, para. 2)

There is only one major difference between rape and sexual assault in the military. Rape is threat or force thereof of serious bodily harm or death while sexual assault is threat or force thereof of physical harm (Office of Law Revision Counsel, 2022).

Out of 1.3 million service members in 2014, over 20,000 men and women admitted to experiencing some form of unwanted sexual contact on an anonymous questionnaire (Arnold, 2019). Even though so many experienced this trauma, few reported their unwanted contacts due to a wide variety of issues. “The Department of Defense (DOD) received 6,769 reports of military sexual assault (MSA), including both restricted (confidential) and unrestricted reports, from male and female active service members in 2017” (Powers, Moule, Dodge & Boggess, 2020, p. 204). Among those who were sexually assaulted, 43% of women and 35% of men experienced penetrative assaults (Morrall, Gore, & Schell, 2015). The IAVA survey of 2022 released surprising statistics. For one, a little less than a quarter of the men who experienced sexual assault reported it to the authorities (Pritchard et al., 2022). In addition, only a little over a third of women who experienced sexual assault reported it (Pritchard et al., 2022). Major reasons for not reporting include not thinking anything would be done, fear of retaliation, fear of impact on one’s career, and fear of not being believed (Pritchard et al., 2022). Of those that did report, 63% experienced retaliation (Pritchard et al., 2022). In 2022, the Pentagon released a report that updated the increase of military sexual assaults across all branches. The increase of reported sexual assaults increased 26% for Army personnel, 9% for Navy, over 2% for Air Force, and less than 2% for Marine Corps (Baldor, 2022). Due to these statistics and other potential correlating factors, the Army is expected to suffer the worst in recruitment numbers. The Army is projected to be down about 10,000 recruits by the end of 2022 (Baldor, 2022). Due to this report, Congress and the military have been working to hopefully help curtail the rise in these assault cases.

Although men and women alike are victims of sexual assault within the military, a resounding number of females are more likely to be sexually assaulted and harassed in the military (Morrall et al., 2015). Although social perception is that sexual assault is the only sexual crime, sexual harassment is a large issue in the military. The Department of Defense states sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” (Department of Defense, 1995, p. 18). Also, “Article 93: Cruelty and Maltreatment of the UCMJ (2012) also states that sexual harassment includes “influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature” (Arnold, 2019, p. 236). According to Morrall et al., (2015), 7% of men and 22% of women in active-duty military have been victims of sexual harassment in the workplace (page 91). Hoping to curtail sexual assaults in the military, President Biden made sexual harassment a crime in the military in 2022. Thanks to legislation passed through various means, sexual harassment now falls under Article 134 offenses within the UCMJ (Law Office of Jocelyn C. Stewart, 2022). This change could allow these crimes to potentially have further consequences against offenders.

### **Structures of the Military Judicial System**

Due to sexual assault in the military running rampant over the years, the handling of sexual crimes with the United States military are continuously being changed. Leading up to the current establishment of the U.C.M.J. there was a history of unnecessary and unsuccessful military rules and regulations. Two of the Founding Fathers of the United States, Thomas Jefferson and John Adams, were placed in charge of implementing the U.S. military codes in 1775 for the only branch at that time, the United States Army (Morgan, 1953). Adams began to

model the Army military code after the British Naval Articles which held major success at first and became known as Articles of War (Schlueter, 1980). The first major amendment came in 1786 which made major changes to how court martial for the Army was conducted (Schlueter, 1980). Another amendment was made in 1806 when Congress implemented 101 more articles (Schlueter, 1980). The Articles of the Government for the Navy came after the 1857 U.S. Supreme Court decision of *Dynes v. Hoover* which gives Congress and the President responsibility for the court-martial system of the military (Morgan, 1953). Then, in 1862, the Articles of the Government for the Navy were enacted (Morgan, 1953). During World War I, the military judicial system was evaluated for changes due to numerous complaints from various parties regarding due process for the military personnel. Changes to the system came in 1920 when Congress evaluated the then standing military codes and drew up an additional 121 new articles (Schlueter, 1980). The current UCMJ was signed into effect by President Truman on May 5, 1950, and took effect May 31, 1951 (UCMJ - Uniform Code of Military Justice, 2021). Further amendments to the U.C.M.J. came through the Military Justice Act in 1968 which made extensive changes to how judges conduct courts and procedures within the court (Mounts & Sugarman, 1969). Another most recent change to the U.C.M.J. occurred in 2016.

In the [Military Justice Act of 2016], Congress expanded the provision regarding UCMJ jurisdiction over reservists and members of the National Guard in federal service to cover not only inactive duty training, but also periods of travel to and from the training site and intervals between consecutive periods of training pursuant to orders or regulations. This change closed a gap in jurisdiction encompassing the periods of time when trainees were subject to orders but were not actively performing training, such as off-duty time, time between classes, or travel time. (Congressional Research Service, 2020, p. 8).

Changes regarding the U.C.M.J. have revolutionized the rules and regulations of the United States Military.

As previously mentioned, the Manual for Court Martials (M.C.M.) plays a crucial role in the structures of the court martial system. The M.C.M. was implemented by President Reagan by Executive Order 12473 on April 13, 1984, and took effect August 1, 1984 (LexisNexis, 1984). Executive Order 12473 was amended by President Joseph Biden on January 26, 2022, through Executive Order 14062 (Daily Journal of the United States Government, 2022). These changes allowed service members to have rules and regulations directly related to their duties. Major changes brought forth through Executive Order 14062 highlight violence, particularly domestic violence, sexual violence, and gender-based bias (Daily Journal of the United States Government, 2022).

### ***The Path of a Case Under Military Law***

When a service member is accused of committing a crime, there are many steps leading up to a trial. First, a jurisdiction must be decided. This version of jurisdiction is different from civilian jurisdiction. Civilian jurisdiction typically looks at where the crime was committed, with a few exceptions. Military jurisdiction is based on the status of the accused (Congressional Research Service, 2020). Recent changes to the UCMJ allow for non-traditional or non-active-duty service members to still be held accountable for their actions within the court martialing system (Congressional Research Service, 2020). There are multiple separate ways an accusation can reach resolution after a jurisdiction is decided.

### ***Into the Hands of the Prosecution***

Prosecution stemming from a convening authority is similar to when a law enforcement officer is prosecuted in the civilian world. In the civilian world, prosecutors and law enforcement

agencies share a close relationship and work alongside each other daily. Prosecutors are in charge of charging the suspect with the alleged crime, to include when law enforcement has violated their constitutional oath. However, the relationship between law enforcement and prosecution can raise issues of bias when a law enforcement officer is accused of ill practices.

First, when deciding whether to pursue police officers on criminal charges, prosecutors face the reality that both police officers and prosecutors often know one another, usually feel that they are part of the same team, and may feel bound by loyalties born from working together over long periods. For these reasons, prosecutors face enormous pressure from both police and fellow prosecutors not to go forward with such cases (Harris, 2012, p. 7-8).

Because police initiate and have complete autonomy over an investigation, there are many areas in which misconduct can and has occurred (Harris, 2012). Due to this, law enforcement can be in charge of investigating their fellow officers, such as the instances with Internal Affairs Unit(s) within a specific agency. For example, the Internal Affairs Bureau of the New York City Police Department (IAB NYPD) is the investigative unit within New York City targeting misconduct from police (City of New York, n.d.). Such internal investigative units are similar to a convening authority investigating their own inferior personnel.

The conversation of potential change of the convening authority to a prosecutor catapulted in 2019, when Senator Kirsten Gillibrand introduced the Military Justice Improvement Act (Kirsten Gillibrand, n.d.). This act would remove the chain of command from the prosecution in cases of sexual assault and place the decision-making power in the hands of military prosecutors. As of May 2023, this bill has stalled in the Senate and has not yet seen a floor debate. In September 2020, a bipartisan group introduced the *I am Vanessa Guillen Act* in

the House of Representatives (US House, 2020). This bill assists in changing how the military prosecutes cases. Prosecution will fall away from convening authorities into the hands of a military prosecutor in addition to adding training for investigators regarding handling suspects and victims (White, 2021). In 2021, Secretary of Defense under President Joseph Biden- Lloyd J. Austin- stated there is a shift in leadership regarding prosecution of sexual crimes and other domestic violations due to recommendations from an independent review commission (Lopez, 2021). These changes opened the door for President Joseph Biden to implement legislation to transform how the US military handles court cases.

Under the leadership of President Joseph Biden, The National Defense Authorization Act for Fiscal Year 2022 (NDAA22 also known as Pub. L. No. 117-81, 135 Stat. 1551) introduced the long-term process of changing how the Armed Forces of the United States oversees issues from the Uniform Code of Military Justice (UCMJ) (Lewis, 2022). These new prosecutors will be part of a group known as “Special Trial Counsel” and will be trained on offenses within the UCMJ (Lewis, 2022). These prosecutors will be overseen by a lead prosecutor ranking at an O-7 or higher level (Lewis, 2022). This high ranking is needed so that the lead prosecutor can have extensive experience in the military judicial system and the military as a whole. The current convening authority will retain the power of authority over cases not sent to the Special Trial counsel and retain the responsibility of selecting the panel for court martials. Another change from the NDAA22 includes requiring the judge alone to oversee sentencing after December 27, 2023 (Lewis, 2022). The only exception to this will be in capital cases in which the rule remains the same (Lewis, 2022). “Court members will still determine sentencing in capital cases with a conviction for a death penalty eligible offense. The law does not change the requirement that no part of a sentence extending to death may be executed until approved by the President” (Lewis,

2022, para. 8). Even with the ongoing changes, the United States military will continue to manage various situations that are detrimental to the overall mission of the military.

