



Sgt. 1st Class Lisa Capocci, a U.S. Army Reserve drill sergeant from the 98th Training Division, explains something to a trainee 18 November 2019 during the Pick-Up Day process at Fort Jackson, South Carolina. (Photo by Maj. Michelle Lunato, U.S. Army Reserve)

Discipline as a Vital Tool to Maintain the Army Profession

Maj. Michael Petrusic, U.S. Army

During the past decade, discipline within the Armed Forces and the structures used to maintain that discipline have been scrutinized at a level not seen since the development of the modern

Uniform Code of Military Justice following World War II.¹ From the criticism of the military's handling of sexual assault cases and senior leader misconduct to the high-profile courts-martial of Chelsea Manning and

Bowe Bergdahl and to the recent allegations of serious disciplinary lapses within the Navy's special operations community, service member misconduct and the manner in which the Armed Forces investigate and address that misconduct have been critically examined by Congress, the media, and the public.² The commander of the Naval Special Warfare Command recently echoed criticism of disciplinary lapses in his own organization, stating that the "root of our problem begins with members who fail to correct this behavior within their sphere of leadership," and such failure "erodes the foundation of trust we have earned with our leaders and the American people."³

Army leaders often rightly emphasize proper investigation and disposition of misconduct as critical to ensuring good order and discipline within the force. But the criticism noted above suggests a deeper purpose to getting discipline right: enforcing high ethical and behavioral standards is essential to maintain the public trust and to protect the Army's continued status as a profession and the tremendous deference that status provides. If Army leaders inadequately police misconduct within the force by failing to consider and exercise their range of disciplinary options when appropriate, they will create a perception that the Army is unable or unwilling to address misconduct within the ranks. That perception will both contribute to a culture of impunity regarding misconduct and erode the public's trust in the Army's disciplinary systems and its ability to self-police. This will inevitably result in the breakdown of the Army profession and the relative independence with which Army leaders have managed the institution for decades.

This article's discussion of the military disciplinary system's unique nature and examination into whether the full range of options in the system is underutilized in the Army will lead to an analysis of whether failure to police misconduct within Army ranks is a lapse of leadership that threatens the Army's standing as a profession. It will include an evaluation of the repercussions if the public loses faith in the Army's ability to self-police the force and argue that leaders must fully leverage the range of disciplinary options available to them while preserving the legitimacy of the system and respecting crucial soldier rights.

Discipline and Organizational Legitimacy

The very nature of the military disciplinary system is what makes it an indicator of the Army's legitimacy

as a profession rather than just a commander's tool to maintain good order and discipline. The commanders' central role in all aspects of this system distinguishes the Army profession from any other government entity, corporation, or organization in the United States. In none of these other organizations does leadership have the sole discretion to exercise a full range of disciplinary processes in response to member misconduct. But Army commanders have a suite of options available to them in responding to soldier misconduct, ranging from taking no action on the low end to recommending or referring a case for court-martial on the high end.⁴ In between these poles are a variety of administrative and nonjudicial options such as bars to reenlistment, administrative separations and officer eliminations, and nonjudicial punishment under Article 15 of the Uniform Code of Military Justice.⁵ Although certain serious offenses must be elevated to higher levels of command for disposition and can only be adjudicated at specified types of courts-martial, commanders otherwise have significant freedom to exercise independent judgment and initiate action from across the range of disciplinary options.⁶

This high level of discretion, placed in the hands of select officers, inextricably links the Army's disciplinary system to the legitimacy of the command and the profession. Because Army commanders have exclusive control over the initiation of the disciplinary processes, issues of misconduct and the responses to them will inevitably reflect on the command. A corporation can take some actions in response to employee misconduct but is typically limited to, at the most, firing employees. And a mayor or governor can take some limited actions to punish bad actors in the governments they run but must rely on independent prosecutors and attorneys general to decide to prosecute individuals criminally. Leaders in these organizations therefore have

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fairly limited discretion in disciplinary matters. But the people have entrusted the Army to police itself, and commanders have been empowered to exercise the full range of discipline when soldiers commit misconduct. Consequently, any failure to adhere to and enforce ethical and behavioral standards is seen as not just a failure of the soldier but reflects negatively on the legitimacy of the whole organization.

Are Commanders Underutilizing Their Disciplinary Options?

Considering the diverse range of disciplinary options available to commanders, and their sole discretion over those options, many would expect the answer to this question to be a clear “no.” With military law’s fundamental purposes “to promote justice, to assist in maintaining good order and discipline in the Armed Forces, [and] to promote efficiency and effectiveness in the military establishment,” one would anticipate commanders would use these tools to their utmost potential.⁷ But notwithstanding the range of options available and the critical purposes of maintaining discipline, the

commander will be required to support the proceedings with bailiffs, escorts, panel members, witnesses, and funding.⁹ Administrative separations, which require processing through various offices, notice periods, and boards for soldiers with six years of service, or where an other than honorable characterization of service upon discharge may result, can also be time and labor intensive.¹⁰ These are significant time and resource commitments for units constantly asked to achieve more with less.

