

## **Two For One: The Ethical Pursuit of Justice in the Military, And Battlefield Success, Through Joint Prosecutorial Decisions**

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*The following outlines a reasoned alternative to the current legislative proposals regarding the exercise of prosecutorial discretion in the military. The authors propose 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 military's comprehensive reliance upon a commander-centric organizational and managerial model. Furthermore, such joint prosecutorial decision-making must be complemented by a robust set of ethical guidelines, heretofore 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.*

### **I. Introduction**

The American public has recently heard passionate 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. 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. For example, there is increasing support for amending the UCMJ to remove the existing convening authority power to disapprove (and in effect overturn) a court-martial finding of guilt.<sup>1</sup> Other areas of emerging consensus include vesting the military judge with authority over issues such as witness production and discovery earlier in the criminal process (upon preferral of charges, as opposed to referral to trial), and requiring a written record from the convening authority explaining the rationale for exercising clemency with regard to an adjudged court-martial sentence.

In contrast, whether and when to divest today's commanders of their current 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

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<sup>1</sup> The authors support such a change to Article 60 of the UCMJ, as well as the recommendation to require written clemency decisions regarding adjudicated sentences. See 10 U.S.C. § 860 (2006). The authors also agree with proposals to bring the military judge into the procedural aspects of litigation at an earlier stage.

good order and discipline in the military unit, and therefore the commander who must have 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 these two binary options. What is curious, however, is why this is the case. The debate and its 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. Why can't the decision be shared by *both*? That is, all dispositional and prosecutorial decisions regarding sexual assault cases must be jointly made by *both* the commander and their lawyer? And 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?

## II. Proposal: Require All Prosecutorial Decisions To Be Made By Both Commanders and Lawyers

We propose such an approach as a reasoned alternative to the binary tack currently taken in the legislative proposals. Creating co-equal roles for the commander and his/her military lawyer 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. We base this proposal on our belief that the gravity of any decision to refer an allegation to trial by court-martial appropriately belongs to both the military commander and her lawyer.<sup>2</sup> Requiring prosecutorial decisions to be made jointly by commander-military lawyer teams preserves the commanders' central organizational leadership role in the military, both at the macro and micro levels. 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 lawyer to serve as a true counterweight to potential biases and improper commander impulses. Furthermore, we reject any proposal that limits this joint decision-making process to any one category of offenses, as the systemic issues that prompted today's concerns are not confined to sexual assault cases alone.

We believe that 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 military lawyer, as the individual responsible for ensuring that those impacted by allegations of criminal misconduct receive the legal process they are due, can be excluded from this process without jeopardizing this essential balance of interests.

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<sup>2</sup> 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 Rachel E. VanLandingham, *Acoustic Separation in Military Justice: Filling the Decision Rule Vacuum with Ethical Standards*, 11 OHIO ST. J. CRIM. L. (forthcoming 2014) (on file with authors), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2302765](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302765).

We therefore believe that this proposed joint decision-making process applies with equal force and validity to all allegations of military criminal misconduct, whether the crime is of an inherently military nature (such as absence without leave or failure to obey an order), or is a so-called “common law crime” (such as sexual assault, larceny, or battery). The commander and military legal adviser must operate as a team, in which every referral to court-martial requires mutual agreement. Where such agreement exists, it will enhance confidence in the propriety of the referral decision. When, in contrast, these essential players in the referral decision process disagree on disposition, we propose the case must then be forwarded to the next higher level of command. This superior commander would have no authority to direct any particular outcome. Instead, she would engage in an identical case review process with her military legal adviser, and, if they are in agreement that the charge should be referred to trial, the commander may so refer the case. If disagreement persists at this level, 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 The Judge Advocate General.

This 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>3</sup> This synergistic decision-making process will reap other benefits, 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 military lawyer’s 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.

### **III. The Fallacies of Military Lawyers As Exclusive Prosecutorial Decision-Makers: This Won’t Solve The Problem and Will Create New Ones** *(Such a Proposal Discounts the Organizational Role of Commanders, Fails to Capitalize on Synergistic Effects of Commander-Lawyer Decision-Making, and is Based on a Faulty Civilian Comparison)*

Senator Gillibrand’s current legislative proposal to completely shift referral (prosecutorial) authority from the commander to the military lawyer in a wide swath of cases is too extreme, and will inevitably diminish the value of a commander’s judgment and instincts in this decision-making process.<sup>4</sup> It will also remove the commander from a function that is indelibly connected to the establishment and maintenance of the effectiveness and readiness of the military unit for which she is responsible. This proposed amendment would eliminate the necessity that military lawyers, or judge advocates, engage in a careful interaction with commanders to decide what cases to refer to trial. This in itself will undermine the commander’s organizational role and erode the commander’s sense of responsibility for

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<sup>3</sup> 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.

