

ACOUSTIC SEPARATION IN MILITARY JUSTICE: FILLING THE DECISION RULE VACUUM WITH ETHICAL STANDARDS

*Rachel E. VanLandingham**

Commanders in the U.S. military justice system wield vast criminal prosecutorial authority, power largely unconstrained by formal standards, guiding principles, or training. While extensive regulatory guidance exists regarding most every other enterprise a military commander undertakes—from getting dressed to taking a hill—surprisingly little guides commanders as they decide which service members to prosecute for which crimes. Civilian federal prosecutors, in contrast, operate under a rubric of ethical standards, rules, and policy guidelines that at least channel, if not occasionally limit, their enormous criminal justice discretion. The absence of military professional guidelines, or standards of conduct, regarding command prosecutorial discretion contributes to the appearance of uneven treatment of sexual assault and other crimes in the military. This decisional vacuum does a grave disservice to commanders as they execute their disciplinary duties without clearly articulated decisional touchstones.

This Article critically examines the lack of formal guidance regarding commanders' exercise of their prosecutorial discretion. It first contextualizes the need for such guidance by highlighting the so-called acoustic separation typically prevalent in criminal justice systems. Such separation assumes the existence of both societal conduct rules governing behavior, and distinct decision rules for public officials enforcing the former. Since the requisite normative constraints of decision rules are largely unarticulated in the military justice system, the resultant warped acoustic separation allows for the appearance, if not the occasional reality, of arbitrary and inconsistent results. After contrasting the Manual for Courts-Martial's decisional rule lacuna with the various Department of Justice and American Bar Association guidelines, this Article develops a tailored set of hortatory rules for the military commander to use when making disciplinary decisions. Such hortatory standards of conduct dovetail with the U.S. military's culture of ethical professionalism, and can

* Visiting Assistant Professor of Law, Stetson University College of Law, Lt Col., USAF, (ret). While in the Air Force she served as a trial prosecuting attorney, a trial and appellate defense attorney, and as deputy department head, Department of Law, U.S. Air Force Academy. She wishes to thank Professors Ellen Podgor, Susan Rozelle, and Geoffrey Corn for their helpful insights, as well as Lt Col Todd Pennington, USAF, for his feedback. Alison Hightower is greatly appreciated for her research assistance.

help better educate and guide commanders' prosecutorial and disciplinary decisions, thus reinforcing the "justice" component of the military justice system.

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INTRODUCTION

A commander in the U.S. military justice system wields much authority.¹ Instead of a district attorney choosing which charges to file

¹ The optimal level of authority military commanders should wield, however, is beyond the scope of this Article. The value and necessity of the entire chain of command concept as *the* central organizing component of the U.S. military's structural DNA, and not simply of its military justice system, can and should also be critically examined. Given the cyclical resurgence of new attention to unethical, abusive military commanders, with concomitant lamentation regarding "toxic leadership" among senior ranks, serious thought should be given to whether today's U.S. military structure is the most optimal, and whether its undemocratic elements are still necessary to maintain operational effectiveness and success. *See, e.g.,* Dan Dahler, *Top General Calls for New Evaluations Amid Military Scandals*, CBS EVENING NEWS (Apr. 14, 2013, 8:44 PM), http://www.cbsnews.com/8301-18563_162-57579529/top-general-calls-for-new-evaluations-amid-many-military-scandals/.

against which individuals in his or her jurisdiction, the power to prosecute in the military resides with non-lawyer unit commanders.² He or she is given the independent authority to dispose of criminal charges in a variety of ways, including dismissal of accusations or the opposite, by convening a court-martial (criminal trial) to prosecute the individual.³ Commanders also possess wide-ranging authority to enter into binding plea bargains,⁴ as well the authority to choose the pool of jury members for those they decide to prosecute.⁵ Furthermore, these unit commanders are in a sense “mini-governors” regarding their pardon-like power to entirely, or in part, set aside findings of guilt as well as to lower or commute sentences, for any reason.⁶

These vast powers are largely unguided by formal direction, either in the form of regulations or policy guidelines. Commanders operate in a criminal law system that seems to assume that its statutory crimes, or “conduct rules” in Professor Meir Dan-Cohen’s vernacular, can be mechanistically applied to given situations without most of the normative restraints or “decision rules” that optimally apply to civilian prosecutors.⁷

² See 10 U.S.C. § 822 (2006). See also MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306, 401 (2012) [hereinafter MCM]. See generally CRIM. LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, CRIMINAL LAW DESKBOOK VOL I, at A1-2 (Winter 2011-2012) (describing the process of handling misconduct within the military); Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?*, 16 TUL. J. INT’L & COMP. L. 419, 429 (2007-2008) (describing commanders’ ability to dispose of criminal charges against a service member).

³ MCM, *supra* note 2, R.C.M. 306(c). Regarding special and general courts-martial, the same commander who convened, or ordered, the court-martial also chooses the service members who will sit as the jury, if the accused service member does not elect to be tried by judge alone. 10 U.S.C. § 825(c)1, (d)(2). See also Hansen, *supra* note 2, at 430 (noting that convening authorities choose panel members). Since commanders convene courts-martial, they are referred to as “convening authorities” in this role. 10 U.S.C. § 860.

⁴ See R.C.M. 705; see also *United States v. Callahan*, No. 200100696, 2003 CCA LEXIS 165, at n.3 (N-M. Ct. Crim. App. July 30, 2003) (“This Court gives deference to a CA’s decision on the appropriate disposition of charges or a decision regarding the appropriate limitations of punishment agreed to in a pretrial agreement as these decisions are also exercises of *prosecutorial* discretion.”) (emphasis added). See also *United States v. Bulla*, 58 M.J. 715 (C.G. Ct. Crim. App. 2003).

⁵ MCM, *supra* note 2, R.C.M. 705.

⁶ 10 U.S.C. § 860(c)(3). However, it is likely that the commander’s authority to overturn convictions will soon change. See generally Chris Carroll, *Hagel: Change UCMJ to Deny Commanders Ability to Overturn Verdicts*, STARS AND STRIPES (Apr. 8, 2013), <http://www.stripes.com/hagel-change-ucmj-to-deny-commanders-ability-to-overturn-verdicts-1.215629> (discussing proposed Congressional legislation to alter Article 60, thus removing the commander’s authority to set aside convictions in all but minor, military-related offenses).

⁷ Alternatively, the military criminal justice system assumes both that definitive

Contrasted with the optimal acoustic separation provided by decision rules working in tandem with conduct rules as outlined in Part I of this Article, Part II demonstrates that military commanders, as super-prosecutors and mini-governors, function in a virtual vacuum which 1) contains very little normative policy or ethical guidance governing decisions to prosecute, to enter into plea agreements, and to approve courts-martial findings, and 2) possesses few systemic checks and balances regarding dispositional decisions.⁸ Part III argues that while military lawyers often assist commanders in the exercise of the latter's prosecutorial discretion, such assistance does not equate to a set of decision rules as envisioned by Dan-Cohen. Instead, the system is one in which commanders have "near plenary"⁹ authority to criminally prosecute and discipline subordinates; the decision to prosecute, and at what level, is made by the commander and the commander alone, largely unguided by articulated normative constraints, that is, decision-rules.

While in practice commanders typically receive legal advice from military attorneys prior to disposing of criminal charges and instances of misconduct, commanders are not bound to follow such advice and are not even required to seek it in most instances.¹⁰ Furthermore, such legal advice

normative restraints exist, and that they are intuitively known and adhered to by commanders in the exercise of their prosecutorial role. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 627-31 (1984) (outlining two types of laws: conduct laws which provide instructor to general society regarding their behavior, and decision rules which speak to public officials such as judges and prosecutors on how to apply the conduct laws); *infra* Part I (outlining theoretical framework of conduct versus decision rules and the normative role decision rules can play in such a construct).

⁸ *See infra* Part II.B (describing extant checks and balances).

⁹ *See* Morris, *supra* note 10, at 4 ("The most distinctive procedural feature of the military justice system is that decisions on what to charge, whether to prosecute, and at what level to prosecute are made exclusively by commanders.). *See also* United States v. Smith, 33 C.M.R. 85, 89 (C.M.A. 1963) ("By law, the final responsibility for determining whether charges are to be referred for trial rests with the convening authority.").

¹⁰ *See* MCM, *supra* note 2, R.C.M. 406 (requiring specific advice from a judge advocate prior to a commander's referral of charges to a general court-martial); *Cf.* Hansen, *supra* note 2, at 429 ("Practically speaking, commanders are assisted by their legal advisors throughout this process, but at the end of the day, it is the commander alone who can decide the disposition of the case."). *But see* U.S. DEP'T OF AIR FORCE, INSTR. 36-6001, SEXUAL ASSAULT AND PREVENTION RESPONSE PROGRAM 30 (29 Sept. 2008) (requiring that commanders must receive advice from their staff judge advocate before disposing of sexual assault cases in the Air Force); S. COMM. ON ARMED SERVICES, SEXUAL ASSAULT IN THE MILITARY, 113d Cong., 1st Sess. (2013) (statement of Admiral Jonathan Greenert, U.S. Navy Chief of Nav. Ops. & Vadm Nanette M. Derenzi, U.S. Navy Judge Advocate Gen'l), *available at* http://www.armed-services.senate.gov/statemnt/2013/06_June/Greenert-Derenzi_06-04-13.pdf (describing new requirement in the U.S Navy stipulating that commanders must seek advice from their

itself is not currently guided by robust, standardized ethical rules outlining factors to consider when disposing of misconduct. Even if commanders' military lawyers *were* bound by particular ethical standards serving as decision rules regarding when to prosecute—which again, they largely are not, as this Article demonstrates¹¹—why should such rules bind only the lawyers, and not the commanders who are legally charged with actually making all the key military justice decisions? That is akin to imposing hygiene regulations on nurses in operating rooms, while concomitantly *not* applying those same life-saving rules to the surgeons actually performing the actual operations.¹² Unfortunately in the military justice realm, neither the nurses nor the surgeons—military lawyers and their commanders—are bound by transparent ethical standards governing the exercise of the commander's prosecutorial and disciplinary discretion.

This Article highlights that despite being a highly regulated, “made”¹³ legal order with touted procedural safeguards for the accused,¹⁴ the military justice system's¹⁵ governing statutes and executive guidance include

military lawyer regarding all sexual assault cases). *See generally* LAWRENCE J. MORRIS, *MILITARY JUSTICE: A GUIDE TO THE ISSUES*, 57-58 (2010) (describing the judge advocate role in the military justice system); Colonel Kenneth M. Theurer & James W. Russell III, *Why Military Justice Matters*, *THE REPORTER*, Summer 2010, at 10 (“As judge advocates, we are responsible for providing advice on disciplinary issues and administering justice under the UCMJ. Military justice is our core competency.”).

¹¹ *See infra* Part III (outlining the current ethical rules applicable to military lawyers, and highlighting their omission of specific dispositional elements).

¹² This is also analogous to imposing law of armed conflict principles on intelligence analysts and other support personnel, but not on the commander making the actual decision to employ force. However in this Article's regard, neither the commander nor their support personnel are subject to normative standards regarding the exercise of disciplinary discretion.

¹³ *See Note, Prosecutorial Power and The Legitimacy of the Military Justice System*, 123 *HARV. L. REV.* 937, 938-39 (2010) (discussing “made” versus “grown” criminal legal systems, characterizing the U.S. military justice system as the former because it was, for the most part, intentionally designed according to independent variables).

¹⁴ *See generally* MORRIS, *supra* note 10, at 31-32; Hansen, *supra* note 2, at 427-28 (describing systemic changes resulting from excessive commander authority over criminal justice during World War II).

¹⁵ *See, e.g.*, Major General Jack L. Rives & Major Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 *A.F. L. REV.* 213 (2002) (explaining that the military criminal law process is generally referred to as the military justice system). *See generally* R. Chuck Mason, *Military Justice: Courts-Martial, An Overview*, *CONG. RESEARCH SERV.* (Mar. 14, 2012), <http://www.fas.org/sgp/crs/natsec/R41739.pdf> (Grounded on the U.S. Constitution, the statutory, regulatory, and judicial pillars of this system include the Congressionally-enacted Uniform Code of Military Justice (UCMJ), which is codified in 10 U.S.C. §§ 801 – 941; the *Manual for Courts-Martial*, which is issued by the President and supplements the UCMJ with specific Executive Orders providing rules for courts-martial and rules of

surprisingly few compass points regarding commanders' initial disposition decisions. The military justice system's important fail-safes, such as the extensive procedural safeguards of the mandatory military appellate court system and the independent judiciary, resulted from concern about the almost two million service members court-martialed during World War II and the procedural gaps that allowed almost one in four military members to be prosecuted.¹⁶ But today's fear, at least as articulated by U.S. senators leading the charge to overhaul the military justice system in the wake of a so-called sexual assault crises, is at the opposite end of the World War II spectrum.¹⁷ Concerns now abound that misconduct that should be prosecuted is instead being ignored or inappropriately handled via lesser measures other than criminal prosecution.¹⁸

This fear reflects a radical shift in attention regarding the process of military justice. No longer must the system focus on protecting service-members from ramrod justice and overly aggressive commanders who routinely subject military members to trumped-up charges.¹⁹ Today's challenge is the inverse. Given that the process for courts-martial currently provides substantial protection against perverting procedural and substantive justice once a service member is formally charged, the focus must now shift to developing a credible mechanism for better managing the initial decision-making process involved *prior to charging*—a focus on the dynamics surrounding the initial disposition decision—to ensure that credible allegations of criminal misconduct are not ignored or mishandled.²⁰

evidence; and judicial opinions resulting from military appellate courts as well as the U.S. Supreme Court.).

¹⁶ Significant concern for the accused service member's rights in the context of inordinate commander authority has prompted significant procedural and systemic modifications to the UCMJ since World War II. The same level of attention has not been paid to the lack of prosecution for certain crimes, such as sexual assault, until recently. See Bob Egelko, *Victims say Military Condones Rape*, S. F. CHRON., (September 28, 2012, 9:32 PM), <http://www.sfgate.com/nation/article/Victims-say-military-condones-rape-3904221.php>. See also MORRIS, *supra* note 10, ch. 14 (overviewing major changes to military justice system since World War II).

¹⁷ An entire Article could and should be dedicated to the prevalence of sexual assault in the U.S. military; this Article does not serve that function. It instead focuses on a systemic failure that the author bears witness as contributing to the sexual assault crises.

¹⁸ See, e.g., Jeremy Herb, *Gillibrand: Some Can't Distinguish Between a 'Slap on the Ass and a Rape'*, THE HILL (June 4, 1013 1:10PM), <http://thehill.com/blogs/defcon-hill/policy-and-strategy/303355-gillibrand-some-commanders-cant-distinguish-between-slap-on-the-ass-and-a-rape> (highlighting Congressional concern regarding insufficient command action).

¹⁹ See generally MORRIS, *supra* note 10, ch. 7 (discussing military justice practices during World War II and the resultant changes to the UCMJ).

²⁰ See Donna Cassata & Richard Lardner, *Sexual Assaults Force Changes to Military Justice*, MILITARY.COM NEWS (June 4, 2013), <http://www.military.com/daily->

This Article takes up that challenge. It critically examines the lack of normative guidance currently cabining commander military justice decision-making by contrasting it with the system of decision rules and standards of conduct applicable to civilian prosecutors in the federal U.S. criminal justice systems.²¹ While the civilian system is far from perfect, this Article argues that hortatory decision rules for commanders, in the form of an ethical code of conduct inspired by the civilian sector, would function more effectively in the military's rule-following culture, and facilitate the attainment of more consistently-just decisions. Part I grounds this analysis in the theoretical construct of conduct and decision rules, highlighting the need for improved decision making, and therefore acoustic separation, by way of formalized decision rules and training. Part II outlines the military justice system's extant front-end prosecutorial process, focusing on the role current policy guidance and systemic checks play as quasi-decision rules in this process, while noting the inhibitory role played by the doctrine of unlawful command influence. Part III discusses the types of decision rules applicable to civilian prosecutors, in particular their professional standards of conduct. Part IV synthesizes the military justice system's existing decision rules with those applicable to civilian prosecutors to propose the outlines of a code of military justice conduct designed to assist commanders in the responsible and just execution of their prosecutorial duties.²² This Article concludes that commanders, and the military members they lead, are currently unfairly served by the military justice system's current lack of normative constraints, and that a professional commander code of conduct for military justice can help right the current imbalance.