The drain on time and resources for these processes presents even greater challenges during periods of high operational tempo where commanders may need all hands available, or in the cases of soldiers with specialized skills highly valued by the organization. Commanders may simply have little patience for initiating burdensome disciplinary processes when there are more important real-world priorities or if they want to keep an “all-star” soldier. Maj. Gen. James Mingus, 82nd Airborne Division commander, cautioned against this dynamic during the 2019 Profession of Arms Forum at Fort Leavenworth, Kansas. He noted that leaders should not allow their desire for soldier competence and

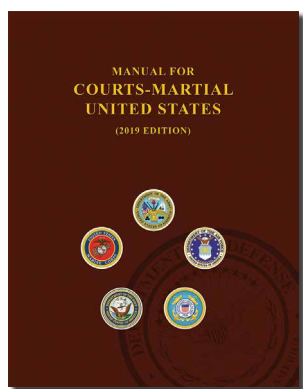
commitment to overtake the need to ensure soldier character, as doing so risks degrading the profession of arms.¹¹

Beyond these practical challenges in initiating disciplinary proceedings, many commanders may also feel conflict between the need to address misconduct or ethical lapses within their formation and the Army’s ethos of taking care of soldiers. Doctrine tells commanders that the “nation entrusts the Army leader with its most precious commodity, its sons and daughters,” and cautions them to “keep the well-being of their subordinates and their families in mind” and “connect

at a personal level with their subordinates.”¹² This mandate to keep in mind the interests of soldiers and form deep connections with them puts commanders in a tough situation when they are called on to consider initiating proceedings that could result in a soldier’s separation, loss of pay, or even imprisonment. This tension can be understandably difficult for many commanders to navigate.

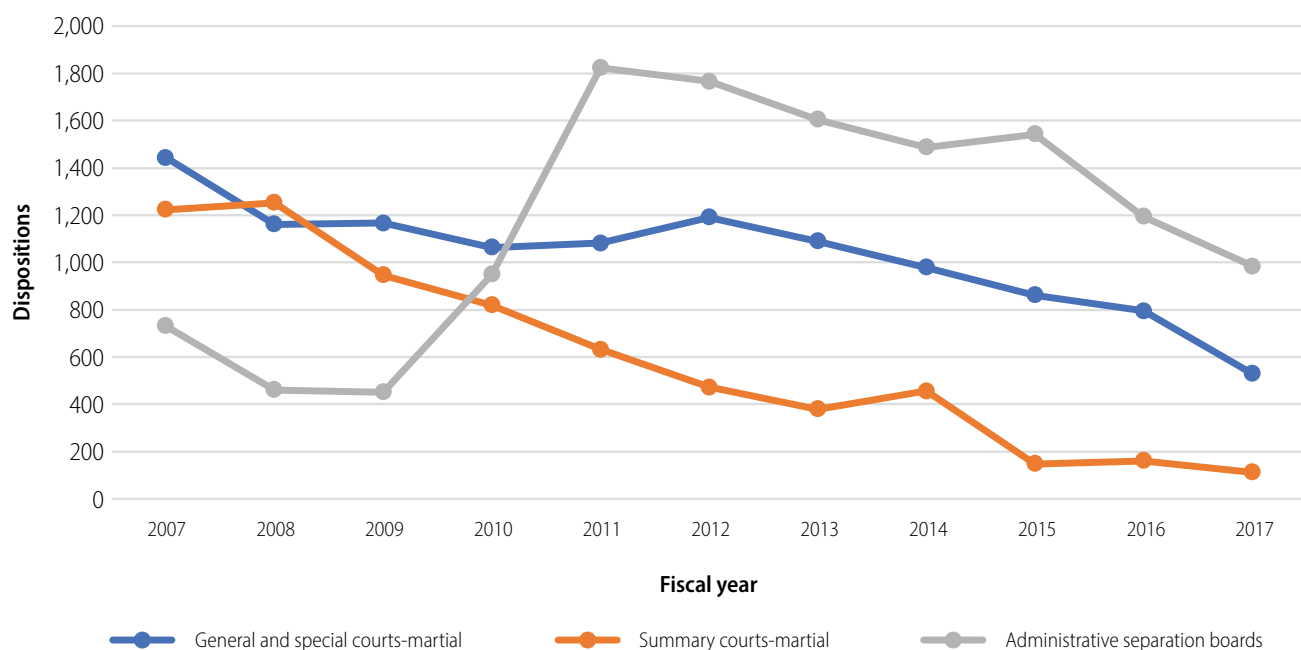
So, with these tensions in mind, is the Army underutilizing its disciplinary toolkit? Former Secretary of Defense James Mattis certainly suspected this was

