

# **TWO FOR ONE: THE ETHICAL PURSUIT OF JUSTICE IN THE MILITARY, AND BATTLEFIELD SUCCESS, THROUGH JOINT PROSECUTORIAL DECISIONS**

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Professor Rachel VanLandingham &  
Professor Geoffrey Corn\*

*This Article outlines a reasoned alternative to recent legislative proposals regarding the exercise of prosecutorial discretion in the military. It proposes requiring that commanders and their military lawyers jointly make all prosecutorial decisions. Elevating the staff judge advocate to an equal role in prosecutorial decision-making emphasizes and promotes justice and fairness, and formalizes what typically already occurs in courts-martial decision-making. Simultaneously, this approach preserves a wide swath of the commander's authority to determine appropriate responses to service member misconduct, including criminal acts. Such preservation is necessary to ensure that commanders maintain their essential responsibility and accountability for good order and discipline in their units, given both good order and discipline's vital link to battlefield success and the*

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\* Rachel E. VanLandingham, Lt Col, USAF, (ret.), is an Associate Professor of Law at Southwestern Law School in Los Angeles, California. Geoffrey S. Corn, LTC, USA, (ret.), is a Presidential Research Professor at South Texas College of Law in Houston, Texas. This article reproduces, with minor modification, the authors' unpublished 2013 written submission of the same name to the statutorily-mandated Response Systems to Adult Sexual Assault Crimes Panel. See Rachel VanLandingham & Geoffrey Corn, *Two For One: The Ethical Pursuit of Justice in the Military, And Battlefield Success, Through Joint Prosecutorial Decisions* (unpublished written submission to Response Systems to Adult Sexual Assault Crimes Panel), [http://responsesystemspanel.whs.mil/Public/docs/meetings/20130924/materials/academic-panel/additional/VanLandingham\\_Corn\\_Two\\_For\\_One\\_Ethical\\_Pursuit\\_of\\_Justice.pdf](http://responsesystemspanel.whs.mil/Public/docs/meetings/20130924/materials/academic-panel/additional/VanLandingham_Corn_Two_For_One_Ethical_Pursuit_of_Justice.pdf) (last visited Jan. 6, 2016). The authors thank Andrew Culliver, South Texas College of Law J.D. 2017, for his astute editing assistance.

*military's comprehensive reliance upon a commander-centric organizational and managerial model. This Article insists that such joint prosecutorial decision-making be complemented by a robust set of ethical guidelines as well as transparency initiatives, heretofore both lacking in the military justice system, to govern the appropriate criminal prosecution and administrative discipline of service-members, in addition to rigorous training regarding the same.*

#### TABLE OF CONTENTS

I. INTRODUCTION.....	497
II. AN OVERVIEW OF THE MILITARY JUSTICE SYSTEM.....	498
A. BACKGROUND .....	498
B. THE ROLE OF THE MILITARY COMMANDER .....	499
III. THE FALLACIES OF MILITARY LAWYERS AS EXCLUSIVE PROSECUTORIAL DECISION-MAKERS .....	502
A. SUPPLANTING THE MILITARY COMMANDER FOR A MILITARY LAWYER IN THE PROSECUTORIAL ROLE LACKS EMPIRICAL SUPPORT.....	503
B. SUPPLANTING THE MILITARY COMMANDER FOR A MILITARY LAWYER IN THE PROSECUTORIAL ROLE ABANDONS THE FUNDAMENTAL REASONS FOR A COMMAND-RUN SYSTEM ...	505
C. MILITARY LAWYERS ENCOUNTER ANALOGOUS PRESSURES TO THEIR CIVILIAN COUNTERPARTS.....	507
D. SITUATIONAL AWARENESS: COMMANDER VERSUS JUDGE ADVOCATE.....	508
IV. WHY NOT REQUIRE ALL PROSECUTORIAL DECISIONS TO BE MADE JOINTLY, BY BOTH COMMANDERS AND JUDGE ADVOCATES? .....	508
A. A JOINT REFERRAL PROCESS.....	508
B. A JOINT REFERRAL PROCESS CODIFIES CURRENT PRACTICE AND ADDRESSES LEGITIMATE CONCERNS.....	511
C. A JOINT REFERRAL PROCESS MUST BE COMPREHENSIVE .....	513
V. COLLATERAL OPERATIONAL EFFECTS: DILUTING THE COMMANDER/LEGAL ADVISER RELATIONSHIP AND THE RISK TO OPERATIONAL LEGITIMACY .....	515
VI. THE VITAL NEED FOR ETHICAL PROSECUTORIAL STANDARDS PLUS TRANSPARENCY .....	518
VII. CONCLUSION.....	520

## I. INTRODUCTION

The American public has become increasingly exposed to arguments from both proponents and opponents of amending the Uniform Code of Military Justice (UCMJ) to remove prosecutorial authority from commanders serving as court-martial convening authorities. It is suggested that such commanders, who currently possess exclusive and plenary discretion to decide what charges are referred for trial by court-martial, be replaced by military lawyers.<sup>1</sup> All voices in this debate share a common motivation of ensuring the ethical, credible, fair, and effective utilization of the military justice system to guarantee just accountability for service-members accused of criminal misconduct. While there is substantial disagreement among debate participants on how to best achieve this goal, the debate itself has revealed areas of, perhaps surprisingly, significant consensus.<sup>2</sup>

In contrast, whether and when to divest today's military commanders of their vast prosecutorial decision-making authority represents the greatest divergence among participants in this debate. Proponents of this change emphasize the need to remove lay commanders' ability to override the judgments of military lawyers, thereby aligning the military prosecutorial process with that in civilian jurisdictions. Opponents insist that while the exercise of this authority must rely heavily on the advice of the military legal adviser, it is the commander who is ultimately responsible for the establishment of good order and discipline in the military unit, and therefore the commander who must possess the ultimate say on who, when, and what allegations should be referred to trial by court-martial.

To date, the debate over the commander's role in the military justice process has offered a rigid binary choice of only these two options. What is curious, however, is why this is the case. The debate and associated legislative proposals to amend the military justice system have seemingly embraced an all-or-nothing approach, vesting the decision to prosecute certain types of cases, exemplified by sexual assault cases, in *either* the judge advocate *or* the commander. This Article recommends a different

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1. See, e.g., Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013), <http://www.gpo.gov/fdsys/pkg/BILLS-113s967is/pdf/BILLS-113s967is.pdf>.

2. Such consensus has resulted in recent changes to Article 60 of the UCMJ, as well as the recommendation to require written clemency decisions regarding adjudicated sentences. See U.C.M.J. art. 60 (2014). The authors also agree with proposals to bring the military judge into the procedural aspects of litigation at an earlier stage.

approach. Perhaps the more practical proposal is this: why can't the decision be shared by *both*? Why can't all dispositional and prosecutorial decisions regarding sexual assault cases be jointly made by *both* the commander and their lawyer? And taking the matter further—if a “two-heads-are-better-than-one” approach to prosecution of sexual assault crimes in the military appropriately balances the unique military and jurisprudential factors at play—why not extend such a Solomon-like strategy to *all* prosecutorial decisions in the military justice system?

## II. AN OVERVIEW OF THE MILITARY JUSTICE SYSTEM

### A. *Background*

The military justice system differs from U.S. civilian penal systems (state and federal) in several respects. For this Article to be fully appreciated, it is helpful to briefly sketch the history and functional aspects of the military's criminal justice system.