### ***Article 32 Hearing***

After a convening authority is determined, a preliminary hearing occurs, known as an Article 32 hearing. This is like the preliminary hearing done in the civilian world. The investigator(s) assisting can bring on additional help such as military police or civilian law enforcement officers to assist with the investigation. The convening authority can provide a written charge sheet which in the civilian world is like a bill of indictment in a grand jury (Congressional Research Service, 2020). Once the charge sheet is complete, “The commander can choose to dispose of the charges by (1) taking no action, (2) initiating administrative action, (3) imposing non-judicial punishment, (4) preferring charges, or (5) forwarding to a higher authority for preferral of charges” (Congressional Research Service, 2020, p. 13). An Article 32 hearing is conducted prior to a general court martial which allows there to be a basis established for prosecution. This hearing is conducted with a preliminary hearing officer who should be commissioned and judge advocate (Congressional Research Service, 2020). In deciding to take administrative action, the accused can be made to face outcomes such as withholding of privileges, extra duty, criticism/reproach/rebuke, and/or counseling. (Joint Service Committee on Military Justice, 2017). An Article 15 is also known as a non-judicial punishment or NJP. If the convening authority decides on an Article 15, it can only be used on enlisted members and not officers (Army Publishing Directorate, 2011). Various punishments can only be limited to: extra duty 1-14 days, restriction 1-14 days, an oral reprimand, or any combination of the above (Army Publishing Directorate, 2011). These resolutions allow for offenders to face punishment with minimal court costs.



### *Court Martial*

If the convening authority decides a court martial is needed, a preferral of charges or referral of charges will occur. Proceedings leading up to this are conducted during an Article 32 hearing with either a military or magistrate judge who views the investigative subpoenas, search warrants, pretrial motions and matters, evaluations of accused and/or victim, etc. (Congressional Research Service, 2020). “A military judge must be [1] a commissioned officer of the armed forces [2] who is a member of the bar of a Federal court or the highest court of a State and [3] certified to be qualified, by reason of education, training, experience, and judicial temperament, for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member” (Congressional Research Service, 2020, p. 22). The accused should be informed of the charges as soon as possible and sign the charge sheet under oath of an officer who has already taken a sworn oath (Joint Service Committee on Military Justice, 2019). This process is like a bill of indictment coming from a grand jury returning as true resulting in an arraignment.

There are three different ways to have a court martial that can occur: summary, special, or general and this is known at referral of charges (Congressional Research Service, 2020). The only expectation to this is if the victim of a sexual assault case would like to pursue a case in civilian court, the convening authority must hand over the case to civilian court. Accused have equal rights within a general and special court martials (Congressional Research Service, 2020). An extreme difference between civilian grand juries and military hearings are in court martials, accused personnel are entitled to examine evidence, witnesses, and arguments; however, in civilian courts, the accused is unable to do these things with a grand jury (Congressional Research Service, 2020). Another distinct difference between the two courts is the laws

surrounding the types of cases. However, both systems have ways to inflict consequences on offenders of criminal behavior.

Military members have processes like *voir dire* in the civilian world. The accused has the option to be tried before a military judge alone or trial in front of military members (Congressional Research Service, 2020). However, the panel must be of the same rank or higher (ex: if the accused is an E-5 then one-third of the panel can be an E-5 while the rest of the pool must be E-6 or higher) (NOLO, 2013). The only other exception is in military court martial, both sides only have one strike each as opposed to multiple strikes in the civilian courts (Congressional Research Service, 2020). Other than the difference between rank and striking, military *voir dire* and civilian *voir dire* are remarkably similar. *Voir dire*s can question jurors regarding biases regarding potential circumstances. In the 2005 case of *United States v. Sonego* determined that a panel member should answer each *voir dire* question accurately because inaccurate answers of a member can lead to an unfair trial for a defendant (United States v. Sonego, 2005). In the 2011 case of *United States vs. Gooch*, the Court ruled that *voir dire* is a legal proceeding done to determine members of a panel and to ensure said members are free of any bias (United States v. Gooch, 2011). *Voir dire*s allow for biases to be minimized as there is intensive questioning leading up to hearing a case.

### ***Sentencing after a Court Martial***

In the military, convicted service members are sentenced like civilian courts. The panel is responsible for sentencing as long as it follows guidelines set by Manual for Court-Martials (Schmid, 2011). The panel can decide whether the defendant has the maximum penalty, no penalty, or any punishment between the two (Schmid, 2011).

Meanwhile, the presiding judge should hope to convey a fair and impartial bias including through sentencing. This is because the panel is instructed that the five reasons for sentencing are “rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses” (Department of the Army, 2020, p. 81). However, these reasons can be different depending on the errors that come with military court martials. These errors can include things such as sentence disparity and unlawful command influence (Schmid, 2011). Although the UCMJ establishes minimum punishments, the accused are protected from excessive penalties similar for civilians under Amendment 8.

### ***Post-Sentencing***

Similar to civilians, convicted service members have the opportunity to appeal their conviction. The United States Court of Appeals for the Armed Forces was found May 31, 1951, after years of debate arising from how misconduct in the service was overseen (United States Court of Appeals for the Armed Forces, n.d.).

If the sentence, as approved by the convening authority, includes death, a bad-conduct discharge, a dishonorable discharge, dismissal of an officer, or confinement for one year or more, the case is reviewed by an intermediate court. There are four such courts — the Army Court of Criminal Appeals, the Navy-Marine Corps Court of Criminal Appeals, the Air Force Court of Criminal Appeals, and the Coast Guard Court of Criminal Appeals (p. 3).

Each appellate court oversees various delinquencies of the UCMJ that have occurred in the armed forces. This gives an offender another chance to potentially have the outcome that they are looking for.

Each aspect of the military judicial system has key roles involved in the potential conviction of military criminals. These roles are not perfect; however, current legislation action is progressing to aid in obtaining better justice for victims.

### **Extralegal Bias**

Bias can be defined as “the predisposition of a judge, arbitrator, prospective juror, or anyone making a judicial decision, against or in favor of one of the parties or a class of persons. This can be shown by remarks, decisions contrary to fact, reason or law, or other unfair conduct” (Hill & Hill, n.d., para. 1). Even though there are measures to prevent bias, any bias in a court case can cause an unnecessary outcome to be determined. These categories, also known as extralegal biases, potentially allow for a change in punishment for the offender (American Bar Association, 2019).

Military panels and juries are also frequently subjected to extralegal biases. These biases range from stereotypes to specific knowledge to prejudice (Umbrasas, 2020). Psychologically, stereotypes often occur quickly upon interaction with a new person (Northwestern University, 2015). Another form of bias comes from specific knowledge regarding a defendant and/or victim. This can cause bias as one already has knowledge regarding parties involved outside of the case. Lastly, prejudice can take many forms such as interest (a person has an interest regarding the outcome of the case), conformity prejudice (outcome is based on expectations of outside influence), or generic prejudice (most often seen in stereotypes) (Umbrasas, 2020).

In the military, extralegal bias can come from the judge, panel, or even convening authority. As previously mentioned, unlawful command influence (UCI) is a common issue within the military court system. “UCI occurs when someone in the chain of command attempts to coerce or influence the court martial system” (Umbrasas, 2020, p. 351). This can be seen through multiple different cases. For example, in *the United States v. Johnson 2013*, unlawful command influence was seen in speeches from commander-in-chief, President Barack Obama (Umbrasas, 2020). Former President Obama made speeches mentioning the topic of sexual assault within the military and called for all offenders to be held accountable (Umbrasas, 2020). Also, in the 2013 case of *United States v. Sinclair*, a prosecutor withdrew himself from the case due to unlawful command influence on how the Pentagon was processing the case (Umbrasas, 2020). The prosecutor withdrew himself after the charges were not dropped stemming from inconsistency from the victim (Umbrasas, 2020). After a delay, the military judge would then halt proceedings on the case due to unlawful command influence (Umbrasas, 2020). The history of leaders being demoted due to unlawful command influence has been recorded. Both Air Force Lieutenant General Craig Franklin and Air Force Lieutenant General Susan Helms both experienced promotion issues because of using discretion when managing unlawful command influence (Umbrasas, 2020). Lieutenant General Franklin was even demoted after he dismissed a case stemming from issues with unlawful command influence. Other career issues came from the 2015 case of *United States v. Schloff* where the US Court of Appeals for the Armed Forces would eventually have to drop the case due to career concerns during deliberations (Umbrasas, 2020). Lastly, the 2013 case of *United States v. Kauffman* received negative attention after it was brought to light a commander received promotions after sending a case to trial when the case was not recommended for trial (Umbrasas, 2020).