<sup>4</sup> See Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-113s967is/pdf/BILLS-113s967is.pdf>.

good order and discipline, despite the fact that it is the commander who will remain legally, morally, and practically responsible for the same.

Proponents argue that inverting the commander/lawyer roles in the prosecutorial decision-making process in this way will increase the likelihood that those suspected of sexual violence will be brought to justice. They seem to 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 this arena – and that this supposed higher rate has a causal nexus to the attorney as prosecutor; (2) the military’s inappropriate handling of sexual assault cases is exclusively or primarily due to the commander as today’s prosecutorial decision-maker. We believe these assumptions are fundamentally flawed, and remain unsupported by empirical evidence.

There is little empirical evidence that, adjusting for all the variables, the U.S. civilian criminal justice system produces a greater percentage of prosecutions for sexual assault-type crimes than the military;<sup>5</sup> in both sectors such crimes remain under-reported and under-prosecuted.<sup>6</sup> This lack of data does not imply that the military justice system, and in particular the dispositional decision phase, does not need to be improved. It does, and comprehensively (that is, not just limited to sexual assault cases). But we reject the assumption that adopting a civilian-type process, with a lawyer as the decision-maker, will *ipso facto* produce such improvement. There is no empirical support for the proposition that formally removing the commander from their prosecutorial role, in and of itself, will improve reporting rates, or increase prosecutions when appropriate, or do anything to constructively address sexual assault in the

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<sup>5</sup> 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, available at <http://counterquo.org/reference-materials/sexual-violence/assets/files/Justice%20Gap%20paper%20Lonsway%20Archambault.pdf> (providing a masterful 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.”). *Id.* 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 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*, THE WEEKLY STANDARD, July 8, 2013, available at [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 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.

<sup>6</sup> *See* Philip Bulman, *Increasing Sexual Assault Prosecution Rates*, NIJ JOURNAL, no. 264, at 15, available at <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.”). *Id.* *See also* *Reporting Rates*, RAINN, available at <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited Sept. 19, 2013) (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., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, at 13 (Apr. 15, 2013), available at [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).

military. The authors believe that military prosecutorial decision-making – whether it remains with the commander, is instead transferred to military lawyers, or is shared by both – will continue to be impaired by the surprising lack of governing ethical guidelines and training regarding the disposition of crimes and lesser misconduct in the military. This vacuum has long hampered the handling of a variety of crimes in the military justice system, and will continue to impair such decision-making, regardless who is making it. That is, it is not simply who makes the decision to prosecute that matters, it is also how and why such decisions are reached.<sup>7</sup>

A lack of empirical justification for Senator Gillibrand’s proposal, and its lack of consideration of the military justice ethical decision-making venue in general, however, are not the only flaws in its foundation. In addition, the very 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, and they rely on their subordinates (as military members assigned to their unit are commonly referred to), 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 because, as it is said, “the enemy gets a vote.” This is the nature of the culture in which commanders are groomed in the military, 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.

Therefore the commander’s decision-making perspective itself, plus their organizational role regarding good order and discipline, supports retaining their vote in military prosecutorial decision-making, though modified by giving their lawyer an equal voice. We believe it is both highly probative and unsurprising that almost all experienced military lawyers believe that the commander must retain her role in this referral process; this consensus belief bolsters the credibility of our proposal. These military legal officers have actually experienced working with senior commanders entrusted with court-martial convening authority. And 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 command, and are inextricably linked to command, good order and discipline, and mission effectiveness.<sup>8</sup>

The commander must be retained in the referral decision process because, as stated previously, in the military the commander 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 must retain a key role in military justice in order to achieve the readiness and loyalty of subordinates so that the commander’s unit is adequately prepared for 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.

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<sup>7</sup> See VanLandingham, *supra* note 2, at 44 (detailing the development and incorporation of a robust set of prosecutorial guidelines for those making the prosecutorial decision in the military).