First and foremost, it is imperative to understand that military society, and in turn the military justice system, stands apart from U.S. civil society in many respects. The American military justice system, first established as the Articles of War by the Second Continental Congress on June 30, 1775,<sup>3</sup> was created in recognition of this reality; it attempts to provide an appropriate balance between the demands of the military's national security mission and the interests of fairness and justice. Though considered federal, it is distinct from the U.S. federal criminal justice system, and flows from explicit Congressional constitutional authority to create such a separate system: the U.S. Constitution expressly grants Congress the authority “[t]o make Rules for the Government of the land and naval Forces.”<sup>4</sup> American courts have also long supported the necessity of a separate military justice system based on the special attributes of a standing military.<sup>5</sup>

While well-founded that the military is best served by a separate justice system, considerable measures have been taken over the last century to better align the military justice system with constitutional values, and hence make it more akin to the civilian criminal justice system. For example, at the turn of the twentieth century, Congress and the military recognized the need to update the military justice system, which had existed largely

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3. LAWRENCE J. MORRIS, *MILITARY JUSTICE: A GUIDE TO THE ISSUES* 14 (Praeger, 2010) [hereinafter MORRIS].

4. U.S. CONST. art. I, § 8, cl. 14.

5. See *Parker v. Levy*, 417 U.S. 733, 743 (1971) (“This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society.”).

unchanged since the original Articles of War.<sup>6</sup> Half a century later, in World War II alone there were roughly 1.8 million courts-martial—that being in a war that saw around 8 million Americans in uniform.<sup>7</sup> This one-in-four ratio was simply beyond compare, as other nations of similar military size and prowess enjoyed a rate of around one court-martial per every 200 to 250 service members.<sup>8</sup>

Therefore, in 1950, after years of studies and extensive legislative hearings, Congress enacted the Uniform Code of Military Justice.<sup>9</sup> The goal was to make military justice fairer by making it more akin to the civilian justice systems that the citizen-soldier was familiar with, and hence remedy abuses experienced during World War II. Central to these post-war debates was the focus on commander influence in the military justice system, the legitimate exercise of which was considered necessary to the maintenance of good order and discipline in military units. As this Article will consistently highlight, both justice and discipline are equally essential to a legitimate system of military justice because they are mutually reinforcing.

### *B. The Role of the Military Commander*

Despite the changes following World War II, the military commander continues to enjoy the central role in the U.S. military justice system. To truly understand just how vital the commander's role is, this Article briefly highlights the critical stages of how a service-member is procedurally targeted for prosecution. Per the Rules for Court-Martial (R.C.M.),<sup>10</sup> military criminal prosecution of specific misconduct is formally initiated in two stages: *preferral* and *referral* of charges.<sup>11</sup>

First, allegations of misconduct are normally conveyed to an accused service member's immediate commander, who is required to conduct a preliminary inquiry or investigation into the suspected misconduct.<sup>12</sup> If allegations of misconduct implicate that commander or to his or her command group, a more senior or different commander will conduct the

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6. MORRIS, *supra* note 3, at 25–33.

7. *Id.* at 122.

8. *Id.*

9. *Id.* at 25–33.

10. The Rules for Courts-Martial are promulgated by the President at the direction of Congress and are included within the Manual for Courts-Martial. *See* U.S. CONST. art. I, § 8; U.C.M.J. art. 18, 36 (2012); Exec. Order No. 13643, 78 Fed. Reg. 29559 (May 15, 2013).

11. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307, 401, 403, 404, 407, 601 (2012 ed.) [hereinafter MCM].

12. MCM, *supra* note 11, R.C.M. 301, 303.

investigation.<sup>13</sup> Unless authority over a particular offense or offender is withheld by a superior commander, the immediate commander has full discretion to dispose of the alleged offense.<sup>14</sup> This discretion includes the authority to (1) take no action, (2) dispose of the offense through administrative measures, (3) offer non-judicial punishment (NJP) to the accused service member, or (4) prefer charges and recommend trial by courts-martial.<sup>15</sup> If the immediate commander decides that criminal prosecution is appropriate, he or she prefers charges, which involves swearing to formal charges and sending them to a superior commander who has been vested with the authority to convene courts-martial.<sup>16</sup> The commander with the authority to refer a charge is known as the convening authority.<sup>17</sup>

These senior commanders with such referral authority can only decide to prosecute that which is sent to them by subordinate commanders (or others) via the preferral of charges. This allows the potential for subordinate commanders to limit the cases which flow to senior convening authorities by simply exercising their above-mentioned discretion to do nothing or take non-criminal disciplinary action. The services' lack of transparency into, and accountability for, such lower-level decisions results in high-visibility injustices,<sup>18</sup> and should be remedied by greater mandatory reporting requirements and better leadership.<sup>19</sup>

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13. U.C.M.J. art. 22(b), 23(b); U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 5-7 (Oct. 2, 2006).

14. MCM, *supra* note 11, at R.C.M. 303, 306(a). Preferral of charges is not restricted to commanders; anyone subject to the UCMJ can formally charge another service member by taking an oath swearing that the charges are true to the best of his or her knowledge and belief based upon either personal knowledge or investigation. MCM, *supra* note 11, at R.C.M. 307(a), (b)(2).

15. MCM, *supra* note 11, at R.C.M. 306-07; *see* MCM, *supra* note 11, at pt. V (regarding the implementation of non-judicial punishment (NJP)).

16. MORRIS, *supra* note 3, at 51-54 (stating charges can technically be preferred by anyone subject to the UCMJ however, they are preferred most often by the immediate commander of an accused).

17. MCM, *supra* note 11, at R.C.M. 103(6), 504, 601(a) ("Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial," and it can only be accomplished by a commander granted convening authority). Convening authorities are a much more limited number of officers than the pool of commanders itself.

18. *See, e.g.*, Nicholas Kulish, Christopher Drew & Matthew Rosenberg, *Navy Seals, A Beating Death and Claims of a Cover-up*, N.Y. TIMES (Dec. 17, 2015), [http://www.nytimes.com/2015/12/17/world/asia/navy-seal-team-2-afghanistan-beating-death.html?\\_r=0](http://www.nytimes.com/2015/12/17/world/asia/navy-seal-team-2-afghanistan-beating-death.html?_r=0) (describing a cover-up and mishandling of detainee abuse and murder by Navy SEALs in Afghanistan due to a lower-level commander's decision to dispose of the credible allegations of misconduct via administrative and not criminal action; the case therefore never made it to a senior convening authority to refer to a court-martial).

19. *See generally* Rachel E. VanLandingham, *Discipline, Justice, and Command in the U.S. Military: Maximizing Strengths and Minimizing Weaknesses in a Special Society*, 50 NEW ENG. L.

Court-martial convening authorities, pursuant to the UCMJ and Service regulations, determine the level of courts-martial—summary, special, or general—that will adjudicate the case.<sup>20</sup> The convening authority is also responsible for selecting the jury, known as a military panel,<sup>21</sup> that will hear the case.<sup>22</sup> When deciding to refer charges, convening authorities are bound by no legally required standard besides the low one of probable cause, despite the fact that the standard for conviction is beyond a reasonable doubt.<sup>23</sup> Critically, convening authorities are only required to seek legal advice from their judge advocate prior to referring charges when referring to a general court-martial, and not for the other types of courts-martial.<sup>24</sup> This requirement for legal guidance, known as “pretrial advice,” mandates that the general court-martial convening authority’s senior lawyer (staff judge advocate) make conclusions regarding jurisdiction as well as whether or not probable cause exists to support the charges.<sup>25</sup> If the staff judge advocate, who is statutorily-required to provide this legal advice in writing, concludes that probable cause is lacking, the general courts-martial

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REV. 21, 59 (2016) (“To achieve accountability for prosecutorial decisions in the military, there needs to be documentation and review of all major dispositional decisions.”).