The law requires the president of the United States, acting as commander in chief of the Armed Forces, to write rules and regulations to implement military law. The president does so by issuing an executive order promulgating the *Manual for Courts-Martial (MCM) United States*. The MCM details rules and regulations for military courts-martial and provides information for each military offense listed in the punitive articles of the Uniform Code of Military Justice. The 2019 edition updates pertinent amendments and executive orders from 1984 to 2019. To view this manual, visit [https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final\)%20\(20190108\).pdf?ver=2019-01-11-115724-610](https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610).



commander can experience significant tensions in fully utilizing the disciplinary system.

First, many commanders may determine that the Army’s disciplinary system consumes too much time and too many unit resources to be fully exercised. Courts-martial, the most serious of the disposition options, can take a significant period of time to complete due to discovery and evidence production, motions and other pretrial practice, and scheduling conflicts among counsel and the military judge.⁸ And throughout this time, the



(Figure by author)

Figure 1. Offender Dispositions (Courts-Martial and Separations)

the case. In a 2018 memorandum to all service secretaries and chiefs and all combatant commanders, he stated that it “is a commander’s duty to use [the military justice system]. ... Leaders must be willing to choose the harder right over the easier wrong. Administrative actions should not be the default method to address illicit conduct simply because it is less burdensome than the military justice system.”¹³ He further stated bluntly, “Time, inconvenience, or administrative burdens are no excuse for allowing substandard conduct to persist.”¹⁴

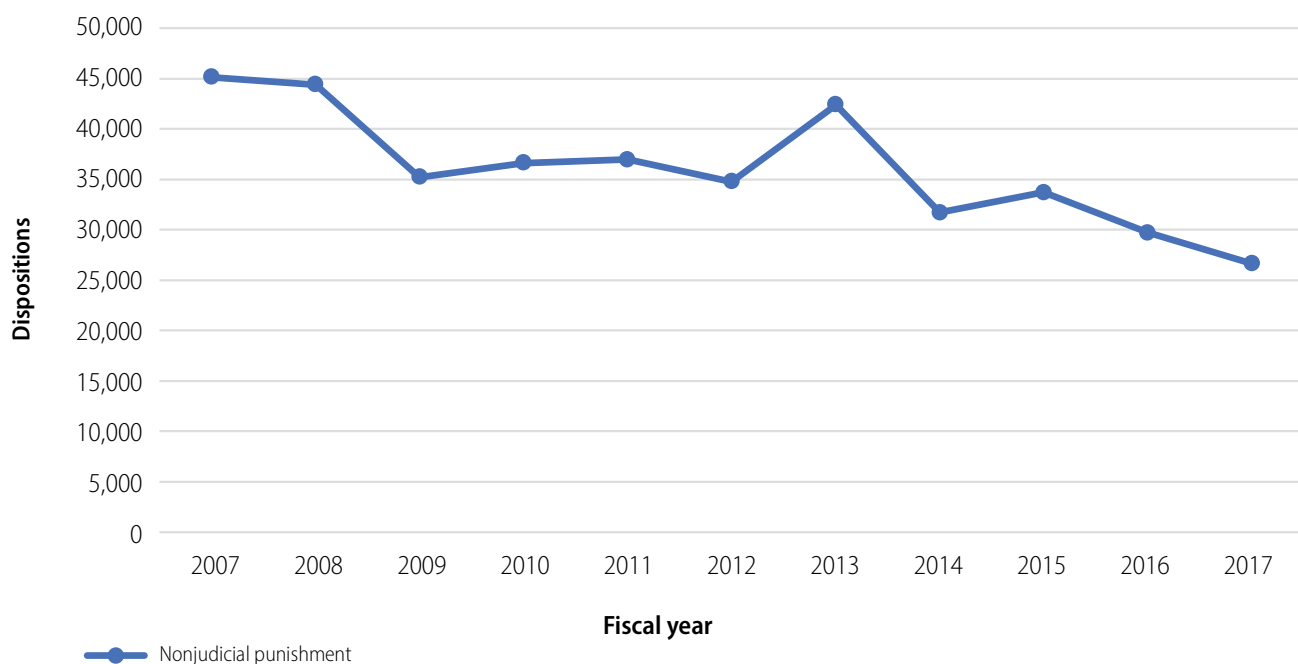
Beyond the observations of Mattis, data on the utilization of various disciplinary actions over the past decade also indicate a significant decline in their use. Analyzing the numbers of courts-martial, administrative separation boards, and Article 15 proceedings in the Army from fiscal year (FY) 2007 to FY 2017, reveals a marked decline over time.¹⁵