<sup>8</sup> See, e.g., JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 19, 20, 239 (2012) (providing background for 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).

Ultimately it is the commander, not their lawyer, who is 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 key role of the commander — on their good leadership.<sup>9</sup> U.S. military commanders are responsible not only for the daily conduct of their soldiers, but for the very lives of their subordinate military members. 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 other words, 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; they are legally required to care. Therefore, they have long exercised the unilateral authority to prosecute in the military.<sup>10</sup>

It is frequently argued in support of Senator Gillibrand’s proposal that there is no reason why military lawyers are any less capable of unilaterally exercising such decision-making authority than commanders. We disagree, and believe that in contrast, 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. Instead, while the various judge advocate corps may 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 judgments. As a result, we believe prosecutors are much more susceptible to risk aversion than their commanders. In the context of allegations of sexual violence – cases that often rely heavily on circumstantial evidence and assessments of victim and defendant credibility – acquittal avoidance is thus an undeniable influence on prosecutorial judgment. No prosecutor, civilian or military, likes hearing “not guilty” at the end of a trial. Although 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 than the commander.

How participants in the military criminal justice process judge professional success only bolsters this conclusion. Commanders do not judge their success based on court-martial win/loss statistics. On the contrary, their function is not to win or lose the case, but to ensure that meritorious allegations of criminal misconduct are referred to trial. Once that decision is made, it is the military lawyer, or judge advocate, that confronts the challenge of executing the mission. And, like any other subordinate within a command, the judge advocate will view success in doing so as the benchmark of professional achievement. No service member aspires to fail to achieve the objectives defined by her commander, and the military lawyer is no different. Thus, ensuring that the responsibility to decide to prosecute a case is not solely up to those tasked with executing that decision significantly immunizes prosecutorial judgment from the risk of acquittal avoidance. In contrast, vesting the military lawyer with the sole, exclusive authority for deciding which cases should be tried will inevitably increase the probability that difficult cases will be avoided.

We also note our strong conviction that unlike civilian prosecutors, military lawyers assigned to an installation rarely possess the same level of long-term understanding for the “community” they serve. In

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<sup>9</sup> 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.

<sup>10</sup> And that responsibility is not relieved by simply shifting prosecutorial decision-making to a military attorney. But 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.

the military, that “community” is first and foremost the unit. Commanders and JAGs 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 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 also represents a fundamental and extremely significant distinction between the military lawyer as prosecutor and their civilian counterpart (district attorney or U.S. Attorney), who remains part of the immediate community.<sup>11</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 her appreciation of the community needs and priorities in order to effectively contribute to the administration of justice in the military community.

#### **IV. Giving Military Lawyers An Equal Prosecutorial Vote Makes Sense**

While we reject Senator Gillibrand’s proposal, we also believe this debate offers an important opportunity to improve on the existing paradigm, and retaining the status quo will not produce that effect. 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 (although we believe a rarely manifested danger) of allowing a commander’s misunderstandings of these dimensions to trump their military lawyer’s advice. Instead, the decision to prosecute should be a joint one because it reaches across both legal and leadership dimensions. Leaving the system as it is currently structured allows commanders to overrule legal advice regarding inherently legal decisions. Realistically, a commander’s arbitrary motivations and misunderstandings of the goals of criminal prosecution, 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 made by both commander and lawyer, than they do by vesting the prosecutorial decision solely in one player or the other.

We certainly agree with Senator Gillibrand that the military lawyer must have an increased and formalized voice in the decision to prosecute. This decision obviously involves quintessential legal judgment, such as discerning facts and circumstances as evidence, weighing such evidence on the scales of justice, and measuring their import 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>12</sup> Lawyers are educated and trained to exercise such judgment, and their professional legal expertise must complement the commander’s strengths. These include the commander’s understanding of the unit, interest in establishing a bond of trust with

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<sup>11</sup> 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 they 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.

<sup>12</sup> See DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.001 (2010) (outlining the guidelines for achieving “the fair and effective administration of justice”).

subordinates, and courage to assume risk in pursuit of vital objectives. The two working together will help to ensure fairness, consistency, and appropriate balancing of the facts and interests.