In the civilian world, bias can be seen throughout the court process beginning with when probable cause becomes established all the way through sentencing. Two major issues of bias in the United States judicial system come from racial and gender disparities (American Bar Association, 2019). Similar to the civilian world, the military judicial system can see biases through different ways.

### ***Gender Bias***

Many times, a person has thoughts without conscious awareness (Richardson, 2017). “Stereotypes are assumptions about the fixed characteristics of the members of particular social groups, and thus form one type of social schemata. Stereotypes influence our reactions to members of these groups”(Hamilton, 1979, as cited in Howard, 1984, pp. 270-271). Because of ever growing stereotypes within a social setting, there is a heightened need for research on the psychological effects of biases within a social group. Bias can appear throughout a variety of means as seen through biological factors such as gender and race.

Biases from a society, regardless of the basis, can result in setting a victim up for an uphill battle. For example, William Ryan wrote *Blaming the Victim* in 1971 to examine the systematic issues with an example case of a woman being blamed for being raped. (Ryan, 2010). Multiple studies have been conducted regarding victim characteristics in relation to female victims of sexual assault crimes. Some of the characteristics have examined attributes such as physical attractiveness and victim’s occupation (Howard, 1984). In 1974, Stephen Schafer proposed there were three victim typologies prone to becoming victims- females, the old, and the young (Howard, 1984). Females have been stereotyped as devious, emotional, intellectually dull, among other characteristics (Klein and Kress, 1976). Because of these characteristics women have become focal points for characteristics of victims of various crimes (Klein and Kress,

1976). Warner and Armstrong argue that even though cases can be dropped due to limiting evidence or other circumstances (ex: drugs and alcohol being involved), there are underlying reasonings for female victims having a less likelihood of seeing restorative justice (p. 265). In the civilian world alone, 1 out of every 6 American women has been the victim of an attempted or completed rape in her lifetime (14.8% completed, 2.8% attempted). About 3% of American men—or 1 in 33—have experienced an attempted or completed rape in their lifetime. (Rape, Abuse & Incest National Network, n.d., para. 1).

Multiple studies have evaluated how women are influenced both as a victim and as an offender. Iwasaki, Picchiello, Morgan and Henninger did a study in 2023 analyzing the issues regarding female victims of sexual assault (SA). These researchers found many women called for policy changes to include anonymous care post-assault and free and ongoing counseling for survivors (Iwasaki et al., 2023). Many of the victims also regretted not reporting the assault or waiting too long to report (Iwasaki et al., 2023). The researchers also concluded there are five key components to sexual assault responses: “safety, empowerment and choice, collaboration, and explanation of procedures” (Iwasaki et al., 2023, p. 74). These five areas are key in assisting victims in regard to the assault incident(s). Lastly, the research team concluded that due to law enforcement and lawyers being predominately male dominated fields, many women working in those fields may consciously or unconsciously invoke victim-blaming behaviors (Iwasaki et al., 2023). Female SA survivors felt uneasy discussing their stories to males, as many women experienced victimization from males engaging in negative behaviors, such as laughing or victim blaming (Iwasaki et al., 2023).

Sexual assault is an international issue where females are predominately the victims (Rennison, 2002). Due to issues stemming from unreported data, an estimated 25%-44% of

women alone in America experience some form of sexual assault, and even with such statistics, many cases go unreported (Smith et al., 2018; WHO, 2021; Morgan and Oderkerk, 2019). Society has attempted to push victims to report cases of sexual assault, but many cases are still going unreported. (Iwasaki et al., 2023). Some of the reasons for not reporting range from fear of repeating victimization to feelings of shame and guilt (Iwasaki et al., 2023).

In addition to women already being fearful of reporting assault, many social groups experience discrimination due to being culturally marginalized (National Collaborating Centre for Determinants of Health, 2021). These groups vary in categories ranging from economic to cultural identities (National Collaborating Centre for Determinants of Health, 2021). The aforementioned research team of Iwasaki et al. found a case where a female sexual assault survivor felt discriminated against due to her sexually identifying as lesbian and multiple victims feeling discriminated against due to their race (Iwasaki et al., 2023).

### ***Racial Bias***

“Implicit racial biases refer to the unconscious stereotypes and attitudes that we associate with racial groups” (Richardson, 2017, p. 876). Although not pertaining to the research for the purposes of this paper, the following research on racial bias in the United States criminal justice system will lay the foundation for extralegal bias in the United States judicial system. The United States justice system has heard many cases regarding racial bias in the court system. Following the civil rights movement in the 1960s, African Americans have called for racial bias to be removed in the justice system.

Most recently, the issue of bias in relation to victims of murder has been called into question. The nationally recognized killing of Trayvon Martin in February of 2012 sparked conversations of racially motivated bias. The victim, an African American male (Trayvon



Martin), was leaving a convenience store and was fatally shot by a Caucasian male (George Zimmerman). Facts regarding the circumstances continue to be disputed in 2023. Zimmerman would be found not guilty in a Florida court of second-degree murder and manslaughter (Kimble, 2013). Questions of biases come from multiple angles of the case. For example, Zimmerman was not charged in the shooting until April 2012 and his bond was set at \$150,000 even though the prosecution requested \$1 million (Kimble, 2013). The federal government began investigating the case, to which no federal charges of hate crime violations were filed (U.S. Department of Justice, 2015).

### ***Prosecutorial Discretion***

Research has been thoroughly conducted evaluating potential extralegal bias in the prosecutorial decision making. By evaluating such research, potential for extralegal bias can be assessed in relation to the United States military. This study aims to contribute necessary research for implications from such bias.

Within civilian courts, prosecutors hold prominent positions in deciding when and why to charge an individual with a crime. For example, regarding issues of racial biases, prosecutors are more likely to charge an African American juvenile as an adult compared to Caucasian juveniles (Kovera, 2019). Even as adults, African Americans are more likely to be charged with crimes that carry mandatory sentencing (Kovera, 2019). “For instance, prosecutors may offer plea bargains and pressure defense lawyers into convincing their clients to accept them despite the fact that neither actor had the time to thoroughly investigate the case and interview all the potential witnesses” (Richardson, 2017, p. 882). In the Reporting Period of October 1, 2014 - September 30, 2016, for the military, it is shown “the odds ratio indicates that for every one White [servicemember] who faces [court martialing] about 1.366 black [servicemembers] face

[court martialing], meaning black [servicemembers] are 36.6% more likely to face [court martialing] than Whites across all branches” (McDonald et al., 2021, p. 17).

Another area where prosecution can have bias is during *voir dire*. Common *voir dire* questions stem from questions regarding biases from various areas such as knowledge of parties or history of involvement. Such questions include “Do any of you know or think you might know any of these witnesses?” or “Do any of you know counsel, or the United States attorney, or any of the employees in his office on any basis, social, professional or otherwise?” (United States District Court, n.d. pg. 3). Such questions are asked to minimize biases stemming from relationships during the jury selection process. Other questions can include “Have any of you or members of your family been a party or witness in any litigation (excluding domestic relations, traffic, or probate)? Do you think this experience would prevent you from being fair and impartial in this case?” (United States District Court, n.d. Recently, such questioning of racial biases came during the 2005 Supreme Court case *Miller-El v. Dretke*. During their ruling, the Supreme Court decided that jurors cannot be struck for race as that would violate the equal protection clause (*Miller-El v. Dretke*. n.d.).

Extralegal bias can cause issues throughout the court process. Although various parties attempt to curtail the bias, it is a widespread issue across the United States justice system. Extralegal bias has a history of causing issues in various cases and research is being conducted to minimize the chances.

## CHAPTER 3

### METHODOLOGY

The literature review of this study highlights the importance of military sexual assault, the military judicial system, and extralegal biases. These three key ideas are interrelated, and studies have been conducted to find relationships between these topics. This study aims to determine if extralegal factors play a role in case outcomes in the military judicial system. By conducting this study, extralegal bias factors should be monitored in relation to post-Article 32 case recommendations. This study also highlights areas of concerns for further research.

This study focuses on the potential correlation between extralegal bias and convening authorities' recommendations. Therefore, this study targets to answer the following:

- 1) Do extralegal factors contribute to convening authorities recommendations following Article 32 hearings?
- 2) If so, what extralegal factors contribute to convening authority's decision on non-judicial hearing recommendations?

The null hypothesis of this study is that extralegal factors do not contribute to the recommendations causing independent variables to not have an impact on the recommendation.

The alternative hypothesis is that these factors do contribute to the recommendation and the changing variables do impact the recommendation. Victim branch, victim paygrade, victim pay grade scale, victim gender, multiple victims, offender branch, offender pay grade, offender pay grade scale, offender gender, and alleged offense are all independent factors that have the potential to impact the recommendation.

## Data

The data used in this study is secondary data which was obtained from the United States Department of Defense Sexual Assault Prevention and Response annual reports. These reports maintain a detailed history of sexual assault within the military. The purpose of this program is to hopefully implement ideas and procedures to minimize the rates of sexual assault, abuse, and contact within the military (United States Department of Defense Sexual Assault Prevention and Response, n.d.). According to Council of Foreign Relations, the Army 35% of active-duty military, Navy totaled 24%, Air Force contained 24%, Marine Corps totaled 14%, and Coast Guard totaled 3% in 2018 (Council of Foreign Relations, 2020). In that same year, females held 16% of enlisted personnel and 19% of officers (Congressional Research Service, 2022).