I. ACOUSTIC SEPARATION AND THE IMPORTANCE OF DECISION RULES

The military justice system's lack of guidance regarding prosecutorial

news/2013/06/04/sexual-assaults-force-changes-to-military-justice.html (discussing the over 26,000 sexual assault cases). See also Editorial Board, *Military Brass Wins on Sexual Assault Bill*, THE WASHINGTON POST (June 15, 2013), available at http://www.washingtonpost.com/opinions/congress-kills-reforms-to-prevent-sexual-assault-in-the-military/2013/06/15/302457a0-d46e-11e2-a73e-826d299ff459_story.html (discussing Congressional attempts to remove prosecutorial discretion from military commanders).

²¹ See, e.g., DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.000 (2010).

²² This Article's proposed standards of conduct, as hortatory decision rules for commanders, are provided as non-exhaustive exemplars in Part IV; a future article dedicated to the exact contours of such rules, with additional detail, is necessary (and envisioned) given the discussion warranted by such an endeavor.

decisions²³ is incongruous with the oft-cited logic that military commanders, trusted to make life-and-death decisions regarding subordinate service members and others during combat, should naturally be entrusted with the (impliedly lesser) responsibility of making prosecutorial decisions.²⁴ This rationale is illogical because in the commander's combat arena, he or she is governed by a huge array of laws, regulations, and standards, including the entire corpus of the law of armed conflict. These rules contain specific principles that help prioritize values during war: the law of armed conflict prohibits military necessity from unilaterally trumping humanity, for example.²⁵ Such overarching normative constraints are incorporated into various tactical-level orders and rules, such as rules of engagement, which represent strategic and tactical policy decisions of superiors.²⁶ In other words, a commander is not simply left to his or her own personal devices in determining how best to secure a village in Afghanistan, or to provide air cover to civilians in Libya, or to conduct a raid against Osama bin Laden in Abbottabad. While these missions reflect a vast amount of discretion entrusted to commanders regarding exact mission execution, such discretion is predicated upon the inculcation of a set of prioritized norms – norms transmitted and trained via decisional rules.²⁷

The situation is markedly different regarding commanders' exercise of

²³ Prosecutorial decisions as used in this Article refer primarily to those regarding the disposition of misconduct, those regarding plea agreements, and those regarding the grant of testimonial immunity.

²⁴ See, e.g., Cassata & Lardner, *supra* note 20, at ¶ 14 (discussing context of Sen. Inhofe's comment that, "These commanders have to make decisions to send our brave troops into battle. How ludicrous is it that we would say to our commanders, 'You've got to make a decision to send one of our kids into battle where they may end up losing their life, but you can't participate in the justice system of the troops.' It doesn't make any sense at all.").

²⁵ There are four fundamental laws of armed conflict principles: distinction, military necessity, proportionality, and humanity. See, e.g., INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 75 (2011).

²⁶ See generally *id.* (outlining the constraining law of armed conflict, rules of engagement, and other applicable norms governing combat operations). Critically, commanders undergo extensive education and training on the rules applicable to combat.

²⁷ Commanders also spend their entire careers training to execute such martial discretion, through experiential learning modules such as those provided at the National Training Center, Fort Irwin, California or during Red Flag exercises conducted at Nellis Air Force Base, Nevada. Such military training scenarios can be quite realistic, forcing commanders to practice decision-making in particular situations. See, e.g., Field Review, *In the Box Tour: Battles in Fake Iraq*, ROADSIDEAMERICA.COM (2010), <http://www.roadsideamerica.com/story/21564> (describing realistic Army training conducted at Ft. Irwin, CA). See also Pamela E. Walk, *Fort Irwin Training Center Villages Re-create Feel of Iraq*, SAVANNAH MORNING NEWS (Aug. 19, 2009) (discussing Iraqi village established in California for Army training).

their prosecutorial prerogative. Put another way, loosely using Professor Meir Dan-Cohen's powerful paradigm of Benthamite conduct and decision rules, the military justice system fails to provide sufficient decision rules with which to guide commanders in their application of the Uniform Code of Military Justice's list of criminal conduct rules.²⁸ In the paradigmatic criminal law system, both conduct rules—those that act on the general public to guide behavior, such as the statute prohibiting murder—and decision rules—those directed at public officials regarding how to enforce conduct rules, such as mandatory minimums in sentencing—operate in a complex state of interdependence.²⁹ This interdependence depends, in part, on what Dan-Cohen calls acoustic separation, a naturally occurring situation in which decision rules are not necessarily always known or fully understood by the public.³⁰

This theoretical as well as practical sense of separation is not a negative, if appropriately balanced, because the necessary level of discretion decision-makers require³¹ does not lend itself to easily-applied, bright-line rules, as opposed to simple conduct rules.³² In fact, to assist decision-makers such as prosecutors, or commanders when faced with misconduct in their unit, in conducting an ex post assessment of the offender's blameworthiness,³³ decision rules "frequently must be complex, based on subjective criteria, and expressed in relatively vague and judgmental standards."³⁴

²⁸ Cf. Dan-Cohen, *supra* note 7, at 627 (outlining the two primary reductionist conflations of decision and conduct rules, rules originally based on Jeremy Bentham's categorization of same).

²⁹ *Id.*

³⁰ See generally Dan-Cohen, *supra* note 7, at 628 (articulating the concept of acoustic separation). Dan-Cohen recognizes that a certain level of acoustic separation naturally occurs in society, without intentional "selective transmission" of rules. *Id.* For example, it is not unreasonable to say that a majority of service members court-martialed are ignorant of the current decision rules, such as the one requiring staff judge advocate pre-trial advice before referral to a general court-martial, which is described *infra* Part II.B.

³¹ See generally Ellen S. Podgor, *The Role of the Prosecution and Defense Function Standards: Stagnant or Progressive?*, 62 HASTINGS L.J. 1159 (2011) (outlining the need for prosecutorial discretion in criminal justice systems).

³² See Paul Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 759 (1990) ("Because the decisionmakers applying the principles of adjudication after the violation can be specially trained, allowed time for thoughtful application, and provided access to research and counsel, there is less need for simplicity and easy application."). Decision rules stand in contrast to conduct rules, which should be clearly understood to appropriately shape behavior of the general public. See *id.* at 759-60.

³³ *Id.* at 731 ("The principles of adjudication function gives decisionmakers (i.e., prosecutors, juries and judges) guidance in assessing ex post the blameworthiness of an individual's violation of the rules.").

³⁴ *Id.* at 759. For example, convening authorities are supposed to be "unbiased and

While decision rules are complex, subjective, and often vague, they must actually exist for acoustic separation to work – that is, they are necessary for the just functioning of a criminal justice system.³⁵ In the absence of decision rules, such as this Article suggests is largely the case in the military justice system, commanders as prosecutorial decision-makers may simply be considered to be mechanistically applying conduct rules. Such application assumes that commanders act in a “normatively unguided or uncontrolled” manner - that is, that they make arbitrary, ad hoc decisions, unguided by particular considerations, when faced with misconduct disposition decisions.³⁶ Alternatively, commanders are guided by personal and cultural values when making prosecutorial decisions, with a wide variance in these norms among individual commanders because of, in part, the lack of intentional articulation of cultural values through formal decision rules.

So whether decision rules to guide commanders’ military justice decisions are so minimal to be non-existent, or they exist but only in a highly abstract and inconsistent manner based on military culture and personal values, or both – the same result potentially ensues: arbitrary enforcement, which leaves “an inescapable residuum of injustice in the hands even of the best-intentioned officers.”³⁷ Therefore the primary purpose of this Article is to highlight what little formal decision rules are already present in the military justice system,³⁸ and to contrast those with

impartial,” subjective terms in and of themselves. See *United States v. Allen*, 31 M.J. 572, 584 (N.M.C.M.R. 1990) (“The principle that an accused is entitled to have a convening authority who is unbiased and impartial is violated if the convening authority abrogates his responsibility in carrying out this neutral role had been a longstanding one.”).

³⁵ What level of selective transmission is necessary (of the decision rules to the society in question) is beyond the scope of this Article.

³⁶ See Dan-Cohen, *supra* note 7, at 628 (describing the realist’s perspective which only acknowledges the existence of conduct rules).

³⁷ See Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 429 (1958) (“A selection for prosecution among equally guilty violators entails not only inequality, but the exercise, necessarily, of an unguided and, hence, unprincipled discretion.”). *Id.* This Article does not intend to imply that the current decision rules applicable to civilian prosecutors has cured the civilian criminal justice system of its residuum of injustice.

³⁸ A detailed discussion of exactly which *informal* decision rules, or normative constraints, act on military commanders in their prosecutorial roles is outside the scope of this Article. However, the author notes one example, the oft-noted phenomenon of “different spansks for different ranks.” This refers to high-ranking officers such as General William “Kip” Ward receiving disproportionately light discipline for having committed fraud against the government through over \$80,000 of unauthorized spending; his reduction to three-star general and fine as punishment stands in stark contrast to a hypothetical non-commissioned officer, who typically would have been criminally prosecuted for similar conduct – hence representing the more lenient conduct high-ranking officers often seem to

the standards of conduct and ethical guidelines utilized in the civilian prosecutorial sector in order to develop decisional touchstones for commanders.³⁹

The term “decision rules” in this analysis is used to refer both to formal rules guiding decision-makers’ disciplinary discretion, such as the rule requiring probable cause for prosecution, as well as to more general guiding principles, or norms, which inform prosecutorial decisions.⁴⁰ Decision rules, in one sense, operationalize morals.⁴¹ This Article’s recommended code of conduct includes decision rules which attempt to legitimate certain morals currently already considered either personal to the commander or as belonging to the military ethos, and more procedural type rules which work to support the value of fairness – while attempting to steer clear of Kant’s warning against an “infinite regress of rules.”⁴²

It is important to note that Kant’s point cannot be overstated. Prosecutorial discretion cannot be reduced to a formula, no more than commander discretion regarding how to defend a city can be reduced to a strict algorithm of specific factors. However, a set of common norms can and should contribute to, and limit, the proper exercise of such contextual discretion. This has been noted by the Supreme Court in various contexts which call for a totality of circumstances-type approach to decision making, and is a foundational premise for the law of armed conflict’s four general principles regarding the use of armed force.⁴³ Both disparate areas of the

receive. See Lolita C. Baldor, *William Ward, Four Star General, Demoted For Lavish Spending, Ordered To Repay \$82,000*, HUFFINGTON POST (Nov. 13, 2012 10:56PM), http://www.huffingtonpost.com/2012/11/13/william-ward_n_2122379.html#slide=more262485.

³⁹ But see Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275 (2007-2008) (critiquing the efficacy of legal ethical rules and citing their failure as a restraint on prosecutorial misconduct).

⁴⁰ A norm is a “principle” that “establishes a standard of conduct.” See David A.J. Richards, *Jurisprudence at the Crossroads: Steering a Course Between Positivism and Natural Law*, 97 HARV. L. REV. 1214, 1218 (1984) (reviewing GEORGE C. CHRISTIE, *LAW, NORMS AND AUTHORITY* (1982)). Norms are “reference points’ that are in fact accepted by those with the right to make authoritative pronouncements.” *Id.* at 1220.

⁴¹ Cf. David Luban & Michael Millimann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 50 (1995-1996) (arguing that today’s attorney ethical codes have become “demoralized” and that in the Hart versus Fuller debate, Fuller should win).

⁴² *Id.* at 39, 61 (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”). *Id.*

⁴³ See, e.g., *Spano v. New York*, 360 U.S. 315 (1959) (providing a totality test for assessing voluntariness of confessions). See also *Manson v. Braithwaite*, 432 U.S. 98 (1977) (outlining a totality test for assessing voluntariness of out of court identifications).

law recognize the existence of identifiable values and prioritization rules that govern the decision process in various situations. This Article now turns to discover just which values and rules currently frame military commanders' decision making regarding the disposition of misconduct.

II. U.S. MILITARY JUSTICE SYSTEM: PROSECUTORIAL PROCESS

A. Commanders' Monarchical Military Justice Role

As recognized since ancient times,⁴⁴ organized armed forces require the element of discipline, or obedience to orders, to be successful.⁴⁵ Maintenance of that essential discipline is the primary goal and hallmark of the military justice system.⁴⁶ The preamble to the *Manual for Courts-Martial (MCM)*⁴⁷ outlines that, “[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”⁴⁸ This need to maintain discipline within the military via the

⁴⁴ See Michael Gibson, *Canada's Military Justice System*, CAN. MIL. J., Spring 2012, at 62. See also RICHARD A. GABRIEL & KAREN S. METZ, A SHORT HISTORY OF WAR: THE EVOLUTION OF WARFARE AND WEAPONS (1992), available at <http://www.au.af.mil/au/awc/awcgate/gabrmetz/gabr0010.htm> (discussing the need for discipline in armies such as Roman Legion or Greeks in “Training,” Chapter 3 - The Military Revolution).

⁴⁵ See Hansen, *supra* note 2, at 423 (assessing militaries as organizations which require commanders' ability to impose punishment in order to maintain discipline due to fact that soldiers may be ordered to sacrifice their lives to accomplish a mission). See also U. S. DEP'T OF DEF., COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER, AND DISCIPLINE IN THE ARMY, *Report to the Honorable Wilber M. Brucker, Secretary of the Army* (18 Jan. 1960) (defining discipline as “state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed”).

⁴⁶ See Hansen, *supra* note 2, at 423 (“Maintenance of discipline is a hallmark of military justice . . .”). See also Major General Thomas J. Fiscus, *Forward*, 52 A.F. L. REV. v (2002) (“While we provide justice in individual cases, our overall focus is on ensuring good order and discipline in the force.”); Lieutenant General Richard C. Harding, *A Revival in Military Justice: An Introduction by The Judge Advocate General*, THE REPORTER, Summer 2010, at 4, 5 (describing the interplay of military justice and discipline).

⁴⁷ MCM, *supra* note 2, at 1. (The 2012 MCM incorporates Executive Orders providing rules for “all amendments to the Rules for Courts-Martial, Military Rules of Evidence (Mil. R. Evid.), and Punitive Articles made by the President in Executive Orders (EO) from 1984 to present, and specifically including EO 13468 (24 July 2008); EO 13552 (31 August 2010); and EO 13593 (13 December 2011.”). *Id.*; *Id.* at A25-1. This edition also contains amendments to the UCMJ made by the National Defense Authorization Acts for Fiscal Years 2009 through 2012. *Id.* at 1.

⁴⁸ MCM, *supra* note 2, pt. I, ¶ 3. Additional reasons traditionally given for the

imposition of criminal and other punishment has also been long recognized by the U.S. Supreme Court: “The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.”⁴⁹

This concept of “discipline as the soul of an Army”⁵⁰ has traditionally been linked to the ability of a commander to punish his or her troops for disobedience. The construct of the commander as prosecutor in the current U.S. military justice system derives from the belief that a military commander must possess the authority to hold the members of their unit criminally accountable in order to maintain good order and discipline. The ability to prosecute ostensibly acts as a guarantee that the commander can successfully exercise their command authority to order these same members into dangerous situations, perhaps even to their deaths.⁵¹ That is, a commander’s orders must be obeyed because U.S. national security depends on it, and that obedience is fundamentally secured by the commander’s ability to discipline the members of their unit.⁵²

Because of the assumption⁵³ that commanders must be able to

maintenance of a separate criminal system for the U.S. military include, “1. The worldwide deployment of military personnel; 2. The need for instant mobility of personnel; 3. The need for speed trial to avoid loss of witnesses due to combat effects and needs; 4. The peculiar nature of military life, with the attendant stress of combat or preparation for combat; and 5. The need for disciplined personnel.” CRIM. LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, CRIMINAL LAW DESKBOOK VOL I, at A-1 (Winter 2011-2012) (quoting FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE V (3d ed. 2007)).