Elevating the military lawyer to a joint position with the commander in convening courts-martial is 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 military lawyer'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>13</sup> However, the current system can and should be improved. Given the dramatically lower number of courts-martial since the last major modifications were made to the UCMJ, the greater number of military lawyers, the availability of instantaneous communication between commanders and their military lawyers if not in the same physical battle-space, and the ever-increasing professionalism of the All-Volunteer Force, it is time to enhance the role of the military lawyer 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 military lawyers, through collaborative dialogue, usually reach a consensus opinion regarding when and whom to prosecute. However, the rare instances in which commanders overrule their legal advisors, thereby potentially allowing injustice, must be prevented. Our proposal will strengthen the vital relationship between defining the mission (the referral decision) and executing the mission (the prosecution of the referred case). Commanders will retain much of their role in deciding which cases to refer to trial. The military lawyer, responsible for executing the mission by trying the case, will have an equal voice in this decision-making process, thereby enhancing the likelihood that legally meritorious – and only legally meritorious – cases are tried.

## **V. Comprehensive Reform**

Senator Levin's proposal hints at such an approach, but does not go far enough.<sup>14</sup> Sexual assault has the headlines today, but the underlying concerns that generated this debate (commanders engaging in arbitrary and unjust dispositional decisions) goes much deeper than simply one category of crime, as serious as that category may be. This is a systemic issue, and though one 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 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 be more susceptible to such arbitrariness.<sup>15</sup> The weighty decision to prosecute, regardless of the charge, should vest in both the commander and their military lawyer.

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<sup>13</sup> 10 U.S.C. § 834 (2006).

<sup>14</sup> See National Defense Authorization Act for Fiscal Year 2014, S. 1197, 113th Cong. § 552 (2013) (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), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-113s1197pcs/pdf/BILLS-113s1197pcs.pdf>.

<sup>15</sup> For example, offenses such as Article 86's failure to go and Article 92's failure to obey offense, 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.



To this end, we also share a visceral objection to Senator Gillibrand’s proposal to segregate military offenses into serious/non-serious categories (and to Senator Levin’s focus on only sexual assault crimes). 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. It is the level of court-martial (general, special, or summary) used to try offenders that distinguishes the most serious from all other crimes, not simply the offense itself. Such a forum choice allows the commander and the military legal adviser to consider much more than simply what provision of the penal code was violated, to include the detrimental impact of a seemingly minor offense of the readiness and discipline of her unit.<sup>16</sup> Furthermore, because officers should and are held to a higher standard, what might be viewed as a minor offense in a civilian jurisdiction is conclusively more serious when committed by an officer, perhaps requiring prosecution.<sup>17</sup> This officer-enlisted distinction 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 current legislative proposals.<sup>18</sup>

## **VI. Collateral Operational Effects: Diluting The Commander/Legal Adviser Relationship and The Risk to Operational Legitimacy**

In addition to the first-order negative consequences that we believe will result from divesting commanders of their current prosecutorial decision-making authority discussed above, we are also deeply concerned about what we predict will be an inevitable second-order consequence of such a change. Because the current model of exercising prosecutorial judgment necessitates close and constant coordination between a commander and their legal adviser – coordination we believe will be increased by our proposal – it provides the crucible for forging what is by any account an essential relationship of trust in the legal adviser. This relationship produces benefits far beyond issues of military justice, and significantly enhances the likelihood that the legal adviser will be incorporated into other 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

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<sup>16</sup> 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 DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.230 cmt. 2 (2010) (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).

<sup>17</sup> 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 a feeling 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. See VanLandingham, *supra* note 2, at 44-54 (discussing proposed ethical standards).

<sup>18</sup> See Military Justice Improvement Act of 2013, *supra* note 4, § 2 (creating a categorical bifurcation between so-called serious and non-serious crimes without consideration of contextual factors surrounding certain offenses); National Defense Authorization Act for Fiscal Year 2014, *supra* note 14, § 531 (focusing on sexual assault crimes to the exclusion of other crimes).

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, 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.’ The definition of legitimacy leaves no doubt about the significance of ensuring legally compliant operations:

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>19</sup>

The effective integration of law into military operations requires more, however, 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 military lawyer 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 judge advocate general corps’s leadership for the past 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. 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 as a model for maximizing the efficacy of legal support to operations. The U.S. Army Center for Law and Military Operations today includes within its staff military lawyers from several allied nations, and foreign military lawyers are a constant presence 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

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<sup>19</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at A-4 (11 Aug. 2011).

the effective, collaborative relationship between their commanders and lawyers regarding operational decisions. They also look to U.S. practice as a model to emulate.