The data set looks at 5,171 cases of sexual assault accusations against military members across fiscal years 2016-2018. The sample has a wide set of factors that are outlined for each case. First, the sample has a synopsis. The data set also includes victim branch, victim paygrade, victim pay grade scale, victim gender, multiple victims, offender branch, offender pay grade, offender pay grade scale, offender gender, location, region, discharge type, case recommendation, and alleged offense. Further discussion of these variables will be laid out later in this chapter. These categories are each crucial in determining the possibility of extralegal bias regarding convening authorities' recommendations.

Within the data set, each individual row is a different case. There are 5,172 rows allotted for 5,171 cases and one row for labels of categories. The first column (column A) entails a synopsis of the case, as previously mentioned. The synopsis will lay the groundwork for what the further columns will point to. The synopsis will contain a brief description of the alleged crime as well as the outcomes.

The next five columns (columns B-F) are statistics of the victim. These statistics are victim branch, victim paygrade, victim pay grade simple, victim gender, and whether there were multiple victims. Details of these categories will be laid out later in the chapter.

The next four columns (columns G-J) are statistics regarding the offender. These statistics are offender branch, offender pay grade, offender pay grade simple, and offender gender. Details of these categories will be laid out later in the chapter.

The next two columns (columns K and L) entail the location and region of the alleged offense. The location is CONUS (continental United States), OCONUS (outside continental United States), or blank. The region column allows for further explanation of OCONUS and CONUS. For OCONUS, the region can be broken down into: Africa, Eastern Asia & Pacific, Europe, South America & Caribbean, SW Asia (including area of responsibility), and Unspecified OCONUS. For cases with a location of CONUS, the region is simply North America. For cases with a blank location, there is also a blank region.

The final four columns (columns M-P) are controlled variables. These are discharge type, discharge type simple, case recommendation, and alleged offense. For the purpose of this research, discharge type simple was not needed. Details of these categories will be laid out later in the chapter.

### **Dependent Variables**

Out of the 5,171 cases, there were a variety of different potential outcomes and may receive following the Article 32 hearing. These outcomes are what could potentially happen to a military offender after being accused of a sexual crime. These outcomes can be seen as: court martial preferred, administrative discharge, non-judicial process, and other adverse actions. There will be dummy codes for case outcomes. These dummy codes will be yes (1) or no (0).

Court martial preferred is recommended when a convening authority wishes to present the evidence to a court martial. This also can be recommended when an authority believes there is enough evidence to convict an offender. The court martial can have a variety of outcomes to include discharge and/or prison time depending on the crime.

One type of case recommendation is an administrative discharge. The only type of discharge that can occur as the result of an Article 32 hearing is administrative. This could be characterized as an honorable, general, or under other than honorable conditions. More severe characterizations would result from punitive discharges.

Another punishment could be a non-judicial punishment (also known as Article 15). This punishment allows for convening authority to inflict punishment without going to court martialing. This punishment has maximums. According to JAG Defense,

Maximum punishments which may be imposed, typically, for enlisted personnel under Article 15 follow: [For] Field Grade Article 15 (Imposed by a Major/Lieutenant Commander or higher) Restriction: 60 days, or if combined with extra duty, 45 days, Extra duty: 45 days, Forfeiture of pay: ½ of basic pay for 2 months [or] Reduction in Grade: E-4 or below may be reduced to E-1; E-5 and E-6 may be reduced one pay grade if the officer imposing the punishment has the authority to promote to E-5 and E-6.

Reduction for E-7 and above varies depending upon service (Para. 7).

This does go on a service member's record and after multiple Article 15s, there can be grounds for discharge (JAG Defense, n.d.).

Lastly, an offender can be punished with other adverse actions. This entails a variety of punishments that are not discharges. This can benefit an offender who has no history of criminalistic behaviors. The convening authority can recommend this if they feel as though the

case is not punishable by discharge or if there is not enough evidence. Other adverse action punishment can include paperwork or extra duty.

### **Independent Variables**

There are a variety of independent factors within this study. This study evaluates the victim's pay grade, victim branch, victim gender, offender pay grade, offender branch, offender gender, if there were multiple victims, and alleged offense. Further discussion of these variables will be laid out later in this chapter. There will be dummy codes for the following variables: victim branch, victim gender, and offender branch.

### ***Victim Measures***

The victim(s)'s pay grade is an ordinal measure divided into the following: non-US military, Foreign Military, Jr. Enlisted (E1-E4), NCO Enlisted (E5-E6), SNCO Enlisted (E7-E9), Warrant Officer, Jr. Officer (O1-3), Sr. Officer (O4+). These will be coded as seen in Table 1.

The victim branch is a nominal measure consisting of the branches of the United States Military (Army, Navy, Air Force, and Marines), US Civilian, Foreign Civilian, Coast Guard, Foreign Military, and unknown. It is important to distinguish the different branches (or other forms) because it establishes percentages of military versus civilian victims as well as which branch has the most victims. These will be coded as seen in Table 1.

The victim gender is measured as: male, female, and unknown. This would total four categories: male, female, multiple genders, and unknown. The multiple genders allow for a category in a situation in which there were multiple victims both male and female. This is important because it helps determine if one or more categories of gender have higher rates of victimization. These will be coded as seen in Table 1.

**Table 1.** Victim Variables

Variable	Description	Code
Pay Grade	Non- US Military	1
	Foreign Military	2
	Jr. Enlisted (E1-E4)	3
	NCO Enlisted (E5-E6)	4
	SCNO Enlisted (E7-E9)	5
	Warrant Officer	6
	Jr. Officer (O1-O3)	7
	Sr. Officer (O4+)	8
Branch	Army	1
	Navy	2
	Air Force	3
	Marines	4
	US Civilian	5
	Foreign Civilian	6
	Coast Guard	7
	Foreign Military	8
	Unknown	9
Gender	Male	1
	Female	2
	Multiple genders	3
	Unknown	4

### *Offender Measures*

The offender pay grade is an ordinal measure measured as: non-US military, Foreign Military, Jr. Enlisted (E1-E4), NCO Enlisted (E5-E6), SNCO Enlisted (E7-E9), Warrant Officer, Jr. Officer (O1-3), Sr. Officer (O4+). It is important to distinguish offender branches because it is important to determine if a superior officer is offending inferior ranked personnel, civilians, and/or others. It is good to rank this factor as this because across the branches, these pay grades are universal whereas position titles are not. These will be coded as seen in Table 2.

The data set shows the offender branch has less divisions as opposed to the victim branches. The offender branch is divided into the branches of the United States Military: Army, Navy, Air Force, and Marines. It is important to distinguish the different branches (or other forms) because it establishes whether the branch affects prosecutorial decision making. These will be coded as seen in Table 2.



The offender's gender is divided into the two genders as a nominal level of measurement. This is important because it helps determine if one or more categories have higher rates of biases in the military. These will be coded as seen in Table 2.

**Table 2.** Offender Variables

Variable	Description	Code
Pay Grade	Non- US Military	1
	Foreign Military	2
	Jr. Enlisted (E1-E4)	3
	NCO Enlisted (E5-E6)	4
	SCNO Enlisted (E7-E9)	5
	Warrant Officer	6
	Jr. Officer (O1-O3)	7
	Sr. Officer (O4+)	8
Branch	Army	1
	Navy	2
	Air Force	3
	Marines	4
Gender	Male	1
	Female	2

### Control Variables

Although this study is looking into whether the convening authority determines case outcome based on extralegal factors, there are a minimum of two factors that should be considered when the authority is looking at case recommendations. For one, the authorities should look at if there are multiple victims. A singular instance can and should have a vastly different outcome as opposed to twenty victims coming forward. It is a different defense for one victim than it is for multiple victims. This uses an ordinal level of measurement.

Also, the alleged offenses should be considered. Although both very traumatic, sexual assault is quite different than sexual contact or even attempt to commit a crime. This uses an ordinal level of measurement. Each alleged offense carries different sentencing guidelines for minimum and maximum punishments. The alleged offenses are: Attempt to Commit Offenses,

Indecent Assault, Wrongful Sexual Contact, Abusive Sexual Contact, Aggravated Sexual Contact, Sexual Assault, Aggravated Sexual Contact and Rape.

Under UCMJ Article 134, indecent assault is any assault that is grossly vulgar to the common person in respect to sexual desires or relations (Department of Defense, 2016). This charge has a maximum punishment of “Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years” (Department of Defense, 2016, A27-2).

Sexual assault has a maximum sentence of “Forfeiture of all pay and allowances and confinement for 30 years. Mandatory minimum – Dismissal or dishonorable discharge” (Department of Defense, 2016, IV-74).

## **Analytic Plan**

### ***Descriptive Analyses***

The first step of the analyses was to run a descriptive statistic. This is used to help identify trends and patterns across the data to hopefully identify extralegal biases among case recommendations.

The independent variables (Victim pay grade, victim branch, victim gender, offender paygrade, offender branch, and offender gender) were each independently studied in relation to the dependent variable (case recommendation).