Figures 1 and 2 (on page 116) indicate that other than administrative separations, the exercise of all of these disciplinary options within the Army decreased dramatically from FY 2007 to FY 2017. And although there were slightly more administrative separation boards in FY 2017 than there were in FY 2007, the 984 boards in FY 2017 were well below the 1,823 boards in

FY 2011. The court-martial, the most time and resource-intensive option in the commander’s disciplinary toolkit, saw the most dramatic decrease with the 2,667 total courts-martial of all types in FY 2007 plummeting to 641 courts-martial of all types in FY 2017.

Although these declines appear dramatic, getting a full context requires also considering offender rates in the Army for various types of offenses over the same period. That is, have the numbers of disciplinary dispositions in the Army fallen because commanders are using them less, or simply because the numbers of alleged offenders within the Army have also fallen? Figure 3 (on page 117) shows the trends in offender rates for various types of offenses over time and helps us paint a fuller picture.¹⁶

This figure shows that the number of alleged offenders for various categories of offenses has also fallen from FY 2007 to FY 2017. However, comparing the decline in types of offenses against the dispositions typically appropriate for those offenses shows the decrease in the exercise of disciplinary options has been significantly sharper than the decline in alleged offenders. For example, while the misdemeanor offender rate decreased 36.7 percent, the number of Article 15 proceedings executed in the Army over the same period



(Figure by author)

Figure 2. Offender Dispositions (Nonjudicial Punishment)

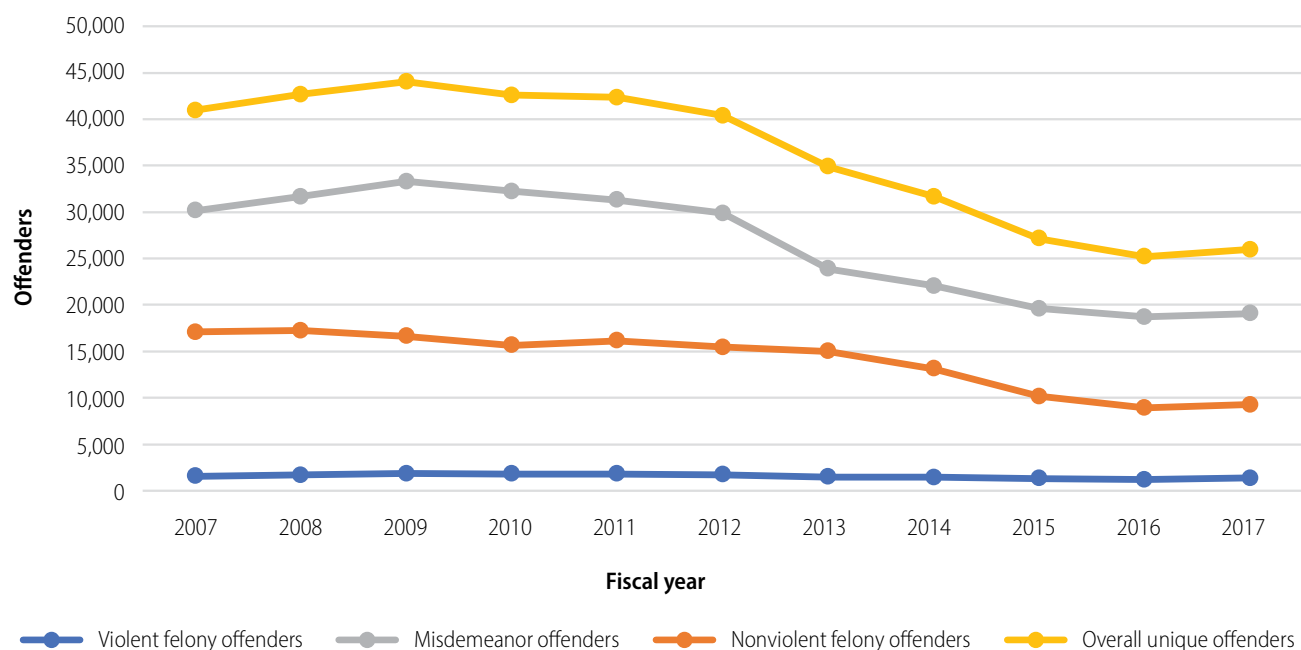
decreased by a steeper 41 percent. Nonviolent felony offenders decreased by 45.8 percent from FY 2007 to FY 2017, while the number of summary courts-martial plummeted 90.8 percent. And finally, the 63.4 percent decline in the numbers of special and general courts-martial was significantly sharper than the 45.8 percent decline in nonviolent felony offenders and the 14.9 percent decline in violent felony offenders.