20. MCM, *supra* note 11, at R.C.M. 306(c), 401-05. There are three levels of court-martial: summary, special, and general. They have no analogous civilian counterpart, but special would be mildly comparable to misdemeanor court and general to felony court. Each level of court-martial has its own convening authority. The convening authority for a summary court-martial cannot call for a special or general court-martial. However, this is not the case in the inverse. A general court-martial convening authority can convene a summary or special court-martial and a special court-martial convening authority can convene a summary court-martial. *Id.*

21. In a court-martial there are no jurors. Instead, there are *members of a panel*. In appearance, they will look very similar to jurors in military uniforms, however, there are several functional differences in their composition and voting requirements. *See* MCM, *supra* note 11, at R.C.M. 103(14), 502(a); U.S. DEP’T OF ARMY, PAM. 27-173, TRIAL PROCEDURE pt. 1 (1992).

22. MCM, *supra* note 11, at R.C.M. 501, 503.

23. Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 284-85 (2007) (arguing that probable cause is an inappropriately low standard for prosecution and encourages abuse, urging implementation of a standard closer to beyond reasonable doubt).

24. MCM, *supra* note 11, at R.C.M. 601(d)(2) (requiring that the convening authority receive pretrial advice per RCM 406 prior to referral of charges to a general court-martial); *see also id.* at R.C.M. 406 (establishing that a staff judge advocate must provide written legal advice to a general court-martial convening authority prior to any charge being referred to trial by general court-martial; the contents include “a written and signed statement which sets forth that person’s: (1) Conclusion with respect to whether each specification alleges an offense under the code; (2) Conclusion with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation (if there is such a report); (3) Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and (4) Recommendation of the action to be taken by the convening authority”).

25. MCM, *supra* note 11, at R.C.M. 406.

convening authority (GCMCA) cannot refer the charges at hand—hence this advice is the only check on a GCMCA’s prosecutorial discretion.<sup>26</sup>

Additionally, this requirement for pre-trial legal advice includes a written recommendation by the senior lawyer to the convening authority as to disposition of the charges; that is, the military lawyer must make a recommendation regarding appropriate disposition of those charges for which probable cause exists. Yet this dispositional advice, as with the intermediary Article 32 preliminary hearing results, is merely hortatory and not binding on the convening authority making the referral decision.<sup>27</sup> One cannot over-emphasize that the *only* limit on a convening authority’s decision to refer charges to a general court-martial is the rare finding by a staff judge advocate in their required pre-trial legal advice that probable cause does not exist to support the charges. However, this low standard of probable cause is almost always met at the referral stage to a general court-martial, given that the system requires earlier procedural steps (such as preferral via sworn oath) that serve to winnow out those situations which are not supported by probable cause. Finally, it bears repeating that this check, as weak as it is in practical terms, does not exist for special or summary courts-martial, as no pre-trial legal advice is required.

### III. THE FALLACIES OF MILITARY LAWYERS AS EXCLUSIVE PROSECUTORIAL DECISION-MAKERS

Many critics of the military justice system advocate stripping commanders of their exclusive and plenary discretion to decide what charges, if any, are referred for trial by court-martial. They suggest that the commander’s prosecutorial duties be instead handed over exclusively to military lawyers.<sup>28</sup> For example, in May of 2013, New York Senator Kristen Gillibrand introduced legislation that proposed a complete shift of the referral authority from the commander to the judge advocate.<sup>29</sup> The

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26. U.C.M.J., art. 34 (2014) (“The convening authority may not refer . . . unless he has been advised in writing by the staff judge advocate that...the specification is warranted by the evidence.”).

27. Prior to a convening authority referring charges to a general court-martial, a newly-revised preliminary hearing, known as an Article 32 hearing, must be conducted, preferably by a military lawyer, in order to find probable cause and otherwise recommend disposition action. *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013); *see also* U.C.M.J., art. 32 (2014).

28. Throughout this article, the terms “military lawyer” and “judge advocate” will be used synonymously.

29. *See* Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013), <http://www.gpo.gov/fdsys/pkg/BILLS-113s967is/pdf/BILLS-113s967is.pdf>.

controversial Military Justice Improvement Act of 2013 stemmed from growing frustration in Congress with the military's handling of sexual assaults, and came just five votes short of advancement to a vote on the Senate floor.<sup>30</sup> While Senator Gillibrand's bill itself is dead, the ideas it encompassed remain very much in play.

A. *Supplanting the Military Commander for a Military Lawyer in the Prosecutorial Role Lacks Empirical Support*

Proponents of such change argue that inverting the commander/lawyer roles in the prosecutorial decision-making process will increase the likelihood that those suspected of sexual violence will be brought to justice. They seemingly base this approach largely on the unsupported assumptions that (1) the U.S. civilian criminal system, in which lawyers serve as the sole prosecutorial decision-makers, produces better results in the sexual assault arena—and that this supposed higher rate has a causal nexus to the attorney as prosecutor; and that (2) the military's inappropriate handling of sexual assault cases is primarily due to the commander as the prosecutorial decision-maker.<sup>31</sup> These assumptions are fundamentally flawed and remain unsupported by empirical evidence.

First, when adjusting for all feasible variables, there is little evidence that the U.S. civilian criminal justice system produces a greater percentage of prosecutions for sexual assault-type crimes than the military.<sup>32</sup> In both

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30. Helene Cooper, *Senate Rejects Blocking Military Commanders From Sexual Assault Cases*, N.Y. TIMES (Mar. 6, 1994), [http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html?\\_r=0](http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html?_r=0).

31. See Eugene R. Fidell, Opening Statement Before the Response Systems to Adult Sexual Assault Crimes Panel (Sept. 24, 2013), [http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/academic/06b-eugene\\_fidell\\_statement.pdf](http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/academic/06b-eugene_fidell_statement.pdf); Letter from Elizabeth L. Hillman, Response Systems Panel on Military Sexual Assault Subcommittee on the Role of the Commander, <http://www.uchastings.edu/news/articles/2014/01/Separate%20statement%20Hillman%20RoC%20subcommittee%201%2028%202014%20ELH%20final%20edits%20copy.pdf>.

32. See Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, VIOLENCE AGAINST WOMEN, Feb. 2012, at 155-56, <http://counterquo.org/reference-materials/sexual-violence/assets/files/Justice%20Gap%20paper%20Lonsway%20Archambault.pdf> [hereinafter Lonsway & Archambault] (providing a critique of civilian prosecution statistics regarding sexual assault crimes and highlighting that the available statistics demonstrate "(contrary to the 'official' data) that only a very small percentage of sexual assault reports eventually result in a conviction.>").

Furthermore, many current civilian studies, by not tracking cases from initial report to final disposition, fail to account for the attrition that occurs prior to prosecutors accepting a case, thus leading to inflated rates of prosecution and the incentivizing of prosecutors to "filter out" weak cases that would lower their conviction rates. See *id.* at 154-56. Out of 100 forcible rapes in U.S. civilian jurisdictions, an estimated .4 - 5.4 are actually prosecuted in the civilian sector. See *id.* at

sectors, such crimes remain under-reported and under-prosecuted.<sup>33</sup> Furthermore, in the civilian realm, statistics are often filtered to produce more favorable performance numbers.<sup>34</sup> These findings do not mean that the military justice system does not need improvement, and particularly in the dispositional decision phase. It does need comprehensive change.<sup>35</sup> But adopting a civilian-type process, with a lawyer as the decision-maker, will not produce desired improvements.