### ***Bivariate Analyses***

The second step was to run bivariate analyses to identify any significant relationships between the independent and dependent measures. By conducting this study, it can be potentially determined if any of the six independent variables have a significant (if any) relationship to the case recommendations (administrative discharge, court martial preferred, non-judicial punishment, and other adverse action). This has occurred through a chi square analysis.

### *Multivariate Analyses*

Multivariate analyses allow for an individual variable to be measured against other variables through a variety of ways (Mengual-Macénlle, Marcos, Golpe, & González-Rivas, 2015, p. E2).

The third step was to conduct a multinomial logistic regression analysis to examine the relationship between extralegal factors and recommendations from convening authorities. Using a logistic regression model, each dependent variable was independently studied as binary variables. The logistic regression analysis helped determine if there was an association between extralegal biases and case outcomes. The logistic regression analysis was run through Stata.

## CHAPTER 4

### RESULTS

The purpose of this study is to identify any correlations between extralegal variables and case recommendations in the United States military as it relates to accusations of crimes of a sexual nature. In order to achieve this, multiple analyses were conducted. The first analysis that was conducted used descriptive statistics to determine the frequency of each category. These categories were: victim branch, victim paygrade simple, victim gender, if there were multiple victims, offender branch, offender paygrade full, offender gender, post initial investigation recommendation, and sexual offense alleged. Next, a series of bivariate analyses were conducted to determine any correlation between the two variables aforementioned. Lastly, a multinomial regression analysis was performed. This determined if any extralegal biases influenced the case recommendation.

#### **Frequency Table**

The frequency table, also known as descriptive statistics, presented was done to establish a baseline (see Table 3). This baseline was done to see initial starting points of major categories. It also showed any category where there was missing information. For example, victim pay grade simple had a smaller number than 5,171. Overall, the descriptive statistics showed where there were major categories such as the United States Army having the most victims and offenders. Victims in foreign civilian, multiple branches, Coast Guard, and foreign military make up only 138 victims (2.68%). Enlisted personnel (E1-E9) made up the majority of victims and offenders. E1-E9 victims made up 68.67% of victims reported, totaling 3,542 personnel. For offenders, E1-E9 made up 92.7% (4,788 personnel). Offenders were predominantly male while victims were predominantly female. Non judicial punishment (Article 15) and other adverse actions were

remarkably close for top case recommendation, with non-judicial processing being the majority of case recommendations at 37.59% (1,944 case recommendations). Other adverse actions accounted for 33.61% of case recommendations (1,738 case recommendations). Lastly, abusive sexual contact was by far the most serious alleged offense. Abusive sexual contact accounted for 54.98% of cases (2,827 alleged cases).

**Table 3.** Descriptive Statistics Frequencies (n = 5,157)

Variable	Freq	%	Variable	Freq.	%
Victim Branch			Offender Branch		
Army	2079	40.31	Army	2751	53.20
Navy	942	18.27	Navy	1129	21.83
Air Force	618	11.98	Air Force	747	14.45
Marine Corps	380	7.37	Marine Corps	544	10.52
US Civilian	1000	19.39	Offender Paygrade Full		
Foreign Civilian	67	1.30	Junior Enlisted/E1-E4	2874	55.64
Multiple	60	1.16	NCO/E5-E6	1486	28.77
Coast Guard	3	0.06	SNCO/E7-E9	428	8.29
Foreign Military	8	0.16	Warrant Officer	35	0.68
Victim Paygrade Simple ^			Jr Officer/O1-O3	204	3.95
Enlisted/E1-E9	3542	68.67	Sr Officer/O4+	108	2.09
Warrant Officer	7	0.14	Cadet/Midshipman	30	0.58
Officer/O1+	136	2.64	Offender Gender		
Cadet/Midshipman	38	0.74	Male	4992	96.65
Civilian	1067	20.69	Female	173	3.35
Multiple	360	6.98	Post Initial Investigation Recommendation		
Foreign Military	8	0.16	Administrative Discharge	643	12.43
Victim Gender ^			Non-Judicial Processing	1944	37.59
Female	4004	77.63	Other Adverse Action	1738	33.61
Male	576	11.17	Court Martial Preferred	846	16.36
Multiple Victims	578	11.21	Sexual Offense Alleged		
Multiple Victims ^			Attempts to Commit Offenses	36	0.70
No	4589	88.91	Indecent Assault	4	0.08
Yes	572	11.09	Wrongful Sexual Contact	11	0.21
			Abusive Sexual Contact	2827	54.98
			Aggravated Sexual Contact	109	2.12
			Sexual Assault	1412	27.46
			Aggravated Sexual Assault	21	0.41
			Rape	722	14.04

Pseudo  $R^2 = 0.0997$

^= n was less than 5,171

## **Bivariate Analysis**

A bivariate analysis was conducted to determine if there was any relationship between two of the variables ran through the frequency table. There was a total of seven analyses conducted.

First, victim branch show that Air Force victims, Marine victims, US civilian victims and multiple victims are likely to have their case go to court martial. Meanwhile, the Army and Navy have similar outcomes across the various punishments. Coast Guard, Foreign Military, and Foreign civilian only equate to 78 victims.

Victim paygrade only had two categories where n was over 1,00 (enlisted where n=3,542 and civilian where n=1,067). Enlisted victims were most likely to have their case recommended to non-judicial punishment or court martial preferred. Meanwhile, Civilian victims had their case recommended to court martial preferred 42.9% of the time.

For victim gender, the most remarkable section was that multiple genders had very close results between Non-Judicial Punishment and Court Martial Preferred. This is an alarming statistic as an offense happening to one person should be treated differently as the same offender harming multiple people. Across genders, male victims were most likely to have their cases be resulted in non-judicial punishment while female victims saw their case going to court martial.

On the other side, male offenders were more likely to go to court martialing while female offenders were more likely to have their case resulting in non-judicial punishment. 38.6% of male offenders go to Court Martial as opposed to only 10.4% of female offenders. This is a massive gap that should be discussed. This will be applied to a theory later on in the presentation.

The two largest categories for offender paygrade were enlisted (n=4,788) and officer (n=312). Similar to enlisted victims, enlisted offenders were more likely to be punished through non-judicial punishment and court martial preferred. Meanwhile, officers were more than 2X likely to have their cases recommended to be punished through other adverse actions (44.6% of the time).

The offender branch showed remarkable findings, particularly for the Air Force and Marines, as both branches tend to send their cases to court martial in comparison to the other branches. However, the Air Force also ranks highest in the other adverse actions results. Meanwhile, the Army and Navy are more likely to have their offenders be punished with a Non-Judicial Punishment.

For the Chi-Square Analysis Between Case Recommendation and Alleged Sexual Offense, there was a steady increase in the rate of court martial preferred. The more severe the charges, the more likely the case was to go to court martial. On the opposite side, the less severe the charges, the more likely the case was to be recommended to go to other adverse action.

**Table 3.** Chi-Square Analysis Between Case Recommendation and Victim Branch Affiliation (n = 5,157)

Case Recommendation	Victim Branch Affiliation								
	Army	Navy	Air Force	Marines	Coast Guard	Foreign Military	US Civilian	Foreign Civilian	Multiple
Other Adverse Action	305 (14.7%)	129 (13.7%)	155 (25.1%)	57 (15.0%)	1 (33.3%)	2 (25.0%)	169 (16.9%)	12 (17.9%)	12 (20.0%)
Non-Judicial Punishment	789 (38.0%)	449 (47.7%)	157 (25.4%)	75 (19.7%)	0 (0.0%)	2 (25.0%)	224 (22.4%)	26 (38.8%)	13 (21.7%)
Administrative Discharge	325 (15.6%)	53 (5.6%)	27 (4.4%)	50 (13.2%)	0 (0.0%)	0 (0.0%)	174 (17.4%)	4 (6.0%)	5 (8.3%)
Courts Martial Preferred	660 (31.7%)	311 (33.0%)	279 (45.1%)	198 (52.1%)	2 (66.7%)	4 (50.0%)	433 (43.3%)	25 (37.3%)	30 (50.0%)
Total	2,079	942	618	380	3	8	1,000	67	60

Note.  $\chi^2 = 357.61$ ,  $p < 0.000$ ,  $df = 24$ ; Column percentages are shown below the observed cell counts.

**Table 4.** Chi-Square Analysis Between Case Recommendation and Victim Paygrade (n = 5,158)

Case Recommendation	Victim Paygrade						
	Enlisted	Warrant Officer	Officer	Cadet/Midshipman	Foreign Military	Civilian	Multiple
Other Adverse Action	552 (15.6%)	3 (42.9%)	55 (40.4%)	4 (10.5%)	2 (25.0%)	181 (17.0%)	45 (12.5%)
Non-Judicial Punishment	1,315 (37.1%)	0 (0.0%)	34 (25.0%)	4 (10.5%)	2 (25.0%)	250 (23.4%)	143 (39.7%)
Administrative Discharge	399 (11.3%)	0 (0.0%)	13 (9.6%)	7 (18.4%)	0 (0.0%)	178 (16.7%)	42 (11.7%)
Courts Martial Preferred	1,276 (36.0%)	4 (57.1%)	34 (25.0%)	23 (60.5%)	4 (50.0%)	458 (42.9%)	143 (39.7%)
Total	3,542	7	136	38	8	1,067	360

Note.  $\chi^2 = 161.77$ ,  $p < 0.000$ ,  $df = 18$ ; Column percentages are shown below the observed cell counts.