This mission-critical relationship is not mandated by statute, nor do we believe such a mandate would ensure the vitality of this relationship. Instead, such a relationship is developed first and foremost through the close interaction of the military lawyer and the commander 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 that relationship. Military officers learn from their first junior commands to rely on the judgment of their servicing military lawyer 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 provided when needed.

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 (military lawyer) 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. We believe 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 they will not seek to provide input. But the degree of attention paid to these issues must naturally be more significant when it is the commander who is responsible for decisions than when the commander simply provides input on a legal matter entrusted to legal officers. In short, that precious commander/judge advocate interaction space will inevitably be constricted once such a change is implemented.

It is impossible to predict with certainty how this will impact the role of the judge advocate in relation to military operations. Nor do we intend to suggest that allies with a different system fail to effectively integrate law into operations. We note, however, that context matters, and none of our allies operate at the scale and geographic dispersion as do our armed forces. What we can say is, as noted above, the level of integration in the U.S. armed forces is a genuine model for emulation. The more sporadic the garrison interaction between the commander and the JAG becomes, the less effective this integration during operations will be.

Such a collateral effect of Senator Gillibrand's proposal – the dilution of the military lawyer's role in military operations – would be truly unfortunate. Years of effort in integrating the judge advocate into military operations would be compromised and potentially undermined. The risks associated with such a dilution extend to every aspect of military operations. To this end, we emphasize that the law of armed conflict is first and foremost a regulatory code, intended to *avert* violations before they ever occur. While disciplinary response to violations is an unfortunate necessity of virtually all operations, as an institution our goal has been and must remain ensuring such violations are the exception to a rule of overall compliance. This requires the complete and genuine integration of judge advocates into every phase of 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.

## VII. The Vital Need for Ethical Prosecutorial Standards

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 (RCM), and implementing service regulations.

The RCM themselves 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>20</sup> Currently buried in the Rules’ non-binding Discussion section are eleven unelaborated factors for commanders to consider in dispositional decisions.<sup>21</sup> These factors lack explanation, comment, context and clarity.<sup>22</sup> While these factors are appropriately based on the American Bar Association’s (ABA’s) Criminal Justice Standards: Prosecution Function,<sup>23</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. For example, the drafters excluded the ABA’s recommendation that the prosecutor should consider their own reasonable doubt as to the accused’s guilt. 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>24</sup> This, despite the commander exercising prosecutorial, and not judicial, authority during the critical pre-decisional, dispositional phase of military justice. Such illogical arbitrariness demands revision and refinement. Furthermore, while the military appellate courts weigh commanders’ referral decisions (decision to prosecute) 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.

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<sup>20</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306(b) (2012) [hereinafter MCM]. 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.” *Id.*

<sup>21</sup> MCM, *supra* note 20, R.C.M. 306(b) discussion.

<sup>22</sup> R.C.M 306(b) Discussion’s factor of “character and military service of the accused” should be deleted, as proposed by Senator McCaskill. MCM, *supra* note 20, R.C.M. 306(b) discussion. It should be replaced with something akin to the Department of Justice’s factor, “the person’s history with respect to criminal activity.” DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.230 (2010). An individual’s history of prior misconduct is relevant to a dispositional decision.

<sup>23</sup> See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(b) (3d ed. 1993).

<sup>24</sup> MCM, *supra* note 20, R.C.M. 306 analysis, at A21-21.

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>25</sup> Contrast this with the Department of Justice's (DOJ) formal "principles of federal prosecution" for U.S Attorneys, found in the United States Attorneys' Manual 9-27.000 (DOJ Manual).<sup>26</sup> These 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 maneuver as the nature of prosecution demands.<sup>27</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. 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>28</sup> This level of detailed explanation is repeated throughout this official guidance, and serves as a model for the development and incorporation of similar principles in the military justice system.

### VIII. Conclusion

Criminal prosecution in the civilian sector is exclusively the domain of the lawyer-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 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 staff judge advocates — and share this 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.

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<sup>25</sup> 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." See DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.220(a) (2010). 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 STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(a) (3d ed. 1993).

<sup>26</sup> See DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.000 (2010).

<sup>27</sup> David Lubman & Michael Millimann, *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").

<sup>28</sup> DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.230 cmt. (2010).