⁴⁹ Parker v. Levy, 417 U.S. 733, 758 (1974). See also *id.* at 743-44 (quoting United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955) and *In re* Grimley, 137 U.S. 147, 153 (1890) “An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.”).

⁵⁰ Letter from George Washington to the Captains of the Virginia Regiments (July 29, 1759), available at <http://www.docstoc.com/docs/3036008/Famous-Quotes-by-George-Washington>. One will rarely find an article or essay on military justice that lacks this favored quote.

⁵¹ See, e.g., MORRIS, *supra* note 10, at 152.

⁵² But see Major Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001-2009*, ARMY LAW., Sept. 2010, at 12 (chronicling deployed U.S. military commanders successfully ordering their subordinates into dangerous combat situations without the concomitant legal authority to initiate court-martial proceedings against them).

⁵³ This assumption should be critically examined, especially given the experience of other successful Western militaries, such as the Israeli Defense Forces, which do not vest prosecutorial authority in their commanders but rather place it in their uniformed military attorneys. However, that examination is beyond the scope of this Article. See generally Menachem Finkelstein & Yifat Tomer, *The Israeli Military Legal System—Overview of the*

administratively and criminally discipline their subordinates in order to ensure obedience to orders, the U.S. military justice system originally gave commanders almost plenary authority over cases of misconduct. However, the system has evolved to interject a substantial role for lawyers in this process, although commanders definitively continue to serve in the leading roles, including that of deciding how to handle service member misconduct.⁵⁴ Commanders possess the authority to respond to misconduct with a range of responses, up to and including the power to decide to prosecute criminal charges.⁵⁵ They possess the responsibility to investigate allegations of misconduct as well as the authority to dispose of them along a broad continuum, ranging from taking no action at all to prosecuting the charges in a court-martial.⁵⁶ In addition to the option of criminal prosecution, commanders in all of the services also possess non-criminal disciplinary tools with which to handle service member misconduct.⁵⁷ Typically referred to as administrative actions, such responses include, for example, letters of reprimand, demotions, extra training, and promotion withholdings.⁵⁸

Furthermore, commanders possess nonjudicial punishment authority, as provided in Article 15, Uniform Code of Military Justice (UCMJ); this

Current Situation and a Glimpse into the Future, 52 A.F. L. REV. 137 (2002).

⁵⁴ See CRIM. LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, CRIMINAL LAW DESKBOOK VOL I, at A-1 (Winter 2011-2012) ("Given the need for discipline in the military, military justice is under the overall control of the commander."). See also James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 186 (2002) ("The maintenance of good order and discipline is an absolutely essential *function of command*.").

⁵⁵ See THE MILITARY COMMANDER AND THE LAW, THE JUDGE ADVOCATE GEN.'S SCH., U.S. AIR FORCE (11th ed. 2012), at 116 ("[C]ommanders always have *jurisdiction to perform administrative actions* and can hold members accountable for wrongdoing by using a variety of adverse administrative actions such as letters of counseling, admonishment, reprimand, etc.). See also MCM, *supra* note 2, R.C.M. 306(c) (listing how offenses may be disposed of).

⁵⁶ MCM, *supra* note 2, R.C.M. 303-306.

⁵⁷ See generally U.S. DEP'T OF AIR FORCE, INSTR. 36-2907 UNFAVORABLE INFORMATION FILE (UIF) PROGRAM (17 June 2005); U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-6(a) (18 Mar. 2008) [hereinafter AR 600-20]; U.S. DEP'T OF NAVY, MANUAL OF THE JUDGE ADVOCATE GENERAL, JAGMAN 0101a(1) (26 June 2012) (describing administrative disciplinary tools).

⁵⁸ See MCM, *supra* note 2, R.C.M. 306(c)(2) (listing administrative corrective measures available to commanders). See, e.g., U.S. DEP'T OF AIR FORCE, INSTR. 36-2907, UNFAVORABLE INFORMATION FILE (UIF) PROGRAM 29 (17 June 2005) (providing guidance on administrative reprimands, counselings and admonitions within the Air Force). See generally CRIM. LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, CRIMINAL LAW DESKBOOK VOL I, at A-1 (Winter 2011-2012) (delineating some adverse administrative actions).

process allows the commander to serve as the judge, jury and executioner.⁵⁹ An Article 15, or nonjudicial punishment (NJP), allows the commander to punish misconduct by members of his or her unit via forfeitures, punitive demotions, and other measures.⁶⁰ While the recipient is provided with a statutory right to refuse nonjudicial punishment offered by the commander, doing so may result in the same commander initiating criminal prosecution for the offense.⁶¹ A service member by refusing an Article 15, therefore, risks a potential criminal conviction, whereby accepting Article 15 punishment avoids a potential court-martial.⁶² Therefore, most nonjudicial punishment offers are accepted by military members.⁶³

As provided in the Rules for Court-Martial (RCM),⁶⁴ which are military procedural rules promulgated by the president, military criminal prosecution of specific misconduct formally consists of preferral and referral of charges.⁶⁵ The immediate commander of the suspected service member typically decides how to initially dispose of the alleged offense.⁶⁶ However,

⁵⁹ See 10 U.S.C. § 815(b) (2006). See also MCM *supra* note 2, R.C.M. 306(c)(3) (highlighting commander's option to dispose of charges via non-judicial punishment). See generally Hansen, *supra* note 2, at 429 (describing commander's role as "the sole adjudicator of charges brought by the commander against the service member.").

⁶⁰ 10 U.S.C. § 815(b)(1).

⁶¹ The military's Article 15 process of an offer and acceptance of administrative punishment for misconduct, in lieu of criminal court-martial, seems to involve similar dynamics as those at play in civilian plea-bargaining, though such an analysis is outside the scope of this Article. See generally Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, GA. ST. U. L. REV., Winter 2011, at 239, 246-50 (emphasizing the "administrative theory" linking the rise of plea bargains to the enhanced power of the prosecutor).

⁶² While an Article 15 does not legally foreclose a superior commander from pursuing court-martial charges for the same offense(s), it is very rare for someone to be court-martialed for something for which they already received Article 15 punishment. See *United States v. McKeel*, 63 M.J. 81 (C.A.A.F. 2006); *United States v. Bracey*, 56 M.J. 387 (C.A.A.F. 2002); *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989).

⁶³ See, e.g., MORRIS, *supra* note 10, at 155 ("In practice, the vast majority of soldiers offered NJP decide to accept this mechanism."). See also Patrick McLain, *Nonjudicial Punishment: Service Cultural Divides in Military Justice*, COMMUNITY WAR VETERANS (April 1, 2011), available at http://www.communitywarvets.org/article8_412011.htm (describing high rate of Article 15, NJP acceptance rates).

⁶⁴ 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; 10 U.S.C. §§ 818, 836 (2006); Exec. Order No. 13,643, 78 Fed. Reg. 29559 (May 15, 2013).

⁶⁵ See MCM, *supra* note 2, R.C.M. 307, 401, 403, 404, 407, 601.

⁶⁶ See MCM, *supra* note 2, R.C.M. 306(a) ("Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense."). See also THE MILITARY COMMANDER AND THE LAW, THE JUDGE ADVOCATE GEN.'S SCH., U.S. AIR FORCE (11th ed. 2012), at 171

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.⁶⁷ The preferral oath must be administered “before a commissioned officer of the armed forces authorized to administer oaths,”⁶⁸ which is limited to judge advocates, adjutants, and naval and coast guard commanding officers.⁶⁹

The limitation as to who can administer the oath is designed, according to the analysis accompanying the president’s RCM, to help ensure “accountability for bringing allegations,” similar to Federal Rules of Criminal Procedure 7(c)(1)’s requirement that an “attorney for the government” sign all indictments or informations.⁷⁰ However, the military’s accountability mechanism (limiting who can administer the oath to select commissioned officers, not just military attorneys) seems an altogether different animal than the federal system’s requirement that an attorney actually sign the charges.⁷¹

The primary step in initiating an actual trial by court-martial involves the referral of charges, which essentially initiates the formal criminal adversarial process; referral power rests exclusively with particular commanders. “Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial[,]”⁷² and it can only be accomplished by a commander with delegated convening authority; such commanders are therefore referred to as convening authorities when exercising this role.⁷³ When deciding to refer charges,⁷⁴ commanders are

(“By Air Force custom, the accused’s immediate commander ordinarily prefers the charge.”).

⁶⁷ MCM, *supra* note 2, R.C.M. 307(a), (b)(2).

⁶⁸ MCM, *supra* note 2, R.C.M. 307(b)(1).

⁶⁹ See 10 U.S.C. § 936 (2006) (listing who is authorized to administer oaths).

⁷⁰ See MCM, *supra* note 2, R.C.M. 307 analysis, at A21-22 (quoting from the Federal Rules for Criminal Procedure).

⁷¹ Stipulating that only certain officers can administer an oath seems a negligible accountability mechanism indeed, given that the perfunctory task of administering the oath does not include any authority to direct or modify the accusations. Furthermore, the requirement that the accuser swear that they believe to the best of their knowledge that the charges are true is not much of a safeguard against frivolous or malicious charges, nor is it a means to ensure warranted charges are indeed brought. The non-attorney accuser is not required to possess, nor do they, any type of legal or other training as to the charges, nor as to alternative methods for their disposition. Nor are they bound by any formal standards of conduct, which require that charges not be based on only permissible factors.

⁷² MCM, *supra* note 2, R.C.M. 601(a).

⁷³ See MORRIS, *supra* note 10, at 41 (highlighting that Army and Air Force colonels and Navy commanders typically act as special court-martial convening authorities, whereas general court-martial convening authorities are typically two-star, or above, generals or admirals). See generally Hansen, *supra* note 2; Lindsay Nicole Alleman, Note, *Who Is In*

bound by no legally required standard besides that of probable cause,⁷⁵ despite the fact that the standard for conviction is beyond a reasonable doubt.⁷⁶

B. Decision Rules Regarding Military Prosecutorial Discretion

1. Policy Guidance Regarding Exercise of Discretion

There is relatively little formal, binding guidance to commanders regarding which disciplinary tool, including criminal prosecution, to use in response to misconduct. One decision rule can be found in RCM 306, *Initial Disposition*,⁷⁷ which gives each commander the “discretion to dispose of offenses by members of that command.”⁷⁸ In a subsection expressly labeled as policy, it provides that “[a]llegations of offenses should

Charge, And Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems, 16 DUKE J. COMP. & INT’L L. 169 (2006).

⁷⁴ Typically, a unit commander prefers charges (and thereby acts as the accuser) and the superior commander with court-martial convening authority convenes such a court. See THE MILITARY COMMANDER AND THE LAW, THE JUDGE ADVOCATE GEN.’S SCH., U.S. AIR FORCE (11th ed. 2012), at 154 (“By Air Force custom, the accused’s immediate commander ordinarily prefers the charge.”). A special court-martial is one of limited punishment; it is only authorized to punishments of no more than one-year confinement and a bad-conduct discharge for enlisted service members; it cannot dismiss an officer from their military service. See MCM, *supra* note 2, R.C.M. 201(f)(2).

⁷⁵ See MCM, *supra* note 2, R.C.M. 601(d)(1) (outlining the sole requirement for the basis for referral of charges to a court-martial: “If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it.”). This standard is known as one of probable cause. MCM, *supra* note 2, R.C.M. 406(b) discussion.

⁷⁶ In fact, Air Force staff judge advocates (SJAs) are directed, by very senior Air Force Judge Advocate leadership, during their formal SJA course that they should “not pass on prosecution merely because there’s a low chance at conviction.” See Interview with unnamed Air Force official (July 2, 2013) (notes on file with author). This admonition reflects a debate in the civilian sector regarding the level of evidence needed to pursue prosecution. See, e.g., Davis, *supra* note 39, at 284-85 (arguing that probable cause is an inappropriately-low standard for prosecution and encourages abuse, and urging implementation of a standard closer to beyond reasonable doubt).

⁷⁷ MCM, *supra* note 2, R.C.M. 306. The discussion to subsection (b) of RCM 401, titled *Forwarding and disposition of charges in general*, also directs commanders to RCM 306 when determining disposition of actual charges received. See MCM, *supra* note 2, R.C.M. 401(b) discussion.

⁷⁸ MCM, *supra* note 2, R.C.M. 306(a). It further provides that “Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense.” *Id.* This disposition decision follows a required preliminary investigation. See MCM, *supra* note 2, R.C.M. 303.

be disposed of in a timely manner at the lowest appropriate level of disposition listed in subsection (c) of this rule.”⁷⁹ Subsection (c) then lists the allowable levels of disposition, starting with the option of no action.⁸⁰ The other disposition levels include administrative measures, nonjudicial punishment under Article 15, forwarding the matter to another commander, and pursuing criminal charges.⁸¹

This terse precatory guidance, of timeliness and a preference for the lowest “appropriate” disposition, is legally binding on a commander when faced with how to handle misconduct by a subordinate, given that the RCM are promulgated by Executive Order.⁸² While the rules themselves do not explain what constitutes “appropriate” disposition, the non-binding discussion paragraphs of RCM 306 provide some clarification. The Discussion sections of the *MCM* (Discussion), written by the Department of Defense to supplement both the Executive Order requirements and the code, are not law, although are considered secondary authority.⁸³ The RCM 306 Discussion includes the following non-binding advice regarding the commander’s disposition decision:

Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused, the views of the victim as to disposition, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.⁸⁴

The Discussion of RCM 306(b) further explains this decision by outlining a specific list of factors a commander should consider when deciding how to handle a disciplinary matter.⁸⁵ The majority of these

⁷⁹ MCM, *supra* note 2, R.C.M. 306(b).

⁸⁰ MCM, *supra* note 2, R.C.M. 306(c).

⁸¹ *Id.* The RCM does not explicitly list preferral of charges as an option but it is implied in RCM 306(c)(4), which refers to RCM 401 regarding disposition of charges. The discussion following RCM 306(c) clarifies that preferral of charges is an option.

⁸² See MCM, *supra* note 2, R.C.M. intro. to analysis, at A21-2 (noting that each rule is considered as stating “binding requirements”).

⁸³ The Discussion sections of the MCM, compiled by the Department of Defense, do not have the force of law, but “may describe legal requirements derived from other sources. It is in the nature of treatise, and may be used as secondary authority.” MCM, *supra* note 2, R.C.M. intro. to analysis, at A21-1,2. *But see* United States v. Foley, 37 M.J. 822, 828 (A.F.C.M.R. 1993) (“[T]here is little value in relying upon the discussion, for it is not authoritative. . . . [T]he discussions that appear throughout the Manual are neither legislative nor Executive and do not purport to have the force of law.”).

⁸⁴ MCM, *supra* note 2, R.C.M. 306(b) discussion.

⁸⁵ These factors were added to the discussion section in the 1984 revision of the *MCM*.

factors are based on the ABA Criminal Justice Standards for Prosecution Function 3-3.9(b) (ABA Prosecution Function Standards),⁸⁶ which are discussed in greater detail in Part III of this Article. The list in the Discussion of RCM 306(b) includes the following factors, in this order:

- (A) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;
- (B) when applicable, the views of the victim as to disposition;
- (C) existence of jurisdiction over the accused and the offense;
- (D) availability and admissibility of evidence;
- (E) the willingness of the victim or others to testify;
- (F) cooperation of the accused in the apprehension or conviction of others;
- (G) possible improper motives or biases of the person(s) making the allegation(s);
- (H) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;
- (I) appropriateness of the authorized punishment to the particular accused or offense;
- (J) the character and military service of the accused; and
- (K) other likely issues.⁸⁷

These RCM Discussion factors were revised in 2012, resulting in a changed order, as well in the addition of consideration of the victim as a new issue relevant to the disposition decision as factor (B).⁸⁸ The order change primarily consisted of moving “the character and military service of the accused” from its original, long-standing position as the first factor, to the second-to-last factor on the list.⁸⁹

The Department of Defense lawyers who drafted the above list, while explicitly adopting these factors from the ABA Prosecution Function Standards extant in 1984, did not adopt them all. They intentionally excluded several of the prosecutorial discretion factors found in the ABA

See MCM *supra* note 2, R.C.M. 306 analysis, at A21-21.