**Table 5.** Chi-Square Analysis Between Case Recommendation and Victim Gender (n = 5,158)

Case Recommendation	Victim Gender		
	Male	Female	Multiple
Other Adverse Action	130 (22.6%)	646 (16.1%)	66 (11.4%)
Non-Judicial Punishment	234 (40.6%)	1,288 (32.2%)	213 (36.9%)
Administrative Discharge	62 (10.8%)	500 (12.5%)	77 (13.3%)
Courts Martial Preferred	150 (26.0%)	1,570 (39.2%)	222 (38.4%)
Total	576	4,004	578

Note.  $\chi^2 = 60.04$ ,  $p < 0.000$ ,  $df = 6$ ; Column percentages are shown next to the observed cell counts.

**Table 6.** Chi-Square Analysis Between Case Recommendation and Offender Branch Affiliation (n = 5,157)

Case Recommendation	Offender Branch Affiliation			
	Army	Navy	Air Force	Marines
Other Adverse Action	427 (15.5%)	158 (14.0%)	183 (24.5%)	78 (14.3%)
Non-Judicial Punishment	956 (34.8%)	503 (44.6%)	171 (22.9%)	108 (19.9%)
Administrative Discharge	460 (16.7%)	81 (7.2%)	28 (3.7%)	74 (13.6%)
Courts Martial Preferred	908 (33.0%)	387 (34.3%)	365 (48.9%)	284 (52.2%)
Total	2,751	1,129	747	544

Note.  $\chi^2 = 320.62$ ,  $p < 0.000$ ,  $df = 9$ ; Column percentages are shown next to the observed cell counts.

**Table 7.** Chi-Square Analysis Between Case Recommendation and Offender Paygrade (n = 5,165)

Case Recommendation	Offender Paygrade			
	Enlisted	Warrant Officer	Officer	Cadet/Midshipman
Other Adverse Action	689 (14.4%)	13 (37.1%)	139 (44.6%)	4 (13.3%)
Non-Judicial Punishment	1,663 (34.7%)	7 (20.0%)	65 (20.8%)	0 (0.0%)
Administrative Discharge	610 (12.7%)	4 (11.4%)	21 (6.7%)	6 (20.0%)
Courts Martial Preferred	1,826 (38.1%)	11 (31.4%)	87 (27.9%)	20 (66.7%)
Total	4,788	35	312	30

Note.  $\chi^2 = 226.53$ ,  $p < 0.000$ ,  $df = 9$ ; Column percentages are shown next to the observed cell counts.

**Table 8.** Chi-Square Analysis Between Case Recommendation and Offender Gender (n = 5,165)

Case Recommendation	Offender Gender	
	Male	Female
Other Adverse Action	799 (16.0%)	46 (26.6%)
Non-Judicial Punishment	1,650 (33.1%)	87 (50.3%)
Administrative Discharge	618 (12.4%)	22 (12.7%)
Courts Martial Preferred	1,925 (38.6%)	18 (10.4%)
Total	4,992	173

Note.  $\chi^2 = 61.47$ ,  $p < 0.000$ ,  $df = 3$ ; Column percentages are shown next to the observed cell counts.

**Table 8.** Chi-Square Analysis Between Case Recommendation and Alleged Sexual Offense (n = 5,142)

Case Recommendation	Alleged Sexual Offense							
	Attempt	Indecent Assault	Wrongful Sexual Contact	Abusive Sexual Contact	Aggravated Sexual Contact	Sexual Assault	Aggravated Sexual Assault	Rape
Other Adverse Action	10 (27.8%)	1 (25%)	4 (36.4%)	587 (20.8%)	15 (13.8%)	158 (11.2%)	5 (23.8%)	60 (8.3%)
Non-Judicial Punishment	12 (33.3%)	0 (0%)	1 (9.1%)	1,291 (45.7%)	32 (29.4%)	274 (19.4%)	2 (9.5%)	121 (16.8%)
Administrative Discharge	4 (11.1%)	1 (25%)	3 (27.3%)	310 (11.0%)	9 (8.3%)	198 (14.0%)	1 (4.8%)	100 (13.9%)
Courts Martial Preferred	10 (27.8%)	2 (50%)	3 (27.3%)	639 (22.6%)	53 (48.6%)	782 (55.4%)	13 (61.9%)	441 (61.1%)
Total	36	4	11	2,827	109	1,412	21	722

Note.  $\chi^2 = 780.88$ ,  $p < 0.000$ ,  $df = 21$ ; Column percentages are shown below the observed cell counts.

## **Multivariate Analysis**

While running the multivariate analysis, the Air Force was chosen as the comparison group of victim and offender branches due to previous research (Dodge et al., 2022). The enlisted personnel (E1-E9) was chosen as the comparison group for victim and offender pay grade. Lastly, males were the comparison group for victim and offender gender. The comparison group for case recommendation is court martial preferred.

As mentioned earlier, location and region were not able to be included in the multivariate analysis due to the fact that there is too much missing data regarding those variables. The victim branch and offender branch categories were completed by all 5,171 cases. Victim pay grade and victim gender had n=5,158 while offender pay grade and offender gender had n=5,165.

**Table 9.** Multinomial Logistic Regression Model Predicting Administrative Discharge (n = 5,158)

Variables	b	s.e.
Victim Branch		
Army	-0.94	0.35
Navy	-0.62	0.39
Marine Corps	-0.17	0.41
US Civilian	0.26	0.33
Foreign Civilian	-0.83	0.64
Multiple	-0.28	0.60
Coast Guard	-15.84	3767.75
Foreign Military	-15.77	1977.45
Victim Paygrade Simple^		
Warrant Officer	-16.11	2765.10
Officer/O1+	0.30	0.37
Cadet/Midshipman***	0.00	0.75
Multiple	-0.20	0.29
Victim Gender^		
Female	-0.15	0.17
Multiple Victims	0.96	0.26
Offender Branch		
Army*	1.98	0.33
Navy*	1.55	0.36
Marine Corps*	1.49	0.37
Offender Pay Grade Simple^		
Warrant	-2.94	0.68
Officer/O1+	-0.50	0.27
Cadet/Midshipman	0.32	0.82
Offender Gender^		
Female***	1.23	0.33
SA-Allegation***	-0.18	0.03
Pseudo R <sup>2</sup>	0.10	

*Notes:* \* p < 0.050; \*\* p < 0.010; \*\*\*p < 0.001; ^= n was less than 5,171. Comparison Groups: Air Force for victim branch and offender branch, Enlisted (E1-E9) for victim pay grade and offender pay grade, and males for victim gender and offender gender.

Cadet/midshipman was significant; however, victim cadet/midshipmen only make up thirty-eight victims which is less than 1% of the overall sample. Cadet/midshipmen are not commissioned but are under contract while in school. Questions have arisen how these cases were overseen due to the potential of Title 9 charges. Based on the results, the Army, Navy, and Marine Corps are more likely to administratively discharge as opposed to Air Force. Also, female offenders are more likely to be administrative discharge compared to male counterparts. Further explanations of these findings will follow. Sexual Assault Allegations are significant

because the higher the score, the less likely of administrative discharge, which makes sense. The more serious the offense, the more likely there is of the offender going to court martial.

**Table 10.** Multinomial Logistic Regression Model Predicting Non-Judicial Processing (n = 5,171)

Variables	b	s.e.
Victim Branch		
Army	-0.19	0.24
Navy	0.05	0.25
Marine Corps**	-0.84	0.30
US Civilian*	-0.48	0.22
Foreign Civilian	0.02	0.37
Multiple	-0.54	0.41
Coast Guard	-16.68	2083.75
Foreign Military	-1.02	0.92
Victim Paygrade Simple^		
Warrant Officer	-16.01	1557.57
Officer/O1+	-0.76	0.28
Cadet/Midshipman	-0.39	0.69
Multiple	-0.19	0.22
Victim Gender^		
Female	-0.17	0.12
Multiple Victims	-0.19	0.20
Offender Branch		
Army***	0.86	0.22
Navy***	0.98	0.24
Marine Corps*	0.46	0.27
Offender Pay Grade Simple^		
Warrant	-0.91	0.53
Officer/O1+	-0.20	0.19
Cadet/Midshipman	-15.60	655.19
Offender Gender^		
Female***	1.30	0.27
SA-Allegation***	-0.54	0.03
Pseudo R2	0.10	

Notes: \* p < 0.050; \*\* p < 0.010; \*\*\*p < 0.001; ^= n was less than 5,171  
Comparison Groups: Air Force for victim branch and offender branch, Enlisted (E1-E9) for victim pay grade and offender pay grade, and males for victim gender and offender gender.

Table 10 shows the multinomial regression predicting non-judicial processing showed US Civilian and Marine Corps victims were less likely to get non-judicial processed in comparison to Air Force. In the offender branch category, Army, Navy, and Marines were all more likely to be non-judicial processed than Air Force. Female offenders were more likely to get non-judicial processing than males, which will be discussed in the Theoretical Framework portion of the discussion.