This comparison of figures shows that the decrease in the number of alleged offenders alone does not fully account for the significant decline in commanders' exercise of disciplinary options over the past decade. Of course, other factors that make pursuing disciplinary action less feasible could certainly account for some of this decline, such as more instances of false reporting, an increase in the number of difficult cases, or a decline in the quality of law enforcement investigations. However, the concerns expressed by numerous senior military leaders over the past few years, including those of Mattis and commanders within the special operations community, suggest commanders are becoming more hesitant to initiate disciplinary action in their formations.

Self-Policing as an Element of the Profession and a Function of Command

If commanders are growing reluctant to utilize their disciplinary options when appropriate, this trend will present a significant threat to the health of the Army profession. Many soldiers may hear the term "Army profession" without fully appreciating its meaning and the extent to which it is essential to the Army's culture as a fighting force. The ability to function as a profession distinguishes the Army from the typical government bureaucracy prevalent in the remainder of the executive branch. It is what has given the Army the ability to largely regulate itself for centuries within the broad left and right limits imposed by civilian leadership.

To understand why the Army is allowed such deference, one must first look at the essential characteristics of a profession. Army Doctrine Publication 6-22, *Army Leadership and the Profession*, lays out these characteristics: (1) professions "provide a vital service to society"; (2) require "expertise and skill developed through years of training, education, and experience"; (3) "establish standards of practice and certify that their members are qualified to



(Figure by author)

Figure 3. Active Duty Offenders

serve”; (4) “live by an ethic with both legal and moral foundations”; and (5) “self-police.”¹⁷ The last two characteristics in particular distinguish the military profession from other governmental entities. Doctrine further explains that because of professions’ adherence to these characteristics, “society trusts professions and grants them autonomy and discretion with prudent, balanced oversight or external controls.”¹⁸ In short, the people give the Army significant autonomy considering the power it wields only to the extent that it maintains the people’s “trust and confidence in the Army as an ethical profession.”¹⁹

Due to the importance of maintaining this trust, doctrine gives commanders the responsibility and the obligation to take actions that place the needs of the Army as a whole above those of the commander or the unit.²⁰ It makes commanders stewards of the profession.²¹ Commanders have many means at their disposal to effectively steward the profession, including the disciplinary system. The various options that make up this system are the commander’s tools for self-policing, allowing him or her to “prevent misconduct, enforce the standards of the profession, and take action to stop unethical practices” impartially and consistently.²² These tools are so critical

that doctrine states standards and discipline “are the point of departure for leading Army organizations.”²³

When the commander neglects this obligation to police standards and discipline in the force, he or she risks the health of both the unit and the profession. The Army will not remain a profession as that term is defined above through words in a doctrine publication alone. Those words must be backed up with conduct. The Army profession is accountable to its client, and its client, “in this case the American people—gets to determine if an institution is treated as a venerated profession meriting the autonomy necessary to do its expert work.”²⁴ If the client determines that elements of the force are not operating within established ethical and legal standards and that the Army is not policing these failures, only the essential characteristics of all other government bureaucracies will be left.²⁵ At that point, the Army will no longer warrant its status as a profession, and its client will begin to handle it accordingly.

So why should anyone be concerned about this risk? Because if the client loses faith in the Army’s ability or willingness to police itself, the client, through increased external oversight and regulation, will take

this privilege away from the Army.²⁶ An example of this dynamic is Congress's increased oversight and regulation of the Armed Forces stemming from the scrutiny of sexual assault in the military over the past decade. The issue of handling sexual harassment and sexual assault allegations has more recently become a widespread concern throughout society, including in corporate America, Hollywood, colleges and universities, and Congress itself. But the Armed Forces have been criticized on this front for several years now.

As a result of that criticism, there has been a string of changes in the functioning of the military justice system over most of the past decade. For example, in the National Defense Authorization Act for FY 2012, Congress directed that the Armed Forces institute an expedited transfer process for alleged sexual assault victims, allowing those soldiers to request a transfer to another installation following a sexual assault report.²⁷ Then in FY 2014's National Defense Authorization Act, Congress instituted a number of significant changes, including a process for higher commander review of decisions not to refer sexual assault cases to court-martial, the implementation of an expansive set of victim's rights and protections, the implementation of mandatory discharges or dismissals upon a guilty verdict and required referral to general courts-martial for certain sexual assault offenses, and the removal of convening authorities' largely unfettered ability to grant clemency following a conviction.²⁸ These changes reflected congressional doubt as to commanders' ability to administer a process that had been their exclusive domain for decades. These and other changes have resulted in a military justice system fundamentally different than the one that existed in 2010. They all reflect, in part, society's displeasure with the way the Army was doing business and a lack of faith in the Army's ability to self-police.