There is no empirical support for the proposition that formally removing the commander from their prosecutorial role will, in and of itself, improve reporting rates, increase prosecutions when appropriate, or do anything to constructively address sexual assault in the military. As discussed later in this Article, military prosecutorial decision-making—whether it rests with the commander, military lawyer, or both—will continue to be impaired by the lack of ethical guidelines and training regarding the disposition of crimes and petty misconduct in the military, as well as by the lack of transparency and accountability for poor military justice decision-making.<sup>36</sup> These systemic weaknesses have long hampered the handling of all crimes in the military justice system and will continue to impair such decision-making, regardless who is making it. Simply put, who

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157. Some voices in the debate have even argued that an individual suspected of committing a crime of sexual violence is far *more* likely to face charge and trial in the military than in the civilian community. See Gail Heriot, *Harassing the Military*, WKLY. STANDARD (July 8, 2013), [http://www.weeklystandard.com/articles/harassing-military\\_738058.html](http://www.weeklystandard.com/articles/harassing-military_738058.html). Such a proposition, if accurate, *does not* prove that the military appropriately handles sexual assault, nor that the supposedly better rate of prosecution is due to the commander's controversial role as prosecutorial decision-maker (something else may account for a higher prosecution rate, such as greater investigatory and prosecution resources). But it does highlight the flawed reasoning used by proponents of Senator Gillibrand's proposal—that any systemic or other improprieties and injustices in prosecuting sexual assault in the military will naturally and easily be solved by simply moving the decision-making to a lawyer, instead of a non-legally-educated commander. The situation is much more nuanced and complex than this simple, and faulty, conclusion would admit.

33. See Philip Bulman, *Increasing Sexual Assault Prosecution Rates*, NIJ J., no. 264, at 15, <https://www.ncjrs.gov/pdffiles1/nij/228384.pdf> (highlighting, in reference to U.S. society in general, that “[h]istorically, sexual assault cases have been underreported and had low prosecution rates.”); see also *Reporting Rates*, RAINN, <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited Jan. 23, 2016) (aggregating civilian reporting and prosecution rates of sexual assault based on Department of Justice and other reports); SEXUAL ASSAULT PREVENTION AND RESPONSE, U.S. DEP'T OF DEF. ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 13 (2013), [http://www.sapr.mil/public/docs/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-VOLUME\\_ONE.pdf](http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf) (discussing recent reporting and prosecution rates of sexual assaults within the military).

34. See Lonsway & Achambault, *supra* note 32, at 154–57.

35. See *infra* Part IV.C for a more detailed discussion on comprehensive reform.

36. See *infra* Part VI for a more detailed discussion of the need for ethical guidelines.

ultimately makes the decision to prosecute has less bearing in this discussion than how and why prosecutorial decisions are reached.<sup>37</sup>

*B. Supplanting the Military Commander for a Military Lawyer in the Prosecutorial Role Abandons the Fundamental Reasons for a Command-Run System*

The lack of firsthand evidence supporting a proposal like Senator Gillibrand's—and its lack of consideration of the military justice ethical decision-making venue in general—are not the only flaws in its foundation. In addition, the nature of the decision-making instincts of commanders and the lawyers who support them reveal the short-sightedness of placing prosecutorial decision-making solely in the military lawyer's hands. Commanders are in the business of making difficult decisions involving situations of immense uncertainty and gravity. They rely on their subordinates<sup>38</sup> to execute those decisions to the best of their ability. Commanders also know that complex missions involve the risk of failure, and that no matter how well a mission is planned, resourced, and executed, success is never guaranteed. After all, in a military operation, *the enemy gets a vote*. This is the nature of the culture in which military commanders are groomed, and it is this cultivated ability to make difficult decisions with full knowledge of the risk of failure that helps define successful commanders. Indeed, the courage to accept necessary risk in pursuit of vital objectives is an essential component of command responsibility. It is probative that many experienced military lawyers believe that commanders should retain a role in the referral process.<sup>39</sup> These military legal officers have extensively worked with senior commanders entrusted with court-martial convening authority; they recognize the inherent value of vesting those trained and experienced in risk-laden decision-making with the power to select cases for trial. Such decisions reflect the inherent nature of

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37. See Rachel E. VanLandingham, *Acoustic Separation in Military Justice: Filling the Decision Rule Vacuum with Ethical Standards*, 11 OHIO ST. J. CRIM. L. 389, 415–24 (2014) [hereinafter VanLandingham] (detailing the development and incorporation of a robust set of prosecutorial guidelines for those making the prosecutorial decision in the military).

38. Military members assigned a commander's unit are commonly referred to as "subordinates".

39. See, e.g., Pending Legislation Regarding Sexual Assaults in the Military: Hearing on S. 967 Before the S. Comm. On Armed Services, 113th Cong. 12-15 (2013), <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg88639/pdf/CHRG-113shrg88639.pdf> (collaboration and co-authored prepared statements of the respective branch's Chiefs of Staff and the Judge Advocate General's).

command, and are inextricably linked to command, good order and discipline, and mission effectiveness.<sup>40</sup>

Perhaps most importantly, the commander should be retained in the referral process because he or she is legally, morally, and practically responsible to ensure his or her unit is ready to answer the call for whatever challenge the Nation tasks the unit to perform. This is the essence of command responsibility. The commander needs to retain a key role in military justice in order to best maintain the readiness and loyalty of subordinates necessary for unit preparedness and mission execution. Prosecutorial decisions are inextricably tied to mission success because of their link to good order and discipline. Ensuring accountability, in a fair and just manner, for members of the unit whose transgressions fall within the realm of criminal misconduct is essential for strengthening the bond of trust between leader and led that is vital to military effectiveness.

The commander—not their lawyer—is ultimately responsible and accountable for operational readiness and battlefield success. The very DNA of the U.S. military, both its organizational structure and method of operations, hinges on the role of the commander and their effective leadership.<sup>41</sup> Military commanders are responsible not only for the daily conduct of their Soldiers, but for the lives of their subordinates as well. Because of this responsibility, the current military justice system vests commanders with prosecutorial authority, as well as lesser disciplinary authority, in order to effectively lead their units. In summation, commanders are responsible for mission success, and such success has been proven to depend on good order and discipline. Crime and misconduct degrade good order and discipline, and therefore commanders, much more so than their lawyers, care deeply about ensuring that crime and misconduct are effectively dealt with.<sup>42</sup>

In sum, commanders' decision-making abilities, plus commanders' organizational role regarding good order and discipline, support retaining

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40. See *e.g.*, JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 19–20* (Free Press, 2012) (highlighting both George Washington's and Abraham Lincoln's recognition that a military's effectiveness is directly and causally linked to the maintenance of good order and discipline as shaped by commanders).

41. No local district attorney or U.S. Assistant Attorney functions in such a system that revolves around obedience to orders within a hierarchical command structure. Commanders are quite literally responsible for the lives of their Soldiers, Sailors, Airmen/Airwomen and Marines—no mayor, governor, or senator carries equivalent responsibility and accountability.

42. This responsibility is not relieved by simply shifting prosecutorial decision-making to a military attorney. But in all likelihood, the commander, bereft of the primary tool of maintaining good order and discipline, will naturally become less concerned about its maintenance, and the essence of the command structure would be at jeopardy of degrading.

their vote in military prosecutorial decision-making. This Article's suggested paradigm is analogous to prosecutions in a small town, in which the mayor is elected for her leadership skills, maturity, and competence. What if the mayor could share, and hence check abuses in, the local district attorney's plenary prosecutorial power via an equal vote in prosecutorial decisions, with the joint decision supported by public decision memos?

*C. Military Lawyers Encounter Analogous Pressures to Their Civilian Counterparts*

Critics claim that there is no reason why military lawyers are any less capable of unilaterally exercising such decision-making authority than commanders. This notion could not be more incorrect. It is error to assume that all military lawyers share an instinct to accept prosecutorial risk in pursuit of important objectives of justice, good order and discipline, and military readiness. While the Judge Advocate Corps strive to produce military lawyers who are immune to the subtle pressures of resource limitations, competing interests, and ego, it is simply a reality of human nature that these pressures do impact lawyer judgment. In the context of allegations of sexual violence—cases that often rely heavily on circumstantial evidence, assessments of the victim, and defendant credibility—acquittal avoidance is an undeniable influence on prosecutorial judgment. No prosecutor, civilian or military, likes hearing “not guilty” at the end of a trial. And though all prosecutors aspire to immunize their judgments from the influence of acquittal avoidance, it is often natural that the prosecutor will be less inclined to pursue a difficult case. Therefore, unsurprisingly, the reality is that military prosecutors are much more susceptible to risk aversion than commanders.