⁸⁶ Several factors are based on the American Bar Association's STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(b) (2d ed. 1980). While the second edition of the ABA Prosecution Function Standards (1980) was used for the original 1984 MCM discussion, the incorporated standards remain in the current edition of the MCM. The third edition of the ABA Prosecution Function Standards have retained these as well, though found in different listing sequence. See MCM, *supra* note 2, R.C.M. 306 analysis, at A21-21; STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(b) (3d ed. 1993).

⁸⁷ MCM, *supra* note 2, R.C.M. 306(b) discussion.

⁸⁸ *Id.*

⁸⁹ *Id.*

Prosecutorial Function Standards. For example, ABA Prosecutorial Function Standard 3-3.9(b)(i) advises prosecutors to consider, as a relevant factor to consider when weighing criminal charges, “the prosecutor’s reasonable doubt that the accused in fact guilty.”⁹⁰ The Discussion drafters considered this decision rule “inconsistent with the convening authority’s judicial function,”⁹¹ and therefore omitted it from their list of recommended factors guiding prosecutorial discretion.⁹²

Furthermore, the Discussion excludes ABA Prosecutorial Function Standard 3-3.9(a)’s requirement that charges should not be instituted without probable cause, and the admonition that “[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.”⁹³ The drafters explained the omission of both guidelines by stating that “probable cause is followed in the rule.”⁹⁴ RCM 601, *Referral*, at (d)(1), indeed requires as a basis for referral, for all types of courts-

⁹⁰ See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-39(b)(i) (3d ed. 1993). This standard was 3-3.9(b)(i) in the second edition, as well. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-39(b)(i) (2d ed. 1980).

⁹¹ See MCM, *supra* note 2, R.C.M. 306(b) analysis, at A21-21 (citing no case law to support this assumption). The reference to the commander’s prosecutorial decision here as a “judicial function” is perplexing, as well as inaccurate. The military appellate courts have, since the late 1980s, characterized the convening authority’s power to criminally prosecute as prosecutorial. See *United States v. Fernandez*, 24 M.J. 77, 78 (C.M.A. 1987) (In referring a case to trial, a convening authority is functioning in a prosecutorial role.). See also *United States v. Allen*, 31 M.J. 572, 584 (N.M.C.M.R. 1990) (“When a convening authority refers a case to court-martial he is functioning in a prosecutorial rather than a judicial role.”).

⁹² The absence of this factor is out-of-step with the current ABA Prosecution Function Standards and other prosecutorial guidelines. See NAT’L DIST. ATTORNEYS ASS’N, NATIONAL PROSECUTION STANDARDS § 4-1.3(a) (3d ed. 2009), available at <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf> (“Prosecutors should screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest. Factors that may be considered in this decision include: a. Doubt about the accused’s guilt . . .”)

⁹³ STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(a) (3d ed. 1993). Most states utilize the probable cause standard, but Department of Justice requires sufficient admissible evidence. See DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.220 (2010) (“The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person’s conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction . . .”).

⁹⁴ MCM, *supra* note 2, R.C.M. 306 analysis, at A21-21 (“§ 3-3.9(a) (probable cause) is followed in the rule.”). Regarding the Standards’ factor of “sufficient admissible evidence” as a factor to consider when initiating criminal charge, the Discussion factors listed following RCM 306(b) advise that commanders should consider “availability and admissibility” of evidence, and does not discuss pendency of the charges whatsoever.

martial, that the convening authority find or be advised by a judge advocate that “there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it;” that is, the commander must have probable cause to prosecute.⁹⁵ While this probable cause determination must be made by a judge advocate to refer charges to a general court-martial, RCM 601(d)(1) makes clear that a commander with convening authority power can unilaterally make this finding in a summary or special court-martial without lawyer advice.⁹⁶ Additionally, RCM 307, which is based on Article 30, requires that the accuser swear that the charges are true to the best of their knowledge and belief.⁹⁷

The Discussion drafters further noted that they disregarded several other ABA Prosecution Function Standards because they considered them “unnecessary in military practice.”⁹⁸ These included the standard that the prosecutor should give no weight to potential personal or political advantages, nor to enhancing one’s record of convictions, when exercising prosecutorial discretion.⁹⁹ They also omitted the standard providing, “[i]n cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.”¹⁰⁰ Lastly, the Discussion drafters noted that the ABA Prosecution Function Standard that “a prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense,”¹⁰¹ was “implicit in § 3-3.9(a) and in the rule requiring probable

⁹⁵ MCM, *supra* note 2, R.C.M. 601(d)(1). The Analysis notes that while probable cause was required for referring charges to a general court-martial (GCM), the 1984 revisions to the rules expanded this basis to apply to all referrals, and not just GCMs. *See* MCM, *supra* note 2, R.C.M. 601(d)(1) analysis, at A21-31.

⁹⁶ MCM, *supra* note 2, R.C.M. 601(d)(1). *See also* MCM, *supra* note 2, R.C.M. 601(d)(1) analysis, at A21-31 (“Because of the judicial limitations on the sentencing power of special and summary courts-martial, any judge advocate may make the determination or the convening authority may do so personally.”).

⁹⁷ 10 U.S.C. § 830(a) (2006) states, “Charges and specification shall be signed by a *person subject to this chapter* under oath before a commissioned officer of the armed forces authorized to administer oaths” (emphasis added). *See also* MCM, *supra* note 2, R.C.M. 307(a).

⁹⁸ MCM, *supra* note 2, R.C.M. 306(b) analysis, at A21-21.

⁹⁹ The ABA Prosecution Function Standards second edition listed these two standards as §§ 3-3.9(c) and (d), though in the ABA Prosecution Function Standards third edition they are found at (d) and (e), respectively. The *MCM* Analysis analyzing the list of factors found in the Discussion to R.C.M. 306(b) refer to the second edition. *Id.*

¹⁰⁰ *Id.* *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(e) (3d ed. 1993).

¹⁰¹ *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9 (2d ed.

cause” and therefore also not included.¹⁰²

2. Supplemental Guidance

RCM 306(b) Discussion’s recommended factors regarding disposition of alleged misconduct lack in both strength and numbers, and fail to provide comprehensive guidance to commanders exercising their statutory prosecutorial discretion. As discussed in Part III of this Article, military lawyers advising commanders are subject to binding standards of conduct regarding their military justice roles, but the commanders they are advising – who wield almost plenary prosecutorial and disciplinary authority – are not.¹⁰³ While there exists some regulatory guidance to supplement the Discussion’s limited precatory list, the supplementary concerns are largely duplicative. Specifically, Part V of the *MCM*, which outlines procedures for the imposition of NJP for minor UCMJ offenses, includes a policy section discussing commanders’ exercise of their discretion in the misconduct arena.¹⁰⁴ It emphasizes that NJP should be considered on an individual basis, and that “the nature of the offense, the record of the service member, the needs for good order and discipline, and the effect of nonjudicial punishment on the service member and the service member’s record” should be considered when weighing whether to impose NJP.¹⁰⁵

The various service regulations governing the use of disciplinary measures also include rather limited guidance regarding the appropriateness of each, guidance that largely echoes RCM 306(b) and its Discussion factors. The various regulations stress using the least severe measures appropriate to the misconduct: “Commanders should consider administrative corrective measures before deciding to impose nonjudicial punishment. Trial by court-martial is ordinarily inappropriate for minor offenses unless lesser forms of administering discipline would be ineffective.”¹⁰⁶ They also reinforce, to varying degrees, the concept of

1980).

¹⁰² See *MCM*, *supra* note 2, R.C.M. 306 analysis, at A21-21.

¹⁰³ See *infra* Part III.B.1 (outlining the rules applicable to military lawyers, while noting that even the military lawyers lack comprehensive standards regarding the dispositional decision, whether binding or non-binding).

¹⁰⁴ *MCM*, *supra* note 2, pt. V.

¹⁰⁵ *MCM*, *supra* note 2, pt. V, ¶ 1. It also provides factors for commanders to consider when deciding whether a UCMJ offense is minor: “the nature of the offense and the circumstances surrounding its commission; the offender’s age, rank, duty assignment, record and experience; and the maximum sentence imposable for the offense if tried by general court-martial.” *Id.*

¹⁰⁶ See, e.g., AR 600-20, *supra* note 57, para. 4-6(a). See also U.S. DEP’T OF AIR FORCE, INSTR. 51-202, NONJUDICIAL PUNISHMENT 7 (7 Nov. 2003) [hereinafter AFI 51-202] (“Commanders should consider, where appropriate, nonpunitive disciplinary

fairness in responding to misconduct that is first mentioned in the non-binding Discussion to RCM 306(b), “Discretion, fairness, and sound judgment are essential ingredients of military justice.”¹⁰⁷

The Air Force includes a distinct decision rule in its regulation regarding military justice, which appears to encourage commanders to lower or even disapprove of sentences when an accused has been good in combat. Found in the section regarding convening authorities’ discretion to approve of court-martial findings and sentences, it states in pertinent part that:

Convening authorities should consider an accused’s service in an area of combat operations in determining what punishment, if any, to approve. Where the sentence of an accused with an outstanding record in an area of combat operations extends to a punitive discharge, convening authorities should consider suspending or remitting the discharge, provided that return to duty is in the best interests of the Air Force.¹⁰⁸

3. Systemic Aspects Which Function Like Decision Rules

a. No “Policy Guides” Allowed: The Consequences of Article 37

There are few formal checks and balances on commanders’ expansive disciplinary and prosecutorial discretion.¹⁰⁹ The primary check on their

measures, such as counseling, administrative reprimands and administrative withholding of privileges before resorting to NJP, but such measures are not necessary before imposing NJP.”); U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 3-2(a) (3 Oct. 2011) [hereinafter AR 27-10] (“A commander should use nonpunitive measures to the fullest extent to further the efficiency of the command before resorting to nonjudicial punishment.”); U.S. DEP’T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 3120.32C, STANDARD ORGANIZATION AND REGULATIONS OF THE U.S. NAVY 1-9 (11 Apr. 1994) (C6, 26 May 2005) [hereinafter OPNAVINST 3120.32C] (“[A]s another administrative corrective measure that may be employed by superiors to correct infractions of military regulation or performance deficiencies in their subordinates when punitive action does not appear appropriate due to the minor nature of the infraction or deficiency.”).

¹⁰⁷ See, e.g., AR 600-20, *supra* note 57, para. 4.6(a) (“Military authority is exercised promptly, firmly, courteously and fairly.”). See also AFI 51-202, *supra* note 106, at 14 (“The commander’s action must be temperate, just, and conducive to good order and discipline.”); OPNAVINST 3120.32C, *supra* note 106, at 1-5 (“Leadership must ensure equity for each member of the organization.”).

¹⁰⁸ U.S. DEP’T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE 154 (6 June 2013) [hereinafter AFI 51-201].

¹⁰⁹ See AR 600-20, *supra* note 57, para. 4-7(a) (“Commanding officers exercise broad disciplinary powers in furtherance of their command responsibilities.”); OPNAVINST 3120.32C, *supra* note 106, at 1-6 (“Leaders and supervisors have a duty to hold their subordinates accountable, and to initiate appropriate corrective, administrative,

prosecutorial discretion is the superior commander's authority to withdraw both criminal prosecutorial and NJP authority from subordinate commanders, either for particular types of offenses or in general.¹¹⁰ If such authority has not been withheld, then independent disposition discretion rests in each commander.¹¹¹ Typically, as stated in RCM 306(a) and discussed above, "[e]ach commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense."¹¹² This grant of discretion specifically translates into a prohibition against superior commanders directing – either explicitly or implicitly – subordinate commanders how to dispose of either a particular case or types of cases: "[a] superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld."¹¹³

disciplinary, or judicial action when individuals fail to meet their responsibilities."); MORRIS, *supra* note 10, at 4 ("[C]ommanders enjoy tremendous discretion and near plenary authority to bring charges, pick juries, approve (or disapprove) findings and sentences, and grant clemency."). See generally Hansen, *supra* note 2, at 428 ("Under the current version of the UCMJ, the commander still has extensive power in investigating and charging soldiers . . .").

¹¹⁰ See MCM, *supra* note 2, R.C.M. 306(a) ("A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally."). See also *United States v. Hardy*, 4 M.J. 20 n.9 (C.M.A. 1977) ("The superior might withhold the decision as to referral of a case to court-martial to himself for a specified class of cases if such a class of offenses presented a particular disciplinary need within that command"); AR 27-10, *supra* note 106, para. 3-7(d) ("Any commander having authority under UCMJ, Art. 15 may limit or withhold the exercise of such authority by subordinate commanders. For example, the powers of subordinate commanders to exercise UCMJ, Art. 15 authority over certain categories of military personnel, offenses, or individual cases may be reserved by a superior commander. A superior authority may limit or withhold any power that a subordinate might otherwise have under this paragraph.").

¹¹¹ See MCM, *supra* note 2, R.C.M. 103(5) ("'Commander' means a commissioned officer in command or an officer in charge . . ."). See also MCM, *supra* note 2, pt. V, ¶ 2(a) ("'Commander' means a commissioned officer who, by virtue of that officer's grade and assignment, exercises primary command authority over a military organization or prescribed territorial area, that under pertinent official directives is recognized as a 'command.'").

¹¹² MCM, *supra* note 2, R.C.M. 306(a).

¹¹³ *Id.* See, e.g., AR 600-20, *supra* note 57, para. 4-7(c) ("Commanders will neither direct subordinates to take particular disciplinary actions, nor unnecessarily restrict disciplinary authority of subordinates."). See also *United States v. Allen*, 31 M.J. 572, 574 (N.M.C.M.R. 1990) ("Except for the decision to refer, an officer who exercises court-martial convening authority is required to fill a neutral role in the court-martial process."). For example, the Department of Defense has withheld disposition authority regarding rape, sexual assault, and sodomy from lower level commanders. See U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES 41 (28 Mar. 2013) [hereinafter DODI 6495.02] ("In accordance with Secretary of Defense

This prohibition against superior commanders directing particular disciplinary outcomes results from Article 37,¹¹⁴ which represents Congress's intent to eradicate improper commander influence on court-martial outcomes following abuses during World War II.¹¹⁵ The UCMJ attempts to balance giving commanders tremendous, "near plenary" authority to discipline subordinates via administrative as well as criminal measures, with the danger of superior commanders either ordering specific outcomes in disciplinary cases being handled by subordinates, or attempting to influence the outcome of courts-martial.¹¹⁶ When such unlawful command influence conduct is alleged in connection with a court-martial, it can become the basis for various motions by the defense, both during the pendency of the court-martial as well as during the appellate process.¹¹⁷

Primarily because of Article 37, commanders and the military in general have been leery to promulgate formal, comprehensive policy guidance

Memorandum . . . the initial disposition authority is withheld from all commanders within the Department of Defense who do not possess at least special court-martial convening authority and who are not in the grade of O-6 (i.e., colonel or Navy captain) or higher, with respect to the alleged offenses of rape, sexual assault, forcible sodomy, and all attempts to commit such offenses, in violation of Articles 120, 125, and 80 . . . [of the UCMJ].")

¹¹⁴ See 10 U.S.C. § 837(a) (2006) ("No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.").

¹¹⁵ See generally Lieutenant Colonel Erik C. Coyne, *Influence With Confidence: Enabling Lawful Command Influence By Understanding Unlawful Command Influence—A Guide For Commanders, Judge Advocates, and Subordinates*, 68 A.F. L. REV. 1, 4-6 (2012) (outlining the historical roots of Article 37, UCMJ's prohibition on unlawful command influence).

¹¹⁶ See, e.g., MORRIS, *supra* note 10, at 4 ("Commanders enjoy near plenary authority to bring charges, pick juries, approve (or disapprove) findings and sentences, and grant clemency.").