The category of Sexual Assault Allegations is significant because the higher the score, the less likely of non-judicial processed, which makes sense. The more serious the offense, the more likely there is of the offender going to court martial.

**Table 11.** Multinomial Logistic Regression Model Predicting Other Adverse Action (n = 5,171)

Variables	b	s.e.
Victim Branch		
Army*	-0.57	0.25
Navy	0.30	0.29
Marine Corps	-0.58	0.33
US Civilian	-0.23	0.22
Foreign Civilian	-0.14	0.44
Multiple	0.01	0.44
Coast Guard	-1.47	1.33
Foreign Military	-1.07	0.96
Victim Paygrade Simple^		
Warrant Officer	-0.40	0.90
Officer/O1+	0.38	0.27
Cadet/Midshipman	-1.21	0.76
Multiple	0.08	0.33
Victim Gender^		
Female**	-0.42	0.14
Multiple Victims***	-1.21	0.29
Offender Branch		
Army	0.16	0.22
Navy	0.00	0.26
Marine Corps	-0.08	0.29
Offender Pay Grade Simple^		
Warrant**	1.43	0.46
Officer/O1+***	1.30	0.17
Cadet/Midshipman	0.36	0.78
Offender Gender^		
Female***	1.43	0.29
SA-Allegation***	-0.52	0.03
Pseudo R <sup>2</sup>	0.10	

Notes: \* p < 0.050; \*\* p < 0.010; \*\*\*p < 0.001; ^= n was less than 5,171

Comparison Groups: Air Force for victim branch and offender branch, Enlisted (E1-E9) for victim pay grade and offender pay grade, and males for victim gender and offender gender.

Table 11 shows other adverse actions as the outcome. The victim branch showed Army victims are less likely than Air Force victims to receive other adverse action. Meanwhile, female victims are less likely to get other adverse action compared to court martial preferred. Also, Warrant Officers and Officer/O1+ are more likely to have other adverse action than court martial

preferred. Lastly, Female offenders significantly more likely to get other adverse action than court martial preferred. In the factors that are not of extralegal magnitude, multiple victims are less likely to get other adverse action compared to court martial preferred which can show that the convening authorities are looking at cases with multiple victims harder than a singular victim.

## CHAPTER 5

### DISCUSSION

As it currently stands, much research has been devoted to correlating extralegal factors into biases of civilian prosecutors as opposed to the military court system. Although current research has been beneficial for the average American citizen, more research is needed to protect American soldiers against extralegal biases within the court martial system.

Through this study, an in-depth analysis of military sexual assault cases was conducted to determine if extralegal variables are correlated with case recommendations. The analysis between extralegal variable and case recommendations was done by evaluating 5,171 military sexual assault cases between fiscal years 2016-2018. By having the p-value of  $< 0.001$ , we are able to reject the null hypothesis that extralegal factors do not contribute to the recommendations causing independent variables to not have an impact on the recommendation. By stating such, it can be shown that extralegal factors, particularly offender variables, do in fact contribute to case recommendations. In this chapter, the results will be discussed in more detail, connecting the findings to the existing literature. This chapter also includes a theoretical framework, strengths and limitations of the study, directions for future research, and policy implications.

#### **Research Questions**

The first research question in this study was, “Do extralegal factors contribute to convening authorities’ recommendations following Article 32 hearings?” As displayed in Tables 5-7, extralegal factors do indeed contribute to convening authorities’ recommendations following Article 32 hearings, thereby rejecting the null hypothesis. The null hypothesis of this study is that extralegal factors do not contribute to the recommendations causing independent variables to not



have an impact on the recommendation. The alternative hypothesis is that these factors do contribute to the recommendation and the changing variables do impact the recommendation. In depth analysis will follow.

Relatedly, the second question asked, “If so, what extralegal factors contribute to convening authority's decision on non-judicial hearing recommendations?” The data showed that offender gender, branches, and pay grade (rank) have an impact on the case recommendation.

### **Extralegal Factors**

As seen in the study, characteristics of extralegal bias play a large role in the case recommendation in relation to the alleged crimes. By not properly evaluating the alleged crimes and therefore recommending case outcomes based on extralegal factors, the military justice system fails as a whole to uphold the core beliefs of honesty and integrity.

#### ***Victim Gender***

Males were the comparison group for victim gender. Female victims, when compared to similar cases regarding their male counterparts, were significantly less likely to have their case recommended to other adverse action as compared to court martial referral. This can be correlated to stigmas regarding sexual assault against females in general as seen in gender bias in chapter 2. Based on statistics provided throughout the literature review, females are more likely to become victims of sexual crimes (Rape, Abuse & Incest National Network, n.d.). It is possible that if the convening authority is male, there is a difference in not being able to emotionally relate to a female victim of a sexual crime. It is easier to relate to a person of similarities than it is to relate to a person of differences.

### ***Victim Branch of Service***

While running the multivariate analysis, the Air Force was chosen as the comparison group of victim branches due to previous research (Dodge et al., 2022). When evaluated, victims in either the Marine Corps or as a US Civilian were more likely to have their case recommended to non-judicial punishment, in comparison to victims in the Air Force. Meanwhile, victims in the Army were more likely to have their case recommended as other adverse action. Although each branch of service uses the UCMJ, each branch of service has an unspoken culture. Hypothetically, these cultures could be influencing the convening authorities' decision of case recommendations.

### ***Victim Pay Grade***

The enlisted personnel (E1-E9) was chosen as the comparison group for victim pay grade. When evaluating the potential bias in victim pay grade, cadet/midshipman had the most remarkable category. While Chi-Square analysis showed significant differences, the regression models showed no significance. The relationship has been shown through other variables.

### ***Offender Gender***

Males were the comparison group for offender gender. Female offenders were significantly more likely to receive a less severe case recommendation than their male counterparts. This can be attributed to a combination of the biological extralegal biases in chapter 2 as well as the Feminist Theory of Crime later in this chapter. Based on previous research, females are less likely to get stricter sentencing guidelines compared to males in the civilian justice system, which could explain why these guidelines transfer into the military judicial system. “Since the work of Nagel and Weitzman (1971) and Pope (1975), who found that women appear to receive preferential treatment in sentencing over males...” (Rodriguez,

Curry, and Lee, 2006, p. 1). As such, the 173 female offenders only make up 3.35% of all offenders of this study while females make up 17.3% of the active-duty force, as aforementioned in the literature review. Of those 173 offenders, many received other adverse action, the lightest punishment measured.

### ***Offender Branch of Service***

While running the multivariate analysis, the Air Force was chosen as the comparison group of offender branches due to previous research (Dodge et al., 2022). All three branches (Army, Navy, and Marine Corps) were more likely than the Air Force to recommend non judicial processing in comparison to court martialing. However, each of those branches were also likely to recommend administrative discharge in comparison to court martialing. Similar to victims, the branches of the military each have different cultures establishing the flow of how things are done. Because there are different courts and jurisdictions for each of the branches, any punishment from other adverse action down to court martialing has potential precedent that can be contributing to the convening authority's decision. Dodge et. al, along with other researchers, have concluded the Air Force tends to punish offenders with other adverse actions (Dodge et al., 2023). The Air Force has close to a quarter of cases being recommended as other adverse actions while the other branches punished offenders with other adverse actions 14-16% of the time (Dodge et al., 2023).

### ***Offender Pay Grade***

The enlisted personnel (E1-E9) was chosen as the comparison group for offender pay grade. Offenders holding pay grades of Warrant Officer or Officer were more likely to be recommended to other adverse actions as compared to court martial referred. Hypothetically, this can be implied that the military gives offenders of officer or warrant officer rank a lighter

punishment due to seniority and experience. Warrant officers, in particular, have years of experience and that has cost the military money that could have been used to train someone else.

### ***Legal Factor of Most Serious Allegation***

The analysis conducted did contain results of the most serious allegations (labeled SA-Allegation). This should be one of, if not the only, factor(s) considered when determining a case recommendation. Under UCMJ guidelines, the alleged offenses were ranked from least serious to most serious.

**Table 12.** Alleged Offense Frequencies (n = 5,142)

Alleged Offense	Freq	%
Attempts to Commit Offenses (Art. 80)	36	0.70
Indecent Assault (Art. 134)	4	0.08
Wrongful Sexual Contact (Art. 120)	11	0.21
Abusive Sexual Contact (Art. 120)	2,827	54.98
Aggravated Sexual Contact (Art. 120)	109	2.12
Sexual Assault (Art. 120)	1,412	27.46
Aggravated Sexual Assault (Art. 120)	21	0.41
Rape (Art. 120)	722	14.04

### **Theoretical Explanation**

Female offenders have a significant correlation with lesser punishments. This can be pointed to the Feminist Theory of Crime. Feminist Theory of Crime is a broad theory examining the relation between females and levels of crime. “During the early 1970s, radical feminist scholars and activists labored to reform the public response to crimes such as rape and intimate violence. Prior to the revision of policies and laws, rape victims were often blamed for their victimization” (“Feminist Criminology”, 2023, Section IIIA). Throughout the literature review, biological gender bias is discussed and can be used to uphold the claim. As mentioned in the literature review, Stephen Schafer proposed females as being one of the three groups of people most likely to be victimized (along with the young and elderly) (Howard, 1984). Similar to the research of racial biases in favor of Caucasians, female offenders are at a lesser chance of having strict punishments because they are not viewed as criminals in a social mindset. “The feminist-

etiologically approach assumes that the low crime rate among women can be explained by the gender-specific socialization background. The values and norms set by society and the 'intended' female role model mean that women have less opportunity to commit criminal acts” (Wickert, 2019, para. 2).