How the individual with prosecutorial power characterizes professional success only bolsters this conclusion. Commanders do not measure their success based on court-martial win/loss statistics. Their function is not to win or lose a case, but to ensure that good order and discipline are maintained by ensuring that meritorious allegations of criminal misconduct are referred to trial. Once that decision is made, it is the military lawyer who confronts the challenge of executing the mission. And, like any other subordinate within a command, the judge advocate will view a successful prosecution as the benchmark of professional achievement. No service member aspires to fail to achieve the objectives defined by their commander—the military lawyer is no different. Thus, placing prosecutorial authority outside the hands of those tasked with executing that

decision in some ways immunizes prosecutorial decision-making from the risk of acquittal avoidance.

*D. Situational Awareness: Commander Versus Judge Advocate*

Lastly, unlike civilian prosecutors, military lawyers assigned to an installation rarely possess the same level of long-term understanding for the “community” they serve. In the military, that “community” is first and foremost the unit. Commanders and judge advocates are always temporary occupants of their positions and possess limited time and space to become immersed in the justice related issues, concerns, and priorities of the unit. Unlike the military lawyer, however, it is the fundamental responsibility of the unit commander to quickly gain this knowledge and understanding as the critical foundation to effective leadership of the unit. The military lawyer, in contrast, plays a supporting role in this leadership process, and rarely, if ever, has the same proverbial finger on the pulse of the unit as does the commander. This anomaly represents a fundamental and extremely significant distinction between the military lawyer as prosecutor and their civilian counterpart, who often remains part of the immediate community for extensive portions of his or her life.<sup>43</sup> It is therefore invalid to assume that vesting the military attorney with the same level of plenary prosecutorial discretion will produce the same results for military society that we assume are inherent in the role of a district attorney. In essence, the military lawyer must rely on the commander to inform him or her on the community needs and priorities in order to effectively contribute to the administration of justice therein.

IV. WHY NOT REQUIRE ALL PROSECUTORIAL DECISIONS TO BE MADE JOINTLY, BY BOTH COMMANDERS AND JUDGE ADVOCATES?

*A. A Joint Referral Process*

While there are clearly many pitfalls to removing the military commander completely from the prosecutorial role, Senator Gillibrand’s Military Justice Improvement Act and those like it include valid considerations. But a better, more balanced approach is available. What if,

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43. Additionally, as mentioned above, there is simply no civilian equivalent to a commander and the responsibility they possess for their unit’s operational readiness. The district attorney, even if he or she wanted to (because two heads are better than one), cannot share prosecutorial decision-making with a senior community figure that is legally accountable for the lives of those in the community, and the community’s overall success.

instead of placing the commander or the military lawyer exclusively in control of the prosecutorial power, the two possessed the responsibility *jointly*? Creating co-equal roles for the commander and his or her judge advocate addresses the concerns on both sides of the debate, and is a natural next step in the evolution of military justice and the modern professional military.

This “*joint referral*” proposal is founded on the belief that the gravity of any decision to refer an allegation to trial by court-martial appropriately belongs to *both* the military commander *and* the judge advocate.<sup>44</sup> A joint-approval referral process offers several benefits over the existing system while addressing the concerns of its critics. First, a team process is more favorable to fundamental fairness in the military justice system, without sacrificing traditional good order and discipline. Additionally, requiring prosecutorial decisions to be made jointly by commander-judge advocate teams preserves the commanders’ central organizational leadership role in the military, both at the macro and micro levels. But of supreme importance to those critical of the current system, incorporating the expertise of the military legal adviser into the prosecutorial decision-making process, in a far more formalized and essential manner than is currently the case, allows the judge advocate to serve as a true legal counterweight to potential biases and improper commander impulses.

The interests of achieving justice for all constituents of the military criminal process (society, the victim, and the accused), and the interests of preserving and enhancing the vital trust and confidence between members of a military unit and the unit commander, are now, as they have always been, intertwined and inseparable. This is the ultimate meaning of the relationship between military justice and good order and discipline. By ensuring fundamental fairness through due and efficient process for all individuals impacted by allegations of criminal misconduct, genuine discipline in the military unit is enhanced. Neither the commander, as the individual ultimately responsible for ensuring the readiness and loyalty of the military unit, nor the judge advocate, as the individual responsible for ensuring that those impacted by allegations of criminal misconduct receive

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44. Most military lawyers and commanders would opine that the system already functions very much in this capacity; nearly all decisions to prosecute, or to decline to prosecute, are agreed to and supported by the commander’s military lawyer, despite formally made by the commander. If this is accurate, there remains a problem in the military justice system that has allowed inadequate handling of sexual assault (and other) crimes. In fact, there is such a problem, and it is the lack of ethical standards and training for commanders, as well as their military lawyers, regarding the exercise of prosecutorial discretion. See VanLandingham, *supra* note 37, at 397, 436.

the legal process they are due, can be excluded from this process without jeopardizing this essential balance of interests.

But what if the commander and the judge advocate come to an immovable disagreement on a decision to refer charges? How would a joint-referral process handle such a dilemma? In this instance, which would be practically rare, the case would then be forwarded to the next highest level of command. There, the case would be subject to the same joint-decision process it enjoyed at the lower level of command. The superior commander and his or her judge advocate would review the case and decide, only mutually, on referral of charge. If in the instance that the superior commander and judge advocate also disagree on their decision, a presumption against referral to trial would then be triggered, requiring a department-level override as the result of mutual agreement by the relevant service chief and judge advocate general. Furthermore, each stage of this process could (and should) incorporate a separate requirement for a written decision memo, one that explains the reasoning behind every dispositional decision—a memo that is shared with superior commanders—which would ultimately help provide transparency and much-needed accountability for all dispositional decisions. Furthermore, such decision memos can serve as training devices for future commanders and their lawyers regarding the appropriate factors to consider, and relative weight of each, in the dispositional decision.

Finally, the joint referral proposal would leverage all of the value of the commander's good judgment and leadership skills, judgment which ostensibly formed the basis for their selection to command, while appropriately relying on the legal expertise resident in the commander's lawyer to mitigate the risk of legally, or ethically, arbitrary referral decisions.<sup>45</sup> This synergistic decision-making process will reap other benefits as well, most significantly, mitigating the risk of non-referral decisions based on improper influences. For example, a military legal adviser would almost certainly object to a non-referral decision where the evidence clearly supports referral but the commander appears to be influenced by favoritism, rank protection, or some other explicit or implicit bias in favor of the accused or against the accuser. Of equal significance, the commander would almost certainly object to a judge advocate's

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45. Such a system also preserves the commander's accountability and responsibility for good order and discipline within their units; such good order and discipline, and commanders' responsibility for it, is the foundation for operational mission success—for which the commander is also responsible. Additionally, the law of armed conflict makes the commander responsible for prosecuting the war crimes of their subordinates; the proposal for joint prosecutorial authority would allow the commander to maintain the tools necessary to carry out this responsibility.

aversion to try a difficult evidentiary case based on the sometimes subtle, and sometimes not so subtle, influence of limited prosecutorial resources, competing prosecutorial priorities, or the always dangerous influence of acquittal avoidance. The joint referral process requires the commander and judge advocate to operate as a team, in which every referral to court-martial requires mutual agreement. Such a process will help to cancel out the negative effects of a sole prosecutorial decision maker while ultimately enhancing confidence in the propriety of every referral decision.