¹¹⁷ See generally Coyne, *supra* note 115, at 9-16 (describing various ways to litigate unlawful command influence). Additionally, Article 98 makes unlawful command influence, and any intentional violation of courts-martial procedure, a criminal offense. However, it is difficult to find any cases in which Article 98 was ever prosecuted. See, e.g., *United States v. Day*, 21 C.M.R. 768, 777-778 (A.F.B.R. 1956) (discussing the perils of bringing an art. 98 violation).

regarding how to dispose of misconduct.¹¹⁸ This apprehension seems to explain a surprising gap in guidance in the otherwise extensively regulated military justice process. The NJP section of the *MCM*, as well as the service regulations, reiterates the same Article 37-based restriction against command guidance regarding how to dispose of types of misconduct. For example, the *MCM* in relevant part states that,

“No superior may direct that a subordinate authority impose nonjudicial punishment in a particular case, issue regulations, orders or guides which suggest to subordinate authorities that certain categories of minor offenses be disposed of by nonjudicial punishment instead of by court-martial or administrative corrective measures....”¹¹⁹

But particularly for this Article’s purposes, it is important to note that the military appellate courts have emphasized that *general* guidance that does not restrict subordinate commanders’ discretion is acceptable.¹²⁰ That is, broadly written principles designed to assist commanders’ decision-making, which serve to guide rather than mandate particular results, would be consistent with Article 37’s prohibition against unlawful command influence while assuring “regularity without regimentation, to prevent unwarranted disparity without sacrificing necessary flexibility.”¹²¹

b. Impartiality, Probable Cause, Pretrial Advice, and Article 32 Hearings

Further cabining convening authority’s prosecutorial discretion is the requirement that they be “unbiased and impartial.”¹²² This largely case-law driven limitation is implemented by the Code’s prohibition against “accusers” referring charges to a special or general court-martial.¹²³

¹¹⁸ See Coyne, *supra* note 115, at 4 (describing commanders’ inaction due to fear of claims of unlawful command influence).

¹¹⁹ *MCM*, *supra* note 2, pt. V, ¶ 1d(2).

¹²⁰ See generally *United States v. Allen*, 31 M.J. 572, 584, 592-93 (N.M.C.M.R. 1990) (“A person who is a convening authority, or the superior of a convening authority, may issue directives and announce policies for adherence by subordinates as long as those directives do not require the convening authority to abdicate his independent judgment while performing his court-martial responsibilities.”). *But see* *United States v. Martinez*, 42 M.J. 327, 331-34 (C.A.A.F. 1995) (Commander’s policy letter stating that reduction in grade and \$500 fine was “starting point” for driving under the influence constituted clear unlawful command influence, despite the letter also stating that “[p]unishment for DWI will be individualized.”).

¹²¹ DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.001 (2010).

¹²² *Allen*, 31 M.J. at 574. However, this language is not found in the UCMJ itself nor in any military regulations governing military justice; practitioners must turn to military ase law to find the standard.

¹²³ See 10 U.S.C. §§ 822(b), 823(b) (2006) (providing that accusers cannot convene

Accusers include not only those military members who prefer or order that charges be preferred; they also include “any other person who has an interest other than an official interest in the prosecution of the accused.”¹²⁴ That is, the commander who prefers charges¹²⁵ cannot refer the same charges, and neither can the convening authority that was a victim of the accused’s alleged crime.¹²⁶

Another intended check on prosecutorial discretion, at least for general courts-martial,¹²⁷ is the procedural requirement for written legal advice found in Article 34, combined with the requirement in Article 32 for a formal, impartial investigation of the charges prior to referral.¹²⁸ Article 34

general or special courts-martial). *See also* MCM, *supra* note 2, R.C.M. 601, 401 (outlining referral and preferral, respectively, and stating prohibition on accuser referring charges).

¹²⁴ 10 U.S.C. § 801(9). *See* United States v. Dinges, 55 M.J. 308 (C.A.A.F. 2001) (“Personal interests relate to matters affecting the convening authority’s ego, family, and personal property. A convening authority’s dramatic expression of anger towards an accused might also disqualify the commander if it demonstrates personal animosity. However, an officer need not act with animus or anger to become an accuser.”) *See, e.g.,* Dinges, 55 M.J. at 310 (“The Court of Appeals for the Armed Forces has found that there is a personal interest when the convening authority is the victim of the accused’s attempted burglary; where the accused tries to blackmail the convening authority by noting that his son was a drug abuser; and where the accused has potentially inappropriate personal contacts with the convening authority’s fiancée. However, a convening authority is not disqualified because of misguided prosecutorial zeal, or where the convening authority issues an order that the accused violates.”).

¹²⁵ Preferral, or swearing to formal charges, is generally the first formal step leading to prosecution via court-martial. *See infra* Part II.B.

¹²⁶ *See generally* Allen, 31 M.J. at 574 (“The accuser concept differs from unlawful command influence in that it denotes someone who has such a personal interest in, or has predetermined the outcome of, the case that his judgment could reasonably be questioned. To preclude the personal interest of the accuser a procedure was created whereby an accused could be brought to trial in an atmosphere free from coercion by one who could, directly or indirectly, influence the court. This atmosphere requires that the officer who convenes the court and reviews the sentence shall himself be free from any influence from the accuser.”). Of course, simply because misconduct in general undermines the good order and discipline of a particular commander’s unit does not mean that the commander is considered a victim.

¹²⁷ The military justice system consists of three distinct types of court-martial: special, summary, and general. Special and summary are jurisdictionally limited regarding types of punishment whereas a general court-martial has no such limitation. *See* 10 USC §§ 816-820. *See also* MORRIS, *supra* note 10, at 41 (describing the different types of court-martial as differing by maximum punishments, level of command that can convene each, and extent of appellate process for each).

¹²⁸ 10 U.S.C. § 834. *See also* 10 U.S.C. § 832 (requiring a formal, impartial investigation of charges prior to referral to a general court-martial); MCM, *supra* note 2, R.C.M. 405 (detailing the Article 32 process); MCM, *supra* note 2, R.C.M. 406 (outlining codal requirement for legal advice prior to convening a general court-martial). The Article 32 hearing has been characterized as “additional insulation against command influence,” though its recommendations are not binding upon the convening authority. *See generally*

stipulates that a commander's staff judge advocate must find that the allegations are warranted by the evidence reported in the required investigation prior to the commander referring a charge to a general court-martial.¹²⁹ Whether the evidence warrants the charges must be determined using a probable cause standard.¹³⁰ Additionally, while neither Article 32's formal investigation nor Article 34's pretrial advice are required for special or summary courts-martial, all three types of military courts require that the convening authority find probable cause before referring the charges to court-martial.¹³¹

While a convening authority must find that there are reasonable grounds that the accused committed an offense triable by court-martial prior to referring charges and thereby convening a particular type of court-martial, the Discussion to the *MCM* points out that "the convening authority is not obliged to refer all charges which the evidence might support," and refers convening authorities to the factors contained in the Discussion to RCM 306(b) discussed above.

c. Constitutional Decision Rules

While the military appellate courts have emphasized the broad prosecutorial discretion vested in the commander as convening authority, they have also noted that this discretion is not completely unfettered: "[t]he convening authority is, of course, vested with considerable discretion in determining whether to refer charges, and what to refer, so long as his selection is not deliberately based upon unjustifiable standards."¹³² That is, while military prosecutorial decisions are granted deference and a presumption of regularity,¹³³ they remain subject to constitutional constraints, namely those derived from the due process clause, either because they violate the equal protection component of the constitutional provision, or because they are vindictive in nature.¹³⁴ Specifically, the

United States v. Smith, 33 C.M.R. 85, 89 (C.M.A. 1963) (describing staff judge advocate pretrial advice as "a valuable pretrial protection to an accused."); MORRIS, *supra* note 10, at 55 (describing the Article 32 investigation and hearing).

¹²⁹ 10 U.S.C. § 834(c); MCM, *supra* note 2, R.C.M. 406.

¹³⁰ See MCM, *supra* note 2, R.C.M. 406(b) discussion (clarifying probable cause standard for pretrial advice finding that the evidence warrants the charges).

¹³¹ See MCM, *supra* note 2, R.C.M. 601(d)(1).

¹³² United States v. Blanchette, 17 M.J. 512, 515 (A.F.C.M.R. 1983).

¹³³ United States v. McKinley, 48 M.J. 280, 282 (C.A.A.F. 1998) (citing presumption of regularity in UCMJ proceedings). See also United States v. Hagen, 25 M.J. 78 (C.M.A. 1987) (There is a strong presumption that the convening authority performs his duties as a public official without bias.).

¹³⁴ *McKinley*, 48 M.J. at 280 ("And although the Executive exercises broad discretion in deciding whether or not to prosecute, the decision is subject to review under the equal

military courts weigh convening authorities' decisions to prosecute "for vindictive prosecution, impermissible discrimination against certain classes of defendants, or malicious and discriminatory prosecution in multiplying the number of charges brought."¹³⁵

Regarding selective prosecution,¹³⁶ the highest military appellate court has noted that:

For the government to make distinctions does not violate equal protection guarantees unless constitutionally suspect classifications like race, religion, or national origin are utilized or unless there is an encroachment on fundamental constitutional rights like freedom of speech or of peaceful assembly. The only requirement is that reasonable grounds exist for the classification used.¹³⁷

This constitutional guarantee of equal protection applies not only to the charging decision, but also to the convening authority's "prosecutorial power to enter into plea bargain agreements."¹³⁸

In addition to the checks on prosecutorial discretion grounded in the constitutional equal protection doctrine, the prosecutorial decision is also limited by the separate doctrines of unreasonable multiplication of charges and multiplicity of charges.¹³⁹ While the latter is designed to guard against constitutional double jeopardy violations and focuses on the elements of the alleged crime, the doctrine of unreasonable multiplication of charges specifically aims to limit "overreaching in the exercise of prosecutorial discretion," and "promotes fairness considerations."¹⁴⁰ It requires the convening authority to avoid "piling on" of charges and overreaching in their prosecutorial decision.¹⁴¹

protection component of the Due Process Clause.). *See also* *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962) ("A prosecutorial decision may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification'")).

¹³⁵ *United States v. Callahan*, No. 200100696, 2003 CCA LEXIS 165, at n.2 (N-M. Ct. Crim. App. July 30, 2003).

¹³⁶ The highest military appellate court has also recognized the impropriety of vindictive prosecution, which it defines as the decision to prosecute in *retaliation* for the exercise of certain constitutional rights. *See generally* *United States v. Hagen*, 25 M.J. 78, 84 (C.M.A. 1987) ("As with a charge of selective prosecution, an accused must show more than a mere possibility of vindictiveness; he must show discriminatory intent.").

¹³⁷ *United States v. Means*, 10 M.J. 162, 165 (C.M.A. 1981).

¹³⁸ *Callahan*, 2003 CCA LEXIS at n.3.

¹³⁹ *See* *MCM*, *supra* note 2, R.C.M. 307(c)(4) ("What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.").

¹⁴⁰ *See* *United State v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). *See also* *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001) (affirming that multiplicity and unreasonable multiplication of charges are distinct doctrines).

¹⁴¹ *Quiroz*, 55 M.J. at 338. This constraint has been described as a policy-based one

III. CIVILIAN PROSECUTORIAL DECISION RULES

The paucity and haphazard nature of the current guidance for commanders regarding the exercise of their vast military justice authorities, as highlighted in the preceding section, stands in stark opposition to the typically robust training and guidance military members receive regarding virtually all other military functions.¹⁴² Furthermore, contrast the military's minimal prosecutorial guidance with the ethical rules and policy guidance that apply to prosecutors in the civilian, particularly the federal, criminal justice arena.¹⁴³ In addition to the general ethical rules binding on attorneys as such, specific prosecutorial guidance has developed out of the recognition of the awesome power prosecutors wield in American society.¹⁴⁴ As noted by Professor Angela Davis and other criminal justice scholars, “[p]rosecutors are the most powerful officials in the criminal justice system.”¹⁴⁵ That power requires direction: “[w]ithout enforceable laws or policies to guide that discretion, all too often it is exercised haphazardly at worst and arbitrarily at best, resulting in inequitable

“established by the President in successive editions of the Manual for Courts-Martial designed to promote equity in sentencing.” See Lieutenant Colonel Michael J. Breslin & Lieutenant Colonel LeEllen Coacher, *Multiplicity and Unreasonable Multiplication of Charges: A Guide to the Perplexed*, 45 A.F. L. REV. 99, 100 (1998).

¹⁴² Military members are famously told how to dress, how to talk, how to change a tire, and how to take a hill—but they are not told how to exercise prosecutorial discretion. See discussion *infra* Part I.B. See, e.g., U.S. DEP’T OF AIR FORCE, INSTR. 13-1BCCV1, BATTLE CONTROL CENTER TRAINING 6 (8 Aug. 2012) (detailing how air command and control defense personnel are to be trained); U.S. DEP’T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (11 May 2012) (detailing the wear and composition of Army uniforms as well as providing general personal appearance guidelines).

¹⁴³ This Article turns to guidance specifically applicable to prosecutors because, as noted by the military appellate courts, commanders exercise prosecutorial power regarding the disposition of offenses, as well as in the pre-trial agreement approval process. Furthermore, this Article focuses on prosecutors versus lawyers in general because, as noted by Professor Angela Davis, “[t]he duties and responsibilities of all prosecutors clearly are distinguishable from lawyers who represent clients.” See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 13 (Oxford University Press 2007). “Without enforceable laws or policies to guide that discretion, all too often it is exercised haphazardly at worst and arbitrarily at best, resulting in inequitable treatment of both victims and defendants.” *Id.*

¹⁴⁴ See generally Mitchell Stephens, *Ignoring Justice: Prosecutorial Discretion and the Ethics of Charging*, 35 N. KY. L. REV. 53, 53 (2008) (“The prosecutor has more control over life, liberty, and reputation than any other person in America.” (quoting Attorney General Robert H. Jackson, *The Federal Prosecutor*, 24 JUDICATURE 18, 18 (1940))).

¹⁴⁵ Davis, *supra* note 39, at 276.

treatment of both victims and defendants.”¹⁴⁶ To date in the civilian sector, this guidance has largely come in the form of legal ethics, also referred to as standards of professional conduct, as well as policy manuals—areas to which this Article now turns.¹⁴⁷

A. *Professional Standards for Attorneys: States’ Codes*

Attorneys in the United States, as professionals,¹⁴⁸ are governed by both mandatory and aspirational legal ethics.¹⁴⁹ While the term ethics in general often refers to the discipline of moral philosophy,¹⁵⁰ or one’s personal theory of moral principles, legal ethics in this Article refers to the “principles of conduct that members of the profession are expected to observe in the practice of law.”¹⁵¹ After considerable training and education, lawyers are licensed to practice law, work which is legally forbidden to non-lawyers,¹⁵² at least outside the military.¹⁵³ These licenses, required by each state in order to practice law in that jurisdiction, subject lawyers to specific standards of conduct; these ethical guidelines are designed to help lawyers discriminate between proper and improper conduct in the practice of law.¹⁵⁴ These standards, also called codes of professional conduct or professional responsibility, are promulgated by each state’s highest court or a subordinate regulatory body, and carry disciplinary

¹⁴⁶ See DAVIS, *supra* note 143, at 13.

¹⁴⁷ See generally MODEL RULES OF PROF’L CONDUCT (2013), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

¹⁴⁸ But see Luban & Millimann, *supra* note 41, at 35 (criticizing emphasis on professionalism within the practice of law as “antiseptic” and lacking public commitment).

¹⁴⁹ See, e.g., LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 6 (3d ed. 2012) (“Joining the legal profession requires mastery of a large and complex body of externally imposed ethical and legal standards.”).

¹⁵⁰ See generally *id.* at 3 (discussing the difference between ethics and morals).

¹⁵¹ *Id.* at 4. These principles are established out of a sense of a lawyer’s special place in American society: “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” MODEL RULES OF PROF’L CONDUCT pmb. ¶ 1 (2013).

¹⁵² See MODEL RULES OF PROF’L CONDUCT R. 5.5 (2013).

¹⁵³ Except in the case of convening authorities practicing law in their prosecutorial roles, which is the practice of law but authorized by the UCMJ. See 10 U.S.C. §§ 801-946 (2006).