In relation to aforementioned research and statistics, it can be hypothesized that women are perceived as less likely to be offenders of sexual crimes, and even if so, those crimes are perceived as less severe. By following such ideas, it can be seen that the convening authority determines case recommendations based on, at minimum, offender gender. As previously stated, most female offenders received punishments of other adverse action, the minimum punishment evaluated. Because the military is predominantly male by an extraordinary amount, Feminist Theory is able to point to the ideas that society, especially males in power, do not view females as criminalistic (“Feminist Criminology”, 2023).

Another theoretical perspective to evaluate as potential for case recommendations from convening authorities can be attributed to Implicit Theory of Crime. “Implicit theory suggests that stigmatizing attitudes may be explained through beliefs regarding the invariable (fixed mindset) or malleable (growth mindset) nature of human attributes” (Rade, Desmarais, and Burnette, 2018, p. 1). By having a predominantly male culture, males are more likely to be in leadership and training positions within the military. By such, these leaders are instilling military culture mindsets into younger junior personnel. By doing such, the Implicit Theory goes through and discusses the potential for an individual to have both fixed and changed mindsets within their beliefs. “Mindsets can be primed through single-session and long-term interventions” (Rade, Desmarais, and Burnette, 2018, p. 17). The mindset developed in this culture means that these male leaders may result in gender perceptions that bias the decision-making of the

convening authority. Harper and Bartels found similar results as they conducted a study via online survey regarding age and gender in child sexual abuse cases (2016). The respondents of such a survey concluded that those with fixed mindsets were stiffer in punishments overall (Harper and Bartels, 2016). Harper and Barles also concluded that respondents believed males should be sentenced harsher than females or juveniles (Harper and Bartels, 2016). Also, entity implicit theorists had more negative attitudes towards sex offenders (Harper and Bartels, 2016). By drawing these results, implicit theory of crime can potentially help explain potential case recommendations from convening authorities.

These theories are the best that correlate to the bias within the military judicial system involving cases of sexual nature. There are multiple other theories that can help show the relationship between extralegal bias and case recommendations; however, the Feminist Theory of Crime and the Implicit Theory of Crime best connect the two variables.

## **Policy Implications**

### ***Victimization Implications***

Although this study has been conducted with the prioritization of the mentality regarding sentencing in the military judicial system, post-sentencing effects for victims were not reported for this study. Further research can and should be conducted to evaluate the effects of victimization in military sexual assault cases. For the purpose of this study, victim repercussions such as emotional trauma, work related effects, and leaving the military have not been evaluated. Although stigmas revolve around servicewomen alone, as shown in the research, sexual assaults victims can be male as well.

This study- in association with aforementioned legislation on replacing the convening authority with special prosecution personnel in sexual offense cases- can have positive

implications for victims of sexual abuse. Policy changes should be evaluated to assess whether or not these reforms have reduced the impact of such biases. Research, such as this study, may serve as a baseline by which future evaluations can compare outcomes.

By changing federal guidelines, servicemembers can be able to have their voices heard when regarding allegations of sexual nature in the US military (Pritchard, Powell, & Horr, 2022). Oftentimes, according to Pritchard, Powell, and Horr, 42% of respondents have a hard time believing that the federal government properly addresses allegations of sexual assault in the military (2022). By conducting research regarding raising awareness of biases from the convening authority, policy changes could allow for an increase in trust between the federal government and servicemembers.

Next, the NDAA22 amends Article 56 of the UCMJ (10 U.S.C. § 856) to require sentencing judges to sentence offenders to parameters established by President Biden on or before December 27, 2023.

“Sentencing parameters delineate sentencing ranges based on five considerations: (1) offense severity; (2) the corresponding guideline or offense category in a United States district court; (3) military-specific sentencing factors; 4) the need for the sentencing parameter to be sufficiently broad to allow for individualized consideration of the offense and the accused; and (5) other relevant sentencing guidelines” (Lewis, 2022, para. 9).

Lastly, implications from this study can be used to guide civilian and military courts regarding female offenders of all crimes. If further studies can prove similar results to this study, it can potentially be concluded that female offenders get off lighter than male offenders of similar crimes.

### ***Policy Implications Regarding the Military***

For the military, policy changes should be evaluated to potentially limit the differences in case recommendations across branches. By enacting such policy changes, the UCMJ might need to be evaluated to ensure the legal canon of the military is followed, regardless of branch differences. The UCMJ should be universal across branches and rank. Policy implications can allow for training requirements to minimize “slap on the wrist” recommendations.

Based on the results provided in this study, ranks were analyzed to determine if the rank of a victim or offender played a role in unnecessary extralegal bias. Due to the results showing officers get punished with a lesser offense, policy changes should be enacted to punish an offender regardless of their rank. If an officer knows based on previous cases, he/she has a higher likelihood of getting a lighter sentence, that is not good for the overall mission of the military.

### ***Policy Implications Regarding Prosecutorial Bodies in the United States Military***

Thanks to the aforementioned legislation by President Joseph Biden, the convening authority will not have as large of a role in the prosecution of offenders in crimes of sexual nature. However, policies should be enacted at a later time if the prosecutorial bodies are still showing extralegal biases in the areas of rank, branch, and/or gender. Through studying such areas,

### **Limitations**

This study has several limitations. For one, this study relied on secondary data. The data does not contain variables with potential to identify other areas for bias such as age range, location, and race. Also, there is a plethora of missing data regarding location and region in the data set. Because of the substantial amount of missing data regarding these areas, these case characteristics could not be evaluated as a potential cause for bias. Should future research



continue, researchers should evaluate if locations impact any extralegal bias. By having locations, researchers could potentially evaluate if the case had bias due to time constraints or victims' communications. Missing data also include race, age, and LGBTQ+ members, as those have shown areas of bias in the civilian world. By studying these areas, research can narrow in on even more areas of bias, which can then be monitored and controlled.

By following the aforementioned policy implications, research can follow culturally specific issues. The potential for this could be by interviewing specific officers who assist with the prosecution within their individual branches. Discussion of relational bias coming from the convening authority to their reporting personnel have been discussed and should be explored.

Another area of limitation is the lack of prior research pertaining to convening authorities. Because of the lack of research, there were difficulties determining a concrete connection between extralegal factors due to convening authority bias and case recommendations. As aforementioned, there is a large need for research regarding decisions made by convening authorities. Because there is such a lack, by having future studies, researchers can look into all case types under the UCMJ to determine where most bias comes from. By expanding this research, future research can begin to evaluate whether further policy changes can and should occur in order to hold offenders responsible in the military court system.

### **Recommendations for Further Research**

In addition to the aforementioned recommendation for further research, there are a few other ways this research can and should continue. With the changes implemented through the National Defense Authorization Act of 2022, the role of the convening authority will be transitioning to the newly established Office of the Special Prosecutor. Future research in this

area should evaluate this change by replicating the analyses on cases that fall under this new jurisdiction to ensure it is having the intended impact or reducing extralegal bias.

Future research can also evaluate qualitative analysis of judicial and victim advocates in how each branch manages sexual allegations claims. By evaluating such data, it can help guide further research and policy changes to explain such differences across branches. By creating a more level grounding for handling of sexual assault allegations, policy changes can be implemented to assist victims and witnesses of sexual crimes in the military.

As seen through the results, the different branches of the United States military have different recommendations following Article 32 hearings. This can be due to a variety of reasons. However, the Uniform Code of Military Justice should be uniform across the recommendations, allowing for minimal differences of branches recommending outcomes following such hearings. Certain recommendations can point to cultural differences across the branches. Further research could and should evaluate if these cultural differences have an impact in recommendations, not just following crimes of sexual nature. Further research could identify if these differences are not following the guidelines of the UCMJ. Further research can and should evaluate cultural analysis across the branches to determine if rules are being bent or broken due to a variety of reasons.

Lastly, one area of further research could be evaluating whether some of the missing data aforementioned is also having an influence on extralegal bias. For example, the aforementioned missing data of location and region could determine if the criminal allegations happening off continental US have an impact on case recommendations, for better or worse. In addition to looking at the missing variables provided, other variables that could and should be added include: age, race, and members of the LGTBQ+ community. These variables all have been shown to be important factors in the civilian side, as shown in the literature review. These factors

should be reviewed in relation to the convening authority's recommendation(s) following an Article 32 hearing.

### **Conclusion**

Extralegal bias can cause unnecessary harm for victims of crimes. In the United States military court system, there are currently a few areas of bias that should be addressed. In addressing these areas, the military can continue to strive for its mission of protecting the citizens of the United States while maintaining honesty and integrity to their service members.

Throughout the results, it became evident of extralegal bias across the military. It raises questions about the integrity and honor within the nation's defense. With further research and policy changes, changes to the convening authority and laws can be beneficial for the victims in the service.

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