*B. A Joint Referral Process Codifies Current Practice and Addresses Legitimate Concerns*

The Military Justice Improvement Act of 2013 derived from legitimate concerns regarding the implementation of military justice. Though it met defeat, retaining the status quo is ill advised. Insisting that the commander retain plenary prosecutorial authority is inconsistent with *actual* customary practice and ignores the legal dimensions of the decision to prosecute in the military. It also creates a danger, albeit rarely manifested, of allowing a commander's misunderstandings of these dimensions to trump their judge advocate's advice. Instead, the decision to prosecute should be both codified as a joint decision, ensuring that it reaches across both legal and leadership dimensions, and brought out into the open via institutionalized recording and tracking mechanisms. Leaving the system as it currently exists allows commanders to overrule legal advice regarding inherently legal decisions. Realistically, a commander's arbitrary motivations and misunderstandings of the goals of criminal prosecution—or a military lawyer's inexperience or myopia, as well as perverse systemic incentives such as acquittal avoidance—stand a far greater chance of being zeroed-out by the forcing function of a joint decision.

Senator Gillibrand was correct in advocating that the military lawyer must have an increased and formalized voice in the decision to prosecute. The decision to refer obviously involves quintessentially *legal* judgment, such as discerning facts and circumstances as evidence, weighing such evidence on the scales of justice, and measuring their importance against the general purposes of the criminal law: deterrence, punishment, protection of the military and public, and rehabilitation of offenders. The decision to prosecute, as part of the “fair and effective administration of justice,” also includes the vital constitutional duty to protect the individual rights of all involved, and in particular those of the accused service member, as well as

the victims of crime.<sup>46</sup> Lawyers are educated and trained to exercise such judgment, and their professional legal expertise can and must complement the commander's strengths. These include the commander's understanding of the unit, interest in establishing a bond of trust with subordinates, and courage to assume risk in pursuit of vital objectives. Mandating that the two work together will help to ensure fairness, consistency, and appropriate balancing of the facts and interests in all cases.

Elevating the military lawyer to a joint position with the commander in convening courts-martial is a natural progression in the evolution of the modern military justice system. As the U.S. military and the society it defends have evolved, the UCMJ and its corresponding military justice system have increasingly recognized not only the commander's traditional, central role in ensuring good order and discipline, but the judge advocate's key role in ensuring fairness and consistency of prosecution of military members as well. Changes, such as Article 34's requirement for a legal review by a staff judge advocate in general courts-martial, demonstrate this recognition.<sup>47</sup> Even with these incremental past progressions, the current system can and should continue to be improved. Given the dramatically lower number of courts-martial since the last major modifications were made to the UCMJ,<sup>48</sup> the greater number of military lawyers,<sup>49</sup> the availability of instantaneous communication between commanders and their military lawyers (even if not in the same physical battle-space), and the ever-increasing professionalism of the all-volunteer force, it is time to permanently enhance the role of the judge advocate to ensure their equal voice in the decision-making process regarding criminal prosecution.

Although rarely framed in such terms, as a practical matter, military justice is already typically implemented through this precise joint decision-making process. Commanders and their judge advocates, through

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46. See DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.110 (2010) [hereinafter U.S. ATTORNEYS' MANUAL] (outlining the guidelines for achieving "the fair and effective administration of justice").

47. See U.C.M.J. art. 34 (2014).

48. See ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES OF THE UNITED STATES SENATE AND THE UNITED STATES HOUSE OF REPRESENTATIVES AND TO THE SECRETARY OF DEFENSE, SECRETARY OF HOMELAND SECURITY, AND THE SECRETARIES OF THE ARMY, NAVY AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE 6-9 (Oct. 1 2013-Sept. 30, 2014), [http://jpp.whs.mil/Public/docs/03\\_Topic-Areas/07-CM\\_Trends\\_Analysis/20151009/09\\_FY14\\_CAAFAnnualReport.pdf](http://jpp.whs.mil/Public/docs/03_Topic-Areas/07-CM_Trends_Analysis/20151009/09_FY14_CAAFAnnualReport.pdf); William H. Michael, *Navy Sees Steady Decline in Courts-Martial*, NAVY TIMES (June 11, 2011, 9:03 AM), <http://archive.navytimes.com/article/20110611/NEWS/106110307/Navy-sees-steady-decline-courts-martial>.

49. See Karen Sloan, *Hiring JAG: Military Needs More Than a Few Good Lawyers*, NAT'L L.J. (June 8, 2009), <http://www.nationallawjournal.com/id=1202484602846/Hiring-JAG-Military-Needs-More-Than-a-Few-Good-Lawyers>.

collaborative dialogue, usually reach a consensus opinion regarding when and whom to prosecute. However, there are instances in which commanders overrule their legal advisors, thereby potentially allowing injustice. This must be prevented. Furthermore, the system is currently shrouded in secrecy, with little transparency and almost zero accountability for military justice decision-making. A joint-referral process will ultimately strengthen the vital relationship between defining the mission, as represented by the referral decision, and executing the mission, as manifested in the prosecution of the referred case. Commanders will retain much of their role in deciding which cases to refer to trial. Judge advocates will have an equal voice in the referral process. And justice will be enhanced by increasing the likelihood that legally meritorious—and only legally meritorious—cases are tried.

### *C. A Joint Referral Process Must Be Comprehensive*

Comprehensive application is imperative to the success of the joint-referral proposal; it must not be limited to any one category of offenses. The systemic issues that prompted concerns in the military justice system are not confined to sexual assault cases. A joint decision-making process must apply with equal force and validity to all allegations of military criminal misconduct, whether the crime is of an inherently military nature<sup>50</sup> or is a so-called “common law crime.”<sup>51</sup>

Senator Carl Levin of Michigan proposed an approach that hinted at a gradual reform for sexual assault cases only.<sup>52</sup> While sexual assault in the military has the headlines today, the underlying concerns that generated debate, such as commanders engaging in arbitrary and unjust dispositional decisions, go much deeper than simply one category of crime. Such a proposal does not go far enough and presents significant danger to the integrity of the entire military justice system. The current deficiencies are systemic, and though they have been revealed by the inadequate handling of sexual assault cases, the problem of inconsistent and unjust dispositions potentially exists in relation to the prosecution of almost all crimes in the military. Indeed, the “military-specific” crimes that some legislative

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50. See MCM, *supra* note 11, at pt. IV, art. 83–115, 133, 134 (punitive articles, military specific offenses).

51. See MCM, *supra* note 11, at pt. IV art. 116–132 (punitive articles, common law offenses).

52. See National Defense Authorization Act for Fiscal Year 2014, S. 1197, 113th Cong. § 552 (2013), <http://www.gpo.gov/fdsys/pkg/BILLS-113s1197pcs/pdf/BILLS-113s1197pcs.pdf> (recommending change to force sexual assault cases in which the commander non-concurs with their military lawyer’s advice to be forwarded to a higher level of command for resolution).

proposals would leave to a commander to exclusively handle, despite the fact that they are criminal prosecutions with serious effects for the unit as well as the accused, may in fact be more susceptible to such arbitrariness.<sup>53</sup>

Military law and practice has long recognized that certain offenses are more serious than others. However, in recognition of the relationship between crime and good order and discipline, the system has never mirrored the normal civilian felony/misdemeanor dichotomy. Instead, what is serious and what is minor is always assessed on a case-by-case basis. The *level of court-martial chosen*—not the offense itself—distinguishes the most serious crimes from all others. This choice of forum allows the commander and judge advocate to consider much more than what provision of the penal code was violated, and perhaps most importantly, allows for consideration of the detrimental impact of a seemingly minor offense on the readiness and discipline of the unit.<sup>54</sup> Furthermore, because officers should be and are held to a higher standard, what might be viewed as a minor offense for an enlisted Soldier, or in a civilian jurisdiction, is conclusively more serious when committed by an officer, perhaps requiring prosecution.<sup>55</sup> This officer-enlisted distinction is one of several examples that demonstrates the danger and inappropriateness of attempting to categorize different offenses into bright-line categories. The current contextually-focused approach based on forum choice to distinguishing what civilians might call misdemeanor from felony is far more effective in achieving meaningful justice within the ranks and enhancing readiness than the type of categorical *per se* approach found in some of the past legislative proposals.<sup>56</sup> Clearly, allocating a joint-

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53. For example, offenses such as Article 86's "absence without leave" and Article 92's "failure to obey order or regulation," are more susceptible to a disparate and wide range of dispositional responses, given their lack of analogy to classic crimes and their dependence on a subjective assessment by the commander as to wrongfulness. U.C.M.J. art. 86, 92 (2014).