¹⁵⁴ See generally LERMAN & SCHRAG, *supra* note 149, at 5, 49 (describing purpose of ethical codes). While the law governing lawyers is much broader than professional rules of ethics and includes applicable state and federal statutes, regulations, case law, client-issued rules, etc., this Article focuses on professional rules of ethics as the most analogous. See *id.* at 24.

sanctions overseen by the same.¹⁵⁵ Sanctions for violating state codes of conduct range from censure to disbarment.¹⁵⁶

These state-mandated rules of professional conduct for lawyers are primarily based on the American Bar Association's Model Rules of Professional Conduct (ABA Model Rules), which include a rule specifically governing prosecutors.¹⁵⁷ ABA Model Rule 3.8 outlines what it calls the "special responsibilities" of a prosecutor, and includes: a prohibition against prosecuting a charge for which there is no probable cause; a provision regarding prejudicial extrajudicial statements; exculpatory and mitigating evidence disclosure requirements;¹⁵⁸ and remedial measures regarding evidence of wrongful convictions.¹⁵⁹ The non-binding comments explain the need for this prosecutor-specific rule: "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate."¹⁶⁰ This prosecutor-specific rule supplements rather than displaces the other ABA Model Rules; that is, all the rules, such as those requiring lawyers to be "competent, prompt and diligent," and those providing guidance on how to resolve conflicts of interest, also apply to lawyers in their prosecutorial role.¹⁶¹

1. Military Application

In the U.S. military, uniformed lawyers, also known as judge advocates, are required to be licensed, and found in good standing, in at least one state, and therefore are governed by that state's rules of professional conduct (which, as noted above, are typically based on the ABA Model Rules).¹⁶² Additionally, each of the military services promulgates rules of professional conduct that apply to military and civilian attorneys, paralegals, and assistants working in their respective judge advocate divisions, as well as to

¹⁵⁵ State ethics codes represent "the most important source of guidance for lawyers about their ethical obligations." See LERMAN & SCHRAG, *supra* note 149, at 45.

¹⁵⁶ See *id.* at 32 (outlining types of disciplinary sanctions that can result from violation of state rules of professional conduct).

¹⁵⁷ MODEL RULES OF PROF'L CONDUCT (2013). See also LERMAN & SCHRAG, *supra* note 149, at 25 (discussing the ABA Model Rules as states' template for state rules of attorney professional responsibility).

¹⁵⁸ Which most prosecutors do not treat as trumping the more limited rules of disclosure mandated by the U.S. Supreme Court in *Brady v. Maryland*. See generally *Brady v. Maryland*, 363 U.S. 83 (1963).

¹⁵⁹ MODEL RULES OF PROF'L CONDUCT R. 3.8 (2013).

¹⁶⁰ MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2013).

¹⁶¹ MODEL RULES OF PROF'L CONDUCT pmb. ¶ 4 (2013).

¹⁶² See, e.g., U.S. DEP'T OF AIR FORCE, INSTR. 51-101, JUDGE ADVOCATE ACCESSION PROGRAM 7 (12 Oct. 2000).

civilian lawyers practicing in their courts.¹⁶³ Notably, these service rules of professional conduct do not apply to commanders in their convening authority or any other role.¹⁶⁴

For example, the U.S. Air Force, similar to its sister services, requires adherence to the “Air Force Rules of Professional Conduct and Standards for Civility in Professional Conduct,” which are adapted directly from the above-discussed ABA Model Rules, and apply to “all lawyers, paralegals and non-lawyer assistants who practice in Air Force courts and other proceedings, including, but not limited to, civilian defense counsel (and their assistants) with no connection to the Air Force.”¹⁶⁵ While fashioned after the ABA Model Rules, the Air Force version contains some military-unique modifications. For example, it changed its version of Rule 3.8 to that governing the special responsibilities of “trial counsel” instead of those governing prosecutors as stated in the ABA Model Rules (since prosecutorial authority in the military, as described above, rests in non-lawyer commanders who are not bound by these rules).¹⁶⁶ Notably, even this rule, which speaks directly to the commander exercising prosecutorial discretion, applies only to lawyers and their assistants and not to the commanders who need it.

B. Other Standards for Prosecutors

In addition to the states’ ethics rules for attorneys (modeled on the ABA Model Rules), which are binding on federal,¹⁶⁷ state and local prosecutors,

¹⁶³ See TJAG POLICY MEMORANDUM TJS-2, AIR FORCE RULES OF PROFESSIONAL CONDUCT AND STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT 3 (17 Aug. 2005). See generally TJAG POLICY MEMORANDUM TJS-2, AIR FORCE RULES OF PROFESSIONAL CONDUCT AND STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT (17 Aug. 2005); U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992); U.S. COAST GUARD, INSTR. M5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM (1 June 2005); U.S. DEP’T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 5803.1D, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL encl. 1 (1 May 2012) [hereinafter JAGINST 5803.1D] (outlining each service’s respective professional standards for attorneys).

¹⁶⁴ *Id.*

¹⁶⁵ See, e.g., AFI 51-201, *supra* note 108, at 16 (outlining applicability of Air Force ethics and standards of conduct).

¹⁶⁶ See TJAG POLICY MEMORANDUM TJS-2, AIR FORCE RULES OF PROFESSIONAL CONDUCT AND STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT 3 (citing source of Air Force rules and applicability); *Id.* at 16 (outlining the “Special Responsibilities of a Trial Counsel.”).

¹⁶⁷ States’ rules of professional conduct were not always considered binding on federal prosecutors, though they have been since the McDade Amendment became effective in 1999. See generally Note, *Federal Prosecutors, State Ethics Regulations, and the McDade*

and include the above-discussed Rule 3.8 for prosecutors, there are specific, comprehensive standards designed solely for prosecutors, such as the National District Attorneys Association's National Prosecution Standards (NDAA Standards).¹⁶⁸ However, by far the most important standards are those issued by the ABA, which has promulgated hortatory¹⁶⁹ criminal justice standards since the late 1960s, including guidelines specifically for prosecutors designed "to be used as a guide to professional conduct and performance."¹⁷⁰ While the principles themselves are non-binding, they are influential, with more than 40 states incorporating at least some of the ABA Standards into their criminal codes.¹⁷¹ The ABA Standards are also widely cited by the Supreme Court, appellate and state courts, and law review articles when discussing the propriety of prosecutorial conduct.¹⁷² As noted above in Part II, the drafters of the Discussion component of the Rules for Courts-Martial utilized the ABA Standards when crafting the RCM 306(b) Discussion prosecutorial discretion section.

The ABA Criminal Justice Standards (which cover a huge swath of

Amendment, 113 HARV. L. REV. 2080-97 (2000).

¹⁶⁸ See generally NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS (3d ed. 2009). This Article does not detail these standards because they seem largely predicated upon, and duplicative of, the ABA Prosecution Function Standards and the ABA Model Rules.

¹⁶⁹ See generally Podgor, *supra* note 31 (describing the role of the ABA Criminal Justice Standards: The Prosecution and Defense Function Standards as serving an internal, advisory one versus as a basis for disciplinary action).

¹⁷⁰ STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.1 (3d ed. 1993).

¹⁷¹ See LERMAN & SCHRAG, *supra* note 149, at 50 (citing the ABA Prosecution Function Standards's incorporation by states and describing their influential role). See generally *Work Revising Criminal Standards Flows From Life in Criminal Law*, UNIV. OF CA HASTINGS COLLEGE OF LAW, 13 Dec. 2012, available at <http://www.uchastings.edu/news/articles/2012/12/criminal-standards-revised.php> (describing the Standards as having been cited over 1000 times in the lower courts and over 100 times by the Supreme Court).

¹⁷² See Brief for the American Bar Association as Amicus Curiae Supporting Petitioner, *Smith v. Cain*, 132 S.Ct. 627 (2012) (No. 10-8145), 2011 WL 3739380 (discussing the Standards' weighty import while tracing their history; "[t]he ABA Prosecution Function Standards represent a collection of "best practices" based on the consensus views of a broad array of professionals involved in the criminal justice system") *Id.* at 4; Podgor, *supra* note 31, at 1168, 1169 (discussing extensive usage of the ABA Prosecution Function Standards by federal courts and highlighting 2011 legal search engine search results for the ABA Prosecution Function Standards); See also Martin Marcus, *The Making of the ABA Criminal Justice Standards: 40 Years of Excellence*, CRIM. JUST., Winter 2009, available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_standards_marcus.authcheckdam.pdf (listing the number of cases citing the standards over 40 years as almost 1000.).

criminal justice activity) pertaining to the prosecution function, last updated and published in 1993, cover a wide ambit of prosecutorial conduct in their Prosecution Function Standards.¹⁷³ The ABA Prosecution Function Standards broadly outline the prosecutor's function as one of "an administrator of justice, an advocate, and an officer of the court" who "must exercise sound discretion in the performance of his or her functions."¹⁷⁴ They stipulate that, "[t]he duty of the prosecutor is to seek justice, not merely to convict."¹⁷⁵ They further detail recommendations covering everything from the organization of a prosecutor's office, to investigatory procedures and relations with victims, to sentencing.¹⁷⁶ The ABA Prosecution Function Standards provide rules relevant to commanders' military justice roles such as "[a] prosecutor should avoid unnecessary delay in the disposition of cases. A prosecutor should not fail to act with reasonable diligence and promptness in prosecuting an accused"¹⁷⁷ as well as the exhortation currently not directly adhered to in the military, "[w]here practical, the prosecutor should seek to insure that victims of serious crimes or their representatives are given an opportunity to consult with and to provide information to the prosecutor prior to the decision whether or not to prosecute, to pursue a disposition by plea, or to dismiss the charges."¹⁷⁸

Particularly relevant for this Article, the ABA Prosecution Function Standards also outline specific factors to consider regarding the decision to charge an individual with a criminal offense.¹⁷⁹ As mentioned previously, the Discussion section of the RCM utilize several of these factors as considerations for commanders regarding their disposition decisions, such as nature of the harm of the offense and the disproportionate nature of the punishment.¹⁸⁰ In addition to requiring that charges be supported by probable cause, the ABA Prosecution Function Standards require that a prosecutor possess sufficient admissible evidence to support a conviction prior to charging; they also require that "in making the decision to

¹⁷³ The American Bar Association is currently considering the proposed revisions to the Standards. *See generally Work Revising Criminal Standards Flows From Life in Criminal Law*, UNIV. OF CA HASTINGS COLLEGE OF LAW, 13 Dec. 2012, *available at* <http://www.uchastings.edu/news/articles/2012/12/criminal-standards-revised.php> (discussing multi-year process of revisions as likely not being complete until late 2014).

¹⁷⁴ *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2 (3d ed. 1993).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* § 3-1.1 – 3-6.2.

¹⁷⁷ *Id.* § 3-2.9.

¹⁷⁸ The ABA Prosecution Function Standards include a rule dedicated to prosecutor's responsibilities toward victims. *Id.* § 3-3.2(h).

¹⁷⁹ STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9 (3d ed. 1993).

¹⁸⁰ *See* discussion *supra* Part I I.B.1.

prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.”¹⁸¹

Furthermore, the ABA Prosecution Function Standards emphasize the importance of having a lawyer as the prosecutor, and assume that the charging decision and the mechanics of criminal prosecution are vested in the same office, even if not carried out by the same person.¹⁸² They recommend that the prosecution function be vested in one public official “who is a lawyer subject to the standards of professional conduct and discipline.”¹⁸³ Specifically,

“It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.5.”¹⁸⁴

1. Military Application

In addition to the non-binding RCM 306(b) Discussion's inclusion of several of the ABA Prosecution Function Standards 3-3.9 factors as non-binding guidance for commanders, the military services require adherence to several of the ABA Prosecution Function Standards by their military lawyers (though not commanders), though this differs among the services.¹⁸⁵ Army regulations, for example,¹⁸⁶ specifically state that the

¹⁸¹ Standards for CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(d) (3d ed. 1993).

This is a relevant section to highlight the utility of having a commander exercise prosecutorial discretion instead of a military Judge Advocate, because commanders are not evaluated on their military justice roles whereas Judge Advocates would face perverse incentives regarding the charging decision, because they very much are evaluated on their military justice record (they receive efficiency reports based on the success of their court-martials and are judged on conviction metrics, etc.).

¹⁸² *Id.* § 3-1.2(a).

¹⁸³ *Id.* § 3-2.1.

¹⁸⁴ *Id.* § 3-1.2(e).

¹⁸⁵ Instead of carving out the rules which specifically apply to the decisions reserved to commanders, the military services make in essence all the ABA Prosecution Function Standards regarding prosecution and defense functions binding on its military attorneys, despite the reality that the military attorneys do not possess the authority to make the decisions which are the subject of many of those rules.

¹⁸⁶ The Navy and Coast Guard make similar use of the ABA Prosecution Function Standards. *See generally* U.S. COAST GUARD, INSTR. M5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM (1 June 2005); JAGINST 5803.1D, *supra* note 163, encl. 1.

ABA Prosecution Function Standards apply to military attorneys, judges and legal support staff to the extent “they are consistent with” the UCMJ, *MCM*, and Army regulations governing military justice, though the regulations do not specify the inconsistencies.¹⁸⁷

The Air Force, in contrast, recently took the step of taking the ABA Prosecution Function Standards and incorporating them directly, section by section, into binding Air Force regulations.¹⁸⁸ The brand-new Air Force version of the ABA Prosecution Function Standards are modified to supposedly “meet the unique needs and demands” of military justice, and like the military’s version of the ABA Model Rules, they are only applicable to lawyers and their staffs, not to commanders in their prosecutorial and judicial roles.¹⁸⁹ Importantly, the Air Force omits major sections of the ABA Prosecution Function Standards, such as standards 3-2.1 through 3-2.5; the Air Force version also omits most of the critical factors recommended for consideration when making the charging decision, which are found in ABA Prosecution Function Standard 3.9. These were omitted because, according to the Air Force, “the convening authority ultimately determines what charges will be referred and whether to convene a court-martial” and therefore the ABA Prosecution Function Standards’ factors which guide prosecutorial discretion are not relevant to military lawyers (except for the standard requiring probable cause).¹⁹⁰

C. Policy Guidance: DOJ Guidelines

Last, but certainly not least, particularly because the modern military justice system is designed to approximate the federal criminal justice system as much as possible, this Article turns to the Department of Justice (DOJ) for analysis regarding how that bureaucracy provides decision-making touchstones to guide prosecutorial discretion. This Article does not

¹⁸⁷ AR 27-10, *supra* note 106, para. 5.8(c).

¹⁸⁸ AFI 51-201, *supra* note 108, at 288.

¹⁸⁹ *Id.*

¹⁹⁰ See *id.* at 296, 298-99. One would think that since the commander’s ranking military lawyer (staff judge advocate) typically advises the commander regarding their decision to prosecute, that said military lawyer should be cognizant of the appropriate factors to consider in such a decision. Furthermore, the Air Force rationale for not including all the ABA Prosecution Function Standards’ prosecutorial discretion factors is inconsistent with the Air Force’s inclusion of Standard 3-3.1(b), which states that, “An SJA should not invidiously discriminate against or in favor of any person on the basis of race, religion, sex, sexual preference, or ethnicity in exercising discretion to investigate or recommend prosecution. An SJA should not use other improper considerations in exercising such discretion.” Why the Air Force adopts this ABA Prosecution Function Standard and not the others which also deal with prosecutorial discretion is odd and arbitrary.

claim that the U.S. military should simply adopt DOJ measures; DOJ focuses on a largely different set of crimes than the military, such as organized crime and financial crime, whereas the military typically prosecutes crimes against persons and property, as well as drug offenses and uniquely military crimes such as absence without leave.¹⁹¹ But DOJ's comprehensive policy guidelines include detailed ethical standards that provide a helpful template for developing a code of conduct specifically tailored to the military.