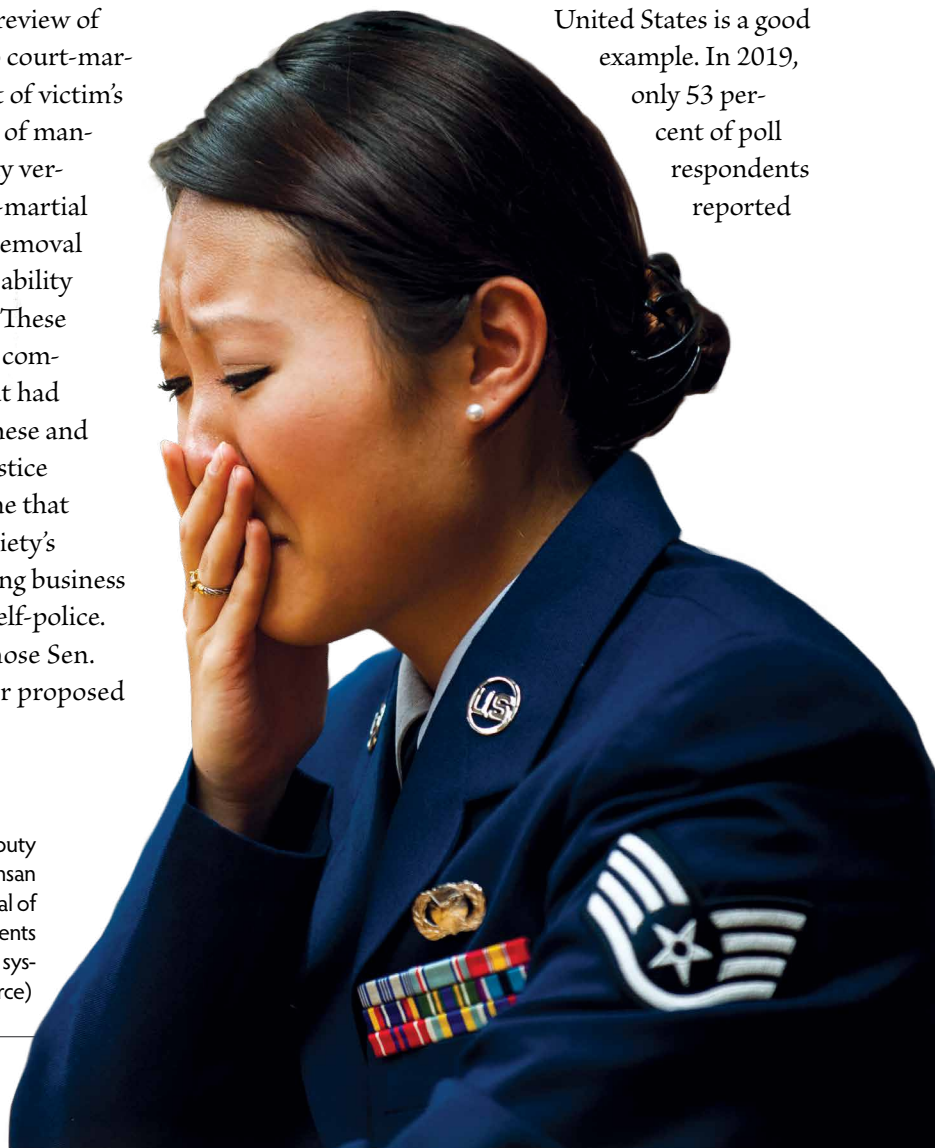
These changes pale in comparison to those Sen. Kirsten Gillibrand has advocated for in her proposed

Military Justice Improvement Act. That bill would altogether remove the commander from the court-martial referral decision for serious offenses and instead hand that responsibility over to judge advocates.²⁹ She has pushed this legislation forward for years due to "the military's failure to combat sexual assault in the ranks or provide a military justice system that holds assailants accountable."³⁰ Filibusters from senators who support retaining commanders in the referral decision are the only thing that has prevented the legislation from passing.³¹ The fact that the Senate is on the cusp of stripping commanders of one of their most fundamental disciplinary functions should serve as a warning of the repercussions the Army faces if the public loses faith in its ability to police itself.