54. This consideration mirrors that of the civilian prosecutor's consideration of "the impact of an offense on the community in which it is committed." See U.S. ATTORNEYS' MANUAL, *supra* note 46, at § 9-27.230 cmt. 2 (discussing how the seriousness and nature of an offense should be considered relevant to the decision to prosecute and listing ways to measure impact on the community).

55. While officers are supposed to be held to a higher disciplinary standard than enlisted personnel due to their responsibilities and acceptance of rank, there is often a perception that, as a common saying in the military has it, there are "different spansks for different ranks." There is an impression that officers, though ostensibly held to higher standards, frequently are treated more leniently in the military justice system than enlisted personnel, at least during the critical dispositional stage when commanders must decide how to deal with alleged misconduct. Such arbitrariness, or appearance thereof, should be addressed through the use of ethical standards as outlined in Section VII of this proposal as well as enhanced transparency. See VanLandingham, *supra* note 37, at 415–24 (discussing proposed ethical standards).

56. See Military Justice Improvement Act of 2013, S. 967, 113th Cong. § 2 (2013), <http://www.gpo.gov/fdsys/pkg/BILLS-113s967is/pdf/BILLS-113s967is.pdf> (creating a categorical

referral process to only a specific subset of offenses would infringe upon this cardinal principle of military justice.

V. COLLATERAL OPERATIONAL EFFECTS: DILUTING THE  
COMMANDER/LEGAL ADVISER RELATIONSHIP AND THE RISK TO  
OPERATIONAL LEGITIMACY

In addition to the first-order negative consequences, a proposal such as Senator Gillibrand's, to wholly divest commanders of their referral authority, will inevitably create negative second-order consequences. Because the current model of exercising prosecutorial judgment necessitates close and constant coordination between a commander and their judge advocate, it provides the crucible for forging an essential relationship of trust in the legal adviser. The commander-judge advocate relationship produces benefits far beyond issues of military justice, and significantly enhances the likelihood that the judge advocate will be incorporated into aspects of the commander's decision-making process that implicate legal and regulatory compliance. In short, it is the bond formed in the garrison (non-deployed) environment, where military justice is the primary source of interaction between the commander and the legal adviser, that is subsequently leveraged during operational deployments (i.e. Afghanistan, Iraq, etc.) to ensure compliance with a much broader array of operational and legal issues.

In no context is this relationship more essential than during military combat operations. Compliance with domestic and international law has never before been so integral in ensuring that the execution of military operations serves the strategic end state of any given mission. This new and developing reality, in turn, has elevated the importance of operational legal advice, and by implication the legal adviser, to a historically unprecedented level. The centrality of law in the planning and execution of military operations is reflected in modern U.S. military doctrine, in which legitimacy is designated as a principle of joint operations, standing alongside traditional principles of war such as offensive, maneuver, mass, and unity of command.<sup>57</sup> The definition of legitimacy leaves no doubt about the significance of ensuring legally compliant operations:

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bifurcation between so-called serious and non-serious crimes without consideration of contextual factors surrounding certain offenses); *see also* National Defense Authorization Act for Fiscal Year 2014, S. 1197, 113th Cong. § 531 (2013), <http://www.gpo.gov/fdsys/pkg/BILLS-113s1197pcs/pdf/BILLS-113s1197pcs.pdf> (focusing on sexual assault crimes to the exclusion of other crimes).

57. JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at 1-2, app. A-4 (2011) [hereinafter JOINT PUB. 3-0].

### I. Legitimacy

(1) The purpose of legitimacy is to maintain legal and moral authority in the conduct of operations.

(2) Legitimacy, which can be a decisive factor in operations, is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences. These audiences will include our national leadership and domestic population, governments, and civilian populations in the operational area, and nations and organizations around the world.<sup>58</sup>

But more to that end, the effective integration of law into military operations requires more than simply emphasizing the significance of legitimacy. It requires integration of the military legal adviser into every aspect of operational planning and execution. This in turn requires a strong bond of trust between the commander and the legal adviser. Absent such a bond, the involvement of the military lawyer in the operational process will be more *pro forma* than genuine. In short, it is this bond that results in the commander demanding that his or her judge advocate be a fully integrated member of the battle staff, which in turn maximizes the likelihood that U.S. operations will be legally compliant, thereby enhancing operational and strategic legitimacy.

The integration of law and the military legal adviser into military operations has been a major objective of the various service JAG Corps' leadership for several decades. Beginning with the visionary efforts of a small number of international law experts in the various JAG Corps, the discipline of 'operational law' was coined.<sup>59</sup> In the decades following inception of this concept, the role of the military lawyer-officer has shifted dramatically. No longer is the judge advocate a so-called "rear area" asset called upon only to deal with problems after they occur. Instead, she is fully integrated into the operational battle staff, ensuring to the greatest extent possible that problems associated with legal compliance never arise or are dealt with at the earliest opportunity.

Our closest allies consider this integration a model for maximizing the efficacy of legal support to operations. Today, the U.S. Army Center for Law and Military Operations includes within its staff military lawyers from several allied nations, and foreign military lawyers are a constant presence

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58. JOINT PUB. 3-0, *supra* note 57, at A-4.

59. See David E. Graham, *Operational Law—A Concept Comes of Age*, ARMY LAW., July 1987, at 1, 9–10 ("operational law (OPLAW), . . . has quickly moved from conceptual discussion to practical curriculum at The Judge Advocate General's School, U.S. Army (TJAGSA) and concerted efforts at implementation by judge advocates in the field. Lest there be any doubt, OPLAW is a *new* concept . . .").

at the U.S. Army Judge Advocate General's Legal Center and School. Foreign militaries, even those as effective and admired as the Israeli Defense Force, consistently praise U.S. military commanders and their lawyers for the effective, collaborative relationship between their commanders and lawyers regarding operational decisions. These nations and their militaries look to U.S. practice as a model to emulate.

This mission-critical relationship is not mandated by statute, nor would such a mandate ensure the vitality of this relationship. Instead, the commander/judge advocate relationship is developed first and foremost through their close interaction in the garrison environment. It is the military justice process, and the central role played by commanders in that process, that is often the genuine crucible for forging the relationship. Military officers learn from their first junior commands to rely on the judgment of their servicing judge advocate counterparts. As officers progress through their careers, and assume commands of increasing responsibility, the significance of this relationship and degree of reliance on judge advocate judgment increases exponentially. This bond of trust and confidence produces a vital dividend when this same commander is called upon to lead forces into operations, or when the commander is serving in a non-command billet on a battle staff. While the legal challenges related to ensuring the legitimacy of operations will involve issues far more diverse than only military justice, it is often this bond of trust that helps ensure that military legal advice is sought and provided when needed.