DOJ provides guidelines for its prosecutors because "it is desirable, in the interest of the fair and effective administration of justice in the Federal system, that all Federal prosecutors be guided by a general statement of principles that summarizes appropriate considerations to be weighed" when making decisions regarding the initiation of prosecution, entry into plea agreements, and other highly significant, and discretionary, prosecutorial matters.¹⁹² These guiding considerations are found in the United States Attorneys' Manual 9-27.000, entitled "Principles of Federal Prosecution" (DOJ Principles).¹⁹³ Its rules and policies are designed to help guarantee "the fair and effective exercise of prosecutorial responsibility by attorneys for the government," as well as to "promot[e] confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case."¹⁹⁴ Their stated purpose is to "promote the reasoned exercise of prosecutorial discretion" among federal prosecutors.¹⁹⁵

While the ABA Prosecution Function Standards, as well as the NDAA Standards, emphasize the prosecutorial goal of justice,¹⁹⁶ the DOJ Principles elaborate by stressing the concepts of promptness, fairness, and

¹⁹¹ See *Guide to Criminal Prosecutions in the United States*, ORGANIZATION OF AMERICAN STATES (2007), available at http://www.oas.org/juridico/mla/en/usa/en_usa-int-desc-guide.html (highlighting the types of crimes prosecuted by the federal government versus the state, and that the federal government is better positioned to prosecute "sophisticated and large-scale criminal activity."). See also Edward T. Pound, *Creating a Code of Justice*, U.S. NEWS & WORLD REPORT, Dec. 8, 2002, available at <http://www.usnews.com/usnews/news/articles/021216/16justice.b.htm> ("Nowadays, most crimes prosecuted by the military are not military-related--drug use, assault, murder, fraud, and so on.").

¹⁹² See DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.110 cmt. (2010).

¹⁹³ *Id.* § 9-27-000.

¹⁹⁴ *Id.* § 9-27.001.

¹⁹⁵ *Id.* § 9-27.110.

¹⁹⁶ See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2 (3d ed. 1993). ("The duty of the prosecutor is to seek justice, not merely to convict"). See also NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS § 1-1.1 (3d ed. 2009) ("The primary responsibility of a prosecutor is to seek justice.").

effectiveness.¹⁹⁷ For example, the DOJ Principles state, “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.”¹⁹⁸ Additionally, the DOJ Principles repeatedly mention the fundamental purposes of criminal law in general, citing “assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous offenders, and rehabilitation of offenders . . . that the rights of individuals are scrupulously protected.”¹⁹⁹

This emphasis on the purposes of criminal law, contrasted with its absence in the ABA Standards, reflects the focused purpose of the DOJ Principles: to guide federal prosecutors in the exercise of their prosecutorial role through a policy document that allows flexibility, yet provides detailed instruction to prosecutors working throughout the country to enforce the same laws fairly and consistently. In that vein, while the DOJ Principles include most of the concepts and rules found in the ABA Standards, the DOJ Principles outlines them in a different manner. The DOJ United States Attorneys’ Manual provides much greater discussion in several keys areas, such as in its section regarding appropriate factors to consider when deciding not to prosecute. Instead of simply listing “nature and seriousness of offense” as an appropriate factor, 9-27.230’s comment section details different ways in which community impact can be evaluated.²⁰⁰ This habit of detailed explanation is repeated throughout the DOJ Principles, such as in 9-27.300’s twelve-paragraph treatment of charging the most serious offense.²⁰¹ Because the DOJ Principles are geared specifically toward executive branch officials in the exercise of their prosecutorial discretion, they are the greatest source of inspiration for the model code of commander conduct developed in the next Part of this Article who, as executive branch officials exercising prosecutorial discretion, should be guided by a similar set of standards.

¹⁹⁷ See DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.250 cmt. (2010) (“When a person has committed a Federal offense, it is important that the law respond promptly, fairly, and effectively.”) Of course the term fairness is often synonymous with justice. See, e.g., *Fairness Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/thesaurus/fairness> (last visited June 12, 2013); *Fairness Definition*, THESAURUS.COM, <http://thesaurus.com/browse/fairness?s=t> (last visited June 12, 2013).

¹⁹⁸ DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.220 cmt. (2010).

¹⁹⁹ *Id.* § 9-27.110.

²⁰⁰ *Id.* § 9-27.230 cmt.

²⁰¹ *Id.* § 9-27.300.

IV. PROPOSED STANDARDS OF COMMANDER CONDUCT

A. *Necessity of Normative Constraints*

Official standards of commander conduct, or a set of ethical rules, are needed to guide commanders in exercising their military justice function.²⁰² Such decision rules, consisting of both general principles and more specific instructions, are necessary to normatively constrain non-lawyer commanders who are accustomed to formal left and right limits.²⁰³ As highlighted in Part II of this Article, little normative guidance currently exists for commanders to utilize when deciding how to respond to particular instances of misconduct.²⁰⁴ Furthermore, what little direction does exist is scattered amongst the RCM, the UCMJ, the *MCM*, and service regulations. Given the military's ingrained tradition of memorializing and consolidating specific direction on how to perform every conceivable task, it is time to provide better guidance regarding commanders' military justice duties.²⁰⁵

Even the training regarding the dispensation of military justice is inadequate, and in stark contrast to the typical military training required for all other military duties. For example, Army general officers can elect to take a few-hour block on military justice during the Army's required general officer course, but they are not required to do so.²⁰⁶ Furthermore,

²⁰² This Article focuses on the convening authority's prosecutorial duties, as opposed to those more judicial in nature such as approving findings and sentences, because of the probability of success of proposed legislation in Congress at the time of this writing that will strip convening authorities of their current Article 60, power to approve and disapprove findings and sentences. *See supra* ftnt 6.

²⁰³ *See infra* Part I (discussing necessity and benefits of decision rules).

²⁰⁴ While commanders receive legal advice on most military justice issues, the UCMJ, *MCM*, military appellate court decisions, and military regulations repeatedly emphasize that prosecutorial discretion and other power is vested exclusively in commanders, not their lawyers; therefore, the commanders with such authority should be bound by appropriate principles regarding its exercise—guidance which is currently missing in action. *See, e.g., United States v. Allen*, 31 M.J. 572, 591 (N.M.C.M.R. 1990) (“The decision to refer charges to a court-martial, the level of the forum and any other aspects concomitant with that authority, are functions of the office of convening authority and matters entirely within the discretion of the convening authority.”).

²⁰⁵ A detailed examination of why the U.S. military lacks guidance for commanders regarding the exercise of their military justice role is beyond the scope of this Article. However, possible reasons include the fear of running afoul of Article 37's unlawful command influence prohibition, as well as a feeling that commanders already possess the requisite good judgment to exercise the duties of their command, including the duty of the military dispensing military justice. However, as noted in this Article's Introduction, military commanders are typically provided extensive training and guidance regarding their other duties, which require the exercise of judgment. *See supra* intro.

²⁰⁶ Telephone Interview with Lieutenant Colonel Devin Winklowsky, USMC, Deputy

the short block of elective instruction focuses on the terse list of factors found in RCM 306(b)'s Discussion, without elaboration. While all mid-level Army commanders are required to take a "senior officer level orientation" course, which does include a short block of instruction on military justice, such instruction also merely focuses on RCM 306(b) and the overall administration of military justice – that is, on form over substance.²⁰⁷

While detailed prosecutorial policies outlining which offenses to prioritize are encouraged in the civilian sector,²⁰⁸ such limiting direction is anathema to the commander-based system in the military that prizes independent commander discretion.²⁰⁹ Therefore, it appears the only permissible way to better educate, inform and therefore guide command prosecutorial decisions in the current military justice construct – particularly

Department Chair, The Judge Advocate Gen.'s Legal Ctr. & Sch., Charlottesville, VA, (June 27, 2013).

²⁰⁷ *Id.* Lieutenant Colonel Winklowsky explained that the military justice instruction provided to Army leaders and general officers is based on the non-regulatory, informal guide produced by the Army's legal school, a product called "Practicing Military Justice." CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR & SCH., U.S. ARMY, PRACTICING MILITARY JUSTICE (2013). The current edition of this guide emphasizes in pertinent part that commanders possess a wide range of available responses to disciplinary incidents, and that prosecutorial discretion rests solely with the commander, not their military lawyer. *See id.* at 1-1. Buried deep within this lengthy treatment of military justice is a brief outline regarding charging geared toward military attorneys rather than commanders. *Id.* at 7-1. It lists various factors to consider when drafting criminal charges (notably, commanders do not draft charges, their military lawyers do) and includes arguably inappropriate guidance such as "[e]rr on the side of liberal charging and be prepared to withdraw as the case develops." *Id.* at 7-2. To its credit, this outline lists, as impermissible, selective and vindictive prosecution, but fails to include most of R.C.M. 306(b)'s factors, and fails to include any type of discussion regarding the principles a commander should consider when disposing of misconduct. It only lists three items under what it terms "ethical limitations" to charging: charges must support the evidence, unreasonable multiplication of charges is prohibited, and no supervising prosecutor can compel a subordinate attorney to prosecute charges for which the subordinate entertains reasonable doubt. *See id.* at 7-2.

²⁰⁸ *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-2.5(a) (3d ed. 1993) ("Each prosecutor's office should develop a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office. The objectives of these policies as to discretion and procedures should be to achieve a fair, efficient, and effective enforcement of the criminal law."). *See also* NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS § 4-1.2 (3d ed. 2009)

²⁰⁹ *See* Part II.B.3 (Explaining that detailed policy letters are considered unlawful command influence and a violation of Article 37). That is, policies stating, for example, that all Driving Under the Influence offenses will be prosecuted in special courts-martial are prohibited—or that all service members convicted of sexual assault will receive punitive discharges.

regarding the charging and pre-trial agreement decisions²¹⁰ — lies in the promulgation of a set of general decision rules to inform the individual judgment of commanders. These rules, based primarily on the DOJ Principles and ABA Standards discussed above, as informed by the MCM and UCMJ, are intended to provide internal guidance to commanders as they exercise their military justice discretion.²¹¹ They are not intended as creating a litigable right for an accused to use against the Government during courts-martial.²¹² However, similar to the DOJ Principles and various state iterations of the ABA Model Rules, such guidelines can and should theoretically form the basis for disciplinary action if commanders greatly deviate from their parameters.²¹³

It is particularly apropos that this Article's recommended ethical standards for commanders draw heavily from the DOJ Principles, given that the MCM is supposed to track federal practice. As Article 36 stipulates, and the Analysis explains, "First, the new Manual was to conform to federal practice to the extent possible, except where the Uniform Code of Military Justice requires otherwise or where specific military requirements render such conformity impracticable."²¹⁴ Given that federal prosecutors have prosecutorial guidelines, then military commanders should as well.²¹⁵

²¹⁰ While this Article focuses on the prosecutorial roles a convening authority assumes, its recommended ethical rules are also applicable to what the military appellate courts have termed a convening authority's judicial functions, such as approving findings and sentences. See *United States v. Fernandez*, 24 M.J. 77, 79 (C.M.A. 1987) (referring to Article 60 role as judicial.).

²¹¹ See, e.g., STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9 (3d ed. 1993).

²¹² Unless, of course, the particular rule in question is one which reiterates a separate constitutional or statutory right, such as the right to be free from selective prosecution based on equal protection, or the right to be free from unreasonable multiplication of charges. The ethical rule is not the basis for an accused's complaint; the separate right it reinforces constitutes said basis.

²¹³ Not that commanders are ever disciplined for performance of their military justice roles, despite this being explicitly called for by Congress in the UCMJ. As discussed *infra* in Part II.B, the author was hard-pressed to find even one appellate court decision regarding a charged or litigated Article 98 violation; Article 98 simply is not used in the military justice system to deal with violations of military justice procedure, despite that being its *raison d'etre*. Commanders are simply not held accountable for their prosecutorial decisions.

²¹⁴ MCM, *supra* note 2, R.C.M. intro. to analysis, at A21-1 (2012).

²¹⁵ One of the challenges in crafting a list of ethical rules for commanders to utilize in their military justice role, particularly in their exercise of traditional prosecutorial discretion, is the artificial distinction the military justice system makes between a prosecuting attorney's duties post-decision to prosecute, and the decisions it reserves for commanders to 1) prosecute and 2) enter inter plea-agreements binding on courts. See *supra* Part II.1 (describing commanders' prosecutorial role). For U.S. civilian prosecutors, the prosecutorial-specific rules and guidance discussed above apply in a complementary

While the DOJ Guidelines have been criticized as ineffective, primarily due to lack of remedies available for non-compliance,²¹⁶ they serve an important “educative role”²¹⁷ and furthermore, attempt to strike a balance between “the need in prosecutorial decision-making for certainty, consistency, and an absence of arbitrariness on the one hand, and the need for flexibility, sensitivity, and adaptability on the other.”²¹⁸

B. Authority to Issue New Rules

Article 36, recognizes the President’s authority²¹⁹ to prescribe rules regarding pretrial, trial, and post-trial procedures.²²⁰ These rules “shall, as far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.”²²¹ Therefore, if the below proposed standards of conduct are not considered contrary to the UCMJ’s unlawful command influence or any other provision, it appears that the President may issue them under this Article 36 authority. If inconsistent, though this Article proposes they are not, then the UCMJ would need amendment by Congress to either include the standards outright, or to reconcile the President’s authority to issue them with the contrary provisions.²²²

fashion with their other ethical obligations as outlined in their respective state rules, as emphasized in Standards for Criminal Justice: Prosecution Function § 3-1.2 (3d ed. 1993). That is, the prosecutorial-specific rules assume that other ethical rules apply—which is why this Article’s list of proposed rules include some that are not traditionally considered specific to the prosecutorial role, such as diligence.

²¹⁶ See generally Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 CORNELL J.L. & PUB. POL’Y 167 (2004) (discussing the scant consequences for failure to comply with the DOJ Guidelines).

²¹⁷ See Podgor, *supra* note 31, at 1161 (discussing role of DOJ Guidelines).

²¹⁸ See generally Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 3 (1971) (discussing the reasons requiring such guidelines for prosecutors).

²¹⁹ The President’s authority to issue such rules originally stems from the President’s constitutional role as commander-in-chief. See U.S. CONST. art. II, § 2, cl. 1; MCM, *supra* note 2, R.C.M. intro. to analysis, at A21-1.

²²⁰ 10 U.S.C. § 836(a) (2006).

²²¹ *Id.*

²²² Including these recommended standards of conduct as an actual component of the UCMJ is not recommended because they are meant as a “guide to professional conduct and performance,” not as “judicial evaluation of alleged misconduct” of a commander. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.1 (3d ed. 1993). Given that Article 98, makes it a criminal offense for “knowingly and intentionally failing to enforce or comply with provisions of the” UCMJ, the Article does not intent its recommended rules to function as the basis of an Article 98 offense. See generally 10

Alternatively, if these proposed standards are indeed consistent with the current UCMJ, as argued above, the President may issue them as rules applicable to military command eligibility, or “fitness for command,” based on his Article 2, U.S. Constitution authority as Commander-In-Chief.²²³ This may be a more logical approach than basing the recommended standards’ issuance on Article 36, which would require contorting their round contours into the square box of “procedures.”²²⁴ The President may also delegate this authority to the Secretary of Defense, similar to much of the regulation of the armed forces. However, the promulgation of the proposed standards should not descend below that of the Secretary of Defense level, given that uniformity of the rules is necessary (versus individual rules issued by each service).²²⁵ Furthermore, the importance of the rules may be better demonstrated by high-level dissemination by the President or his Secretary.

C. Proposed Standards of Commander Conduct²²⁶

The following standards,²²⁷ compiled from the Uniform Code of Military Justice, the *Manual for Courts-Martial*, the ABA Model Rules of Professional Conduct, the ABA Criminal Justice Standards: Prosecution and Defense Function, the NDAA Standards, and the DOJ United States

U.S.C. § 898 (providing a criminal mechanism to punish unnecessary delay in courts-martial proceedings as well as to punish unlawful command influence and other intentional, bad faith failures to enforce or comply with the UCMJ).

²²³ U.S. CONST. art. II, § 2, cl. 1.

²²⁴ While this Article’s standards are not “procedures” in the same sense as the Federal Rules of Criminal Procedure or the Rules for Courts-Martial, the latter already includes the aforementioned “policy” subsection of R.C.M. 306(b), which includes disposition guidance taken directly from the second edition of the ABA’s Criminal Justice Standards, Prosecution and Defense Function. Therefore, expanding R.C.M 306(b) into a stand-alone, comprehensive guide of ethical rules is not as much of a stretch from being characterized as providing a set of “procedures” as it may appear at first blush.

²²⁵ See 10 U.S.C. § 836(b) (2006) (prescribing uniformity of rules issued by the President).