Beyond the risk of additional regulation and interference with military functions and operations, one must also consider other potential issues that follow from a profession losing the client's faith. The current

crisis in policing in the United States is a good example. In 2019, only 53 percent of poll respondents reported

First Lt. Son Lee, 8th Fighter Wing Public Affairs deputy chief, testifies during a mock trial 16 April 2014 at Kunsan Air Base, South Korea. The Wolf Pack put on a mock trial of a sexual assault case for First Term Airman Center students to provide a realistic portrayal of the military justice system. (Photo by Staff Sgt. Clayton Lenhardt, U.S. Air Force)





they had a great deal or quite a lot of confidence in the police, as compared to 73 percent of poll respondents reporting a great deal or quite a lot of confidence in the military.³² Large portions of the public have lost faith in police departments' ability to abide by rules and regulate their own due to numerous highly publicized allegations of police misconduct, particularly against minority communities. This erosion of trust has resulted in increased suspicion and external regulation of the police, including greater use of body cameras and citizen review boards. It has also caused, in some cases, recruiting shortfalls (particularly in minority communities), reluctance to work with police departments, and open hostility toward officers.³³ These are consequences the Army should seek to avoid.

Maintaining the Public Trust and the Profession

Fortunately, maintaining the profession and avoiding these repercussions is not complicated, though it does require some hard work and patience. The two essential characteristics of a profession discussed above that distinguish it from a mere bureaucracy are operating within established ethical and legal standards, and self-policing. These characteristics are linked to the disciplinary system,

The Trial Defense Service provides counsel for the accused 7 August 2018 during the 167th Theater Sustainment Command's fourth annual mock court-martial at the Calhoun County Courthouse in Anniston, Alabama. (Photo by Staff Sgt. Katherine Dowd, Army National Guard)

and commanders must be willing to exercise this system when appropriate. As Mattis noted, the commander has a duty to do so where the circumstances warrant to address substandard conduct, regardless of the "[t]ime, inconvenience, or administrative burdens" involved.³⁴

Commanders can mitigate some of the burdens of going through these processes by establishing standard operating procedures, and planning and executing them like other operations. Commanders can, for example, establish a clear task organization and clearly assign responsibilities to ensure things like medical processing and escort duties are smoothly executed. These actions will not eliminate the time and resource commitments required, but they will help the command anticipate and mitigate their effects. Notably, the Army's Judge Advocate General's Corps recently implemented a military justice redesign that promises to increase efficiency in the processing of disciplinary actions on the government side and has increased

resourcing for defense counsel to give them more time to advocate for their clients.³⁵ Although going through the various aspects of the disciplinary process can be time and resource intensive, appropriately exercising the processes is the best means available to maintain good order and discipline and protect the profession, while also ensuring that soldiers' rights are respected.

In exercising these processes, commanders must understand and embrace the secretary of defense's "Non-Binding Disposition Guidance," which provides factors that convening authorities and commanders should consider when exercising their disciplinary function.³⁶ These factors are designed to "promote regularity without regimentation," "encourage consistency without sacrificing necessary flexibility," and avoid mandating any particular decision or result.³⁷ These suggested factors commanders should consider, among others, include the effect of the alleged misconduct on the command; the nature and seriousness of the offense; the soldier's culpability; the views of the alleged victim and the extent of harm caused to the alleged victim; whether the evidence is likely to obtain a conviction; and the appropriateness of administrative action.³⁸ Full consideration of these factors will help commanders to "exercise their authority in a reasoned and structured manner, consistent with the principle of fair and even-handed administration of the law."³⁹

Finally, commanders can maintain the health of the profession by ensuring that when making disposition decisions, the disciplinary processes are applied fairly. In addition to knowing when to utilize their disciplinary options, commanders maintain trust by having the judgment and personal courage to refrain from exercising their disciplinary authority when such restraint is warranted. Commanders must resist societal and institutional pressure to overcorrect and to act where the circumstances do not justify doing

so. Taking no action in a case is specifically listed as a disposition option for the commander in the Rules for Courts-Martial for a vital reason: some cases of alleged misconduct simply do not warrant disciplinary action.⁴⁰ This can be challenging to do when the profession is under such intense scrutiny. But by using the "Non-Binding Disposition Guidance," commanders can ensure they apply a uniform and justifiable process to evaluate all allegations of misconduct on their own merit. Furthermore, commanders must always remember that allegations are simply allegations until adjudicated and that the results of disciplinary processes must be respected. Treating accused soldiers fairly, and consistently protecting the process and outcome of disciplinary proceedings can help to avoid issues that will inevitably cause delay and extra work during disciplinary proceedings. And more importantly, these are just the right things to do.