Therefore, divesting commanders of their role in the current military justice process will jeopardize this relationship and, in turn, the efficacy of legal support to military operations. While some have argued that the judge advocate will still have an interest in interacting with the commander to solicit the commander's views on criminal matters, the real question is whether the commander will perceive the importance of that interaction in the same way as it is currently viewed. The answer to this question is no. With all the responsibilities inherent in the function of command, eliminating the formal role of a commander in the prosecutorial decision-making process will inevitably lead commanders to treat these decisions as someone else's problem. This is not to say that they will not seek to provide input. However, the degree of attention paid to these issues will naturally be more significant when it is the commander who is responsible for decisions (as opposed to when the commander simply provides input on a legal matter entrusted to legal officers). In short, the precious commander/judge advocate interaction will inevitably be constricted once such a change divesting commanders of their prosecutorial role is implemented.

It is impossible to predict with certainty exactly how such a change would impact the role of the judge advocate in relation to military operations. Nor does this Article does not suggest that allies with a different system fail to effectively integrate law into operations. However, context matters, and no other nation operates at the scale and geographic dispersion of the U.S. armed forces. What can be assumed with relative certainty is this—the level of integration in the U.S. armed forces is a genuine model for emulation—and the more sporadic the garrison interaction between the commander their judge advocate becomes, the less effective this integration will be during military operations. Fundamentally altering the UCMJ and the role of the commander in the military justice process—without considering the detrimental impact such alteration may and likely will have on the process of ensuring legally compliant military operations—is not only short-sighted, but a potential strategic blunder.

#### VI. THE VITAL NEED FOR ETHICAL PROSECUTORIAL STANDARDS PLUS TRANSPARENCY

Even with commanders and their military lawyers possessing equal roles in the decision to prosecute, the pre-trial deliberative process will remain fraught with the potential for injustice because of the lack of guiding ethical standards and training regarding the appropriate versus inappropriate use of prosecutorial and administrative disciplinary measures. There is currently a paucity of formal dispositional touchstones available to commanders as they exercise their prosecutorial and disciplinary discretion. Even if lawyers are incorporated into the prosecutorial decision-making process, the current lack of robust principles to guide such decisions will continue to hamper their effectiveness. Current statutes and regulations provide commanders and their lawyers with vague and limited information regarding the implementation of military justice; most commanders as prosecutors receive little formal instruction regarding when to prosecute and when to use alternative administrative measures. Furthermore, the formal training they may receive is inadequate because it is based on the sparse guidance found in the UCMJ, the Rules for Courts-Martial, and implementing service regulations. This lacuna is exacerbated by the lack of learning available from past dispositional decisions, since such decisions are not required to be explained, never mind memorialized for accountability and training purposes.

The Rules for Courts-Martial formally require commanders to dispose of offenses “in a timely manner and at the lowest appropriate level of disposition,” fail to elaborate what is “appropriate,” and make little mention

of fairness, justice, or goals of the criminal system.<sup>60</sup> Currently buried in the Rules' non-binding Discussion section are eleven unelaborated factors for commanders to consider in dispositional decisions.<sup>61</sup> These factors lack explanation, comment, context and clarity.<sup>62</sup> While these factors are appropriately based on the American Bar Association's (ABA's) Criminal Justice Standards: Prosecution Function,<sup>63</sup> they are not inclusive and fail to include contextual commentary. In fact, the Department of Defense drafters of this section cherry-picked from the ABA's Standards, and chose not to incorporate all of the latter.<sup>64</sup> For example, the drafters excluded the ABA's recommendation that the prosecutor should consider their own reasonable doubt as to the accused's guilt.<sup>65</sup> The drafters chose to explain this omission, stating that a commander's reasonable doubt as to the accused's guilt should not be a factor in the commander's arsenal of dispositional considerations because it is "inconsistent with the convening authority's judicial function."<sup>66</sup> Such illogical arbitrariness demands revision and refinement. Furthermore, while the military appellate courts weigh commanders' referral decisions for constitutional concerns like vindictiveness and use of impermissible classifications such as race or gender, neither the Manual for Courts-Martial, nor the service regulations translate these concerns into ethical standards or dispositional factors for commanders or their advising lawyers to consider.

In reality, commanders are essentially left to their own good judgment to decide when to prosecute, as long as the low standard of probable cause is met.<sup>67</sup> Contrast this with the Department of Justice's formal "principles of

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60. MCM, *supra* note 11, at R.C.M. 306(b) discussion (the "Discussion" section allows that "the interest of justice" and "military exigencies" should be considered, and that the "goal should be a disposition that is warranted, appropriate, and fair").

61. *Id.*

62. *See id.* While the Discussion's factor of "character and military service of the accused" has been recently deleted, it should be replaced with something akin to the Department of Justice's factor, "the person's history with respect to criminal activity." *Id.*; *see* U. S. ATTORNEYS' MANUAL, *supra* note 46, at § 9-27.230 (noting that an individual's history of prior misconduct is relevant to a dispositional decision).

63. *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(b) (1993) [hereinafter PROSECUTION FUNCTION].

64. *Compare* PROSECUTION FUNCTION, *supra* note 63, at § 3-3.9(b), *with* MCM, *supra* note 11, at R.C.M. 306.

65. *Id.*

66. MCM, *supra* note 11, at R.C.M. 306 analysis, at A21-21.

67. Additionally, the Department of Justice supplements the probable cause standard (which is the sole standard in the military) for prosecution; its guidance stipulates that, in addition to probable cause, "both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact."

federal prosecution” for U.S. Attorneys.<sup>68</sup> The comprehensive DOJ principles provide detailed instruction to prosecutors working throughout the country; they aim to provide fairness and consistency in prosecution, yet strive to maintain necessary flexibility and room for maneuverability as the nature of prosecution demands.<sup>69</sup> An example of the explanatory value they add to stated dispositional considerations is found in the DOJ Manual’s section regarding the “nature and seriousness of the offense” as an appropriate dispositional factor.<sup>70</sup> Instead of merely listing it as a factor a prosecutor must consider, the DOJ Manual’s comment section details numerous ways in which such community impact can be evaluated.<sup>71</sup> This level of detailed explanation is repeated throughout this official guidance, and should serve as a model for the development and incorporation of similar principles in the military justice system.

## VII. CONCLUSION

Criminal prosecution in the civilian sector is exclusively the domain of the prosecutor. In such civilian jurisdictions, there is simply nothing analogous to the readiness and disciplinary objectives inherent in the phrase “military justice,” nor the understanding of the community inherent in the responsibility of command. In contrast, the military commander is, and remains, uniquely responsible for ultimate mission success and the lives of their service members, and such operational success and management of lives depend upon good order and discipline. But commanders should not and do not possess a monopoly on good judgment within the military, and in particular judgment that demands legal expertise. It is time commanders share the legal and leadership decision of prosecution with their legal experts—military lawyers serving as judge advocates—and share this

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*See* U.S. ATTORNEYS’ MANUAL, *supra* note 46, at § 9-27.220(a). The ABA Criminal Justice Standards require a similar finding: “(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.” *See* PROSECUTION FUNCTION, *supra* note 63, at § 3-3.9(a).

68. *See* U.S. ATTORNEYS’ MANUAL, *supra* note 46, at § 9-27.000.

69. David Luban & Michael Millemann, Symposium, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 39, 61 (1995-1996) (highlighting the danger, pointed out by Kant, that “reducing judgment to rules or formulas” can simply cause a spiral of additional rules while also noting the necessity of such rules, as long as they retain some moral content: “a jurist’s conscience will function better when it is buttressed by legal authority”).

70. U. S. ATTORNEYS’ MANUAL, *supra* note 46, at § 9-27.230 cmt. 1-8.

71. Luban & Millemann, *supra* note 69, at 39.

weighty burden in *all* prosecutorial decisions, not just those involving sexual assault crimes. Such a maximization of fire power validly bookends the archetypal military commander's honed decision-making skills, and leadership responsibilities for discipline and mission success, with the military lawyer's equally important legal function of protecting the rights of victims, the accused, and the justice system. Placing such a decision-making team into an environment guided by a robust set of dispositional principles will enhance the justice component of military justice, and contribute to overall mission success.