²²⁶ This code is primarily aimed at convening authorities in their exercise of prosecutorial discretion. But since not all commanders are convening authorities, yet may nonetheless exercise Article 15 authority to render punishment over their unit service members, the code is applicable to all commanders. The proposal specifies convening authority where applicable.

²²⁷ This Article’s proposed list of rules, while individually footnoted, often quote verbatim from particular sources. While this is noted in the respective footnotes, the actual text does not use quotations marks to highlight the verbatim portions. These are omitted out of the interest of providing these rules as a comprehensive set of guidelines, versus simply an amalgamation of numerous other standards; that is, to avoid the visual and visceral distraction presented by episodic quotation marks.

Attorneys' Manual, are recommended as a template of guiding principles and decision rules for commanders to utilize in their military justice roles.²²⁸ They are intended as exemplary, non-exclusive principles.²²⁹

1) **Purpose of Rules**²³⁰

- a) *U.S. law reposes unique authority in military commanders to dispose of misconduct in their units. This authority includes vast, but not unfettered, discretion. This discretion must be exercised using sound judgment; it is informed by ethical principles exercised in the fair pursuit of justice.*
- b) *The following principles of command discretion in military justice are intended to facilitate military commanders' reasoned judgment with respect to all aspects of military justice, including but not limited to the disposition of offenses, the approval/disapproval of plea agreements, approval/disapproval of expert witness requests, and all other court-martial proceeding exercises of authority such as grants of testimonial immunity, and approval/disapproval of findings and sentences.*

2) **Military Justice Objective**²³¹

- a) *The overarching purpose of the military justice system is to promote justice. Good order and discipline is attained by securing just results. While it is the commander's duty to maintain good order and discipline,*

²²⁸ A comprehensive code of conduct, with explanatory commentary, is beyond the scope of this Article, given the length such a code necessarily entails, as well as the judgment calls it requires by current policy makers. Therefore this Article provides a reasonable template and rationale for such a code, including what this author considers as its essential components.

²²⁹ The author recognizes that the development of such a set of principles can and should be the focus of an entire article, and plans to engage in that future project. However, the current Article is well-served with these examples in order to demonstrate the types of decision rules advocated for in Parts I, II, and III.

²³⁰ See DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.110 (2010). See generally MCM, *supra* note 2, R.C.M. 102; 10 U.S.C. §§ 801-946 (2006).

²³¹ See generally MCM, *supra* note 2, pt. I, ¶ 3 (explaining that the first purpose of military law is to promote justice). This proposed rule makes clear, whether it holds true already, that justice takes priority over good order and discipline. While the contours of what constitutes "justice" is outside the scope of this Article, suffice it to say that it involves doing the right thing and generally treating like-situated individuals the same way; John Paul Stevens, *Two Questions About Justice*, 2003 U. ILL. L. REV. 821, 823 (2003) (discussing the types of justice advanced in Plato's *Republic*, and concluding that justice may simply be explained similarly to Justice Potter Stewart's explanation of pornography, that is, you know it when you see it.).

*this duty is not balanced with the pursuit of justice; rather, the duty of the commander is to seek justice first and foremost, and in so doing she will ensure good order and discipline.*²³²

- b) *Commanders must make certain that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the military and the general public from dangerous offenders, and rehabilitation of offenders—are adequately met, while making certain also that the rights of individuals are scrupulously protected.*²³³

3) **Competence**²³⁴

- a) *When selecting individual service members for command, consideration should be given to “age, education, training, experience, length of service, and judicial temperament.”*²³⁵ *A commander should be an individual who exhibits sound judgment regarding fellow and subordinate service members.*
- b) *The commander must exercise sound discretion in the performance of his or her duties.*²³⁶

4) **Diligence**²³⁷

²³² See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2 (3d ed. 1993) (“The duty of the prosecutor is to seek justice, not merely to convict.”). See also DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.110 cmt. (2010) (It is “in the interest of the fair and effective administration of justice in the Federal system, that all Federal prosecutors be guided by a general statement of principles”); Nedra Pickler, *U.S. Attorneys Told to Expect Scrutiny*, BOSTON.com (April 9, 2009), http://www.boston.com/news/nation/washington/articles/2009/04/09/us_attorneys_told_to_expect_scrutiny (“‘Your job as AUSA is not to convict people,’ [U.S. Attorney General Eric] Holder said. ‘Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing.’”).

²³³ See generally DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.110 cmt. (2010).

²³⁴ See generally MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. (2013).

²³⁵ See 10 U.S.C. § 825(d)(2) (2006) (describing the attributes of court-martial panel members).

²³⁶ See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2(b) (3d ed. 1993).

²³⁷ See generally MODEL RULES OF PROF’L CONDUCT R. 1.3 (2013). See also MCM, *supra* note 2, R.C.M. 306(b) (“Allegations of offenses should be disposed of in a timely manner.”); MCM, *supra* note 2, R.C.M. 306(c) discussion (“Prompt disposition of charges

A commander shall act with reasonable diligence and promptness in dealing with misconduct and with specific charges.

5) **Fairness**

*A commander should not invidiously discriminate against or in favor of any person on the basis of race, religion, sex, sexual preference, ethnicity or rank, source of commission, or prior military record or professional affiliation in exercising discretion to investigate, discipline, or prosecute. A commander should not use other improper considerations in exercising such discretion.*²³⁸

*Persons who commit similar crimes and have similar culpability should, to the extent possible, be treated similarly.*²³⁹

6) **Standard for Referral of Charges**

*a) A commander should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the commander knows that the charges are not supported by probable cause. Furthermore, a commander 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.*²⁴⁰

is essential.”).

²³⁸ See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.1(b) (3d ed. 1993) (differing by use of commander instead of prosecutor, and by addition of the factor of rank as an impermissible consideration, as well as addition of function of discipline). See also DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.260 (2010). Military rank can and should be used when determining appropriate discipline, including whether to prosecute, based on the significance rank has as to level of culpability and responsibility (the higher the rank, the greater the responsibility and commensurate accountability). Regarding this standard of fairness, rank should not be “invidiously” used to, for example, to treat lower ranking individuals more severely than higher-ranking ones out of an unjust sense of preference for higher rank.

²³⁹ See Memorandum from Office of the Attorney General to All Federal Prosecutors, subject: Department Policy on Charging and Sentencing (19 May 2010) [hereinafter Holder Memo].

²⁴⁰ See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(a) (3d ed. 1993). This second ABA Prosecution Function Standard, that of sufficient admissible evidence to support a conviction, is a higher one than simply of probable cause. If such evidence is lacking, the convening authority should not refer charges, regardless the intent (such as for deterrence purposes or to pursue a plea). “[P]rosecution entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results.” See generally DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’

- b) *The commander is not obliged to prefer or refer all charges supported by the evidence.*²⁴¹

7) **Grounds for Referring or Declining to Refer Charges**²⁴²

The convening authority should refer charges if he/she believes that the person's conduct constitutes a UCMJ offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:

1. *No substantial military or criminal justice interest, such as good order and discipline, deterrence, punishment, rehabilitation, or public safety, would be served by prosecution;*²⁴³
2. *The person is subject to effective prosecution in another jurisdiction; or*
3. *The interests of justice and good order and discipline will be better served by an alternate disposition.*

8) **Permissible Disposition Consideration Factors**

- a) *Illustrative of the factors which the commander may properly consider in exercising his or her discretion to refer charges or respond with non-criminal disciplinary measures are:*
- i. *the commander's reasonable doubt that the accused is in fact guilty;*
 - ii. *the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on military morale, health, safety, welfare, and discipline;*
 - iii. *the disproportion of the authorized punishment in relation to the particular offense or the offender;*
 - iv. *possible improper motives of a complainant;*
 - v. *reluctance of the victim to testify;*²⁴⁴

MANUAL § 9-27.001 (2010).

²⁴¹ See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(b) (3d ed. 1993).

²⁴² DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.220 (2010).

²⁴³ See Holder Memo, *supra* note 239 ("Charging decisions should be informed by reason and by the general purposes of criminal law enforcement: punishment, public safety, deterrence, and rehabilitation.").

²⁴⁴ Current Department of Defense sexual assault regulations provide that commanders, in sexual assault cases, should "honor" victims' decisions regarding whether to prosecute. See DODI 6495.02, *supra* note 113, at 26.

- vi. *views of the victim regarding disposition;*
 - vii. *cooperation of the accused in the apprehension or conviction of others;*
 - viii. *availability and likelihood of prosecution by another jurisdiction;*
 - ix. *existence of jurisdiction over the accused and the offense;*
 - x. *Character and military service record of the accused, particularly any history of previous misconduct.*²⁴⁵
- b) *A commander shall not be compelled by his or her superior commanders to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.*
- c) *In making the decision to prosecute, the commander should give no weight to the personal or career advantages or disadvantages that might result from disposition of the case, or a desire to enhance his or her record of convictions.*
- d) *In cases involving a serious threat to the community, the commander should not be deterred from prosecution by the fact that military panels have tended to acquit persons accused of the particular kind of UCMJ violation in question.*

9) Impermissible Disposition Consideration Factors²⁴⁶

²⁴⁵ See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(b)(i-vii) (3d ed. 1993). Factors ii, ix and x are found in the current R.C.M. 306(b) discussion. MCM, *supra* note 2, R.C.M. 306(b) discussion. Factor ii elaborates upon the ABA Prosecution Function Standard of “extent of harm caused by the offense.” STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.39(b)(ii). Factor x, character and military service of the accused, serve much the same purpose as DOJ Guideline’s § 9-27.230’s factor A.5, “The person’s history with respect to criminal activity.” DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.230 (2010). For example, if the accused has a history of similar offenses, referral to court-martial may be more appropriate than someone with a clean conduct history. However, a terrific service record should not be a reason to dispose of a serious offense through non-criminal measures; the military’s interest in deterrence (directly correlated with good order and discipline) as well as criminal law’s goals of punishment, public safety, and rehabilitation must also be balanced.

²⁴⁶ While these considerations are drawn from DOJ Manual 9-27.260 Initiating and Declining Charges—Impermissible Considerations, as well as from constitutional case law as discussed in Part II.3, they are progressive in that they include sexual orientation as an impermissible factor for consideration. See DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.260 (2010); Sources cited *supra* Part III.C. They are redundant with Rule 5 except for the factor of rank, which should be a factor when charging (for example, a senior non-commissioned officer’s position of trust and

In determining whether and what kind of disciplinary action to take against a particular service member, a commander should not be influenced by:

- 1. The service member's race, religion, sex, sexual orientation, national origin, or political association, activities or beliefs;*
- 2. The commander's own personal feelings concerning the service member, the service member's associates, or the victim; or*
- 3. The possible affect of the decision on the commander's own professional or personal circumstances, or that of any subordinate in the commander's unit;*
- 4. The service member's combat record.²⁴⁷*

10) Unlawful Command Influence

- a) A convening authority shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing.²⁴⁸*
- b) Commanders may not censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings.²⁴⁹*
- c) No commander may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with*

responsibility exacerbates what may be a lesser infraction for a junior enlisted person) but should not used as a basis for invidious discrimination in general.

²⁴⁷ This directly contradicts the current practice, which, as exemplified by the existing Air Force formal guidance, encourages commanders to pursue lesser disciplinary action based on an accused's good combat record. *See* AFI 51-201, *supra* note 107, at 154 ("Convening authorities should consider an accused's service in an area of combat operations in determining what punishment, if any, to approve. Where the sentence of an accused with an outstanding record in an area of combat operations extends to a punitive discharge, convening authorities should consider suspending or remitting the discharge, provided that return to duty is in the best interests of the Air Force.").

²⁴⁸ AFI 51-201, *supra* note 108, at 375 (Air Force Uniform Code of Judicial Conduct 3(B)9); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.4(a) (3d ed. 1993).

²⁴⁹ 10 U.S.C. § 837(a) (2006).

*respect to his judicial acts.*²⁵⁰

- d) *A commander should not discourage or obstruct communication between prospective witnesses and defense counsel. A commander should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.*²⁵¹

11) Unreasonable Multiplication of Charges²⁵²

- a) *Convening authorities will not refer charges greater in number of degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.*
- b) *The charges should fairly represent the defendant's criminal conduct.*²⁵³

12) Relations With Victims and Prospective Witnesses²⁵⁴

- a) *Where practical, the convening authority should seek to insure that victims of serious crimes or their representatives are given an opportunity to consult with and to provide information to the convening authority or the convening authority's Staff Judge Advocate prior to the decision whether or not to prosecute, to pursue a disposition by plea, or to dismiss the charges.*
- b) *The convening authority should ensure that victims and witnesses who request information about the status of cases in which they are interested are promptly provided said information.*
- c) *The convening authority as well as subordinate commanders should seek to insure that victims and witnesses who may need protections against intimidation are advised of and afforded protections where feasible.*

²⁵⁰ *Id.*

²⁵¹ STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.1(d) (3d ed. 1993).

²⁵² MCM, *supra* note 2, R.C.M. 307. See cases cited *supra* Part II.B.3.

²⁵³ Holder Memo, *supra* note 239.

²⁵⁴ This recommended ethical rule is taken almost verbatim. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.2 (3d ed. 1993).

13) Fulfillment of Plea Agreements²⁵⁵

A commander should not fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present.

14) Justification of Decisions

- a) A commander, when contravening the advice of his or her Staff Judge Advocate regarding either the referral of charges to a court-martial or regarding the Article 60 decision to approve sentence and findings, must articulate the justification for such departure from legal advice in writing, and transmit said justification to his or her commander, as well as to the service The Judge Advocate General's representative.*
- b) While the superior commander is not authorized to direct the subordinate commander to alter their decision, the superior commander should take these stated departures from legal advice into consideration when deciding whether to withhold subordinate authority to take action in future such cases.*

CONCLUSION

The modern U.S. military justice system is one operated by ethical—that is, rule-abiding—professionals who dedicate their lives in service of their nation. Commanders are this system's disciplinary fulcrum, and as such are vested with vast criminal prosecutorial powers. But there is a jarring disconnect between commanders' vital prosecutorial role and their martial functions. While as warriors they are well-served by detailed statutory and regulatory guidance regarding combat duties—guidance drilled into them through extensive training—they are under-served in the military justice realm, which provides scant direction as to when and how to exercise command disciplinary and criminal authority. Not only does this stand in stark contrast to the highly-regulated exercise of command martial duties, it also differs from the numerous ethical guidelines imposed on civilian prosecutors in the federal and state criminal justice systems. Such decision rules in the civilian criminal justice arena attempt to facilitate consistent and just results by not removing prosecutorial discretion, but by infusing such discretion with decisional touchstones.

It is time to remedy the disparity between the civilian and military

²⁵⁵ STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-4.2(c) (3d ed. 1993).

prosecutorial realms, and that between the military's own martial and disciplinary arenas, by filling the military justice decisional vacuum with dispositional rules. While some may argue that commanders already receive decisional guidance from their military lawyers, thereby obviating the need for a comprehensive set of rules designed to guide command discretion, this argument breaks apart upon the shores of reality. In the majority of cases, the law does not require that military lawyers provide dispositional advice to commanders regarding when and how to discipline and prosecute, with sexual assault being a recent exception.²⁵⁶ Even assuming *arguendo* that military lawyers always do provide such guidance, such advice is necessarily arbitrary, given the current paucity of articulated standards regarding how disciplinary cases are to be handled in the military, even in those standards already applicable to military lawyers. And at the end of the day, military lawyers are not the ones vested by law with the power to prosecute and discipline—commanders are, and unfortunately, thoughtful, normative, and transparent guidance governing how to exercise that discretion is currently missing in action.

Military commanders, as well the accused and victims who trust the system to serve justice, deserve appropriate decision rules to guide prosecutorial decision-making. Such decision rules, exemplified by this Article's proposed code of conduct, include moral content as well as legal imperatives, and facilitate just, consistent, and even-handed results. They are not based on artificial, highly-legalistic concepts, but rather on fundamental principles of fairness. Given this seemingly basic foundation, one may argue that commanders already implicitly know how and when to dispose of misconduct in their units, and hence need no governing rules. But just as targeting the enemy on the battlefield