By following these basic guidelines, commanders can help ensure that the Army effectively and fairly polices itself and addresses misconduct within the ranks. Doing so is vital to the Army continuing to enjoy the privileged status of a profession and the resulting trust placed in it by the American people and its civilian leadership. As the commanding general of the U.S. Special Operations Command stated following a spate of misconduct in those forces, this trust is "paramount and must never be compromised."⁴¹ Compromising the trust placed in the Army will eventually render the Army just another government bureaucracy, and invite a level of oversight and external regulation previously unseen by the force. It is up to Army leaders to ensure this does not happen. ■

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Notes

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5. *Ibid.*

6. *Ibid.*, R.C.M. 401–404, 407.

7. *Ibid.*, Preamble.

8. *Ibid.*, R.C.M. 701–703, 706, 801, 905–907.

9. *Ibid.*, R.C.M. 901, 911–912B.

10. Army Regulation (AR) 635–200, *Active Duty Enlisted Administrative Separations* (Washington, DC: U.S. Government Publishing Office [GPO], December 2016), chap. 1, 2, 14. Officer discharges can be even more onerous as they require a board of inquiry once an officer is past his or her probationary period; AR 600–8–24, *Officer Transfers and Discharges* (Washington, DC: U.S. GPO, February 2020), chap. 4.

11. James J. Mingus, "Profession of Arms and Mission Command—Panel Discussion" (Command and General Staff College, Fort Leavenworth, KS, 30 October 2019).

12. Army Doctrine Publication (ADP) 6–22, *Army Leadership and the Profession* (Washington, DC: U.S. GPO, November 2019), 5–7, 6–7.

13. Secretary of Defense, memorandum to Secretaries of the Military Departments, Chiefs of the Military Services, Commanders of the Combatant Commands, "Discipline and Lethality," 13 August 2018, accessed 14 August 2020, <https://www.marines.mil/News/Press-Releases/Press-Release-Display/Article/1605285/secretary-of-defense-message-to-the-force/>.

14. *Ibid.*

15. *Joint Annual Report of the Code Committee Pursuant to the Uniform Code of Military Justice, October 1, 2016 to September 30, 2017* (Washington, DC: Department of Defense [DOD], 2018), 34–55; *Joint Annual Report of the Code Committee Pursuant to the Uniform Code of Military Justice, October 1, 2015 to September 30, 2016* (Washington, DC: DOD, 2017), 30–51; *Joint Annual Report of the Code Committee Pursuant to the Uniform Code of Military Justice, October 1, 2014 to September 30, 2015* (Washington, DC: DOD, 2016), 33–49; *Joint Annual Report of the Code Committee Pursuant to the Uniform Code of Military Justice, October 1, 2013 to September 30, 2014* (Washington, DC: DOD, 2015), 34–56; *Joint Annual Report of the Code Committee Pursuant to the Uniform Code of Military Justice, October 1, 2012 to September 30, 2013* (Washington, DC: DOD, 2014), 30–52; *Joint Annual Report of the Code Committee Pursuant to the Uniform Code of Military Justice, October 1, 2011 to September 30, 2012* (Washington, DC: DOD, 2013), 30–51; *Joint Annual Report of the Code Committee Pursuant to the Uniform Code of Military Justice, October 1, 2010 to September 30, 2011* (Washington, DC: DOD, 2012), 1–23; *Joint Annual Report of the Code Committee Pursuant to the Uniform Code of Military Justice, October 1, 2009 to September 30, 2010* (Washington, DC: DOD, 2011), 1–23; *Joint Annual Report of the Code*

Committee Pursuant to the Uniform Code of Military Justice, October 1, 2008 to September 30, 2009 (Washington, DC: DOD, 2010), 1–25; *Joint Annual Report of the Code Committee Pursuant to the Uniform Code of Military Justice, October 1, 2007 to September 30, 2008* (Washington, DC: DOD, 2009), 3–21; *Joint Annual Report of the Code Committee Pursuant to the Uniform Code of Military Justice, October 1, 2006 to September 30, 2007* (Washington, DC: DOD, 2008), 2–23.

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17. ADP 6–22, *Army Leadership and the Profession*, 1–1 to 1–2.

18. *Ibid.*, 1–2.

19. *Ibid.*, 1–1.

20. *Ibid.*, 6–8.

21. *Ibid.*

22. *Ibid.*, 1–3, 2–10.

23. *Ibid.*, 5–6.

24. Don M. Snider, "Five Myths about Our Future," *Parameters* 46, no. 3 (Autumn 2016): 52.

25. ADP 6–22, *Army Leadership and the Profession*, 1–1. "The Army has a dual nature as both a military department of government and a trusted military profession."

26. *Ibid.*, 1–2.

27. National Defense Authorization Act for Fiscal Year 2012 § 582, Pub. L. No. 112–81, 125 Stat. 1386 (2011).

28. National Defense Authorization Act for Fiscal Year 2014 § 1701–1716, 1744, Pub. L. No. 113–66, 127 Stat. 952 (2013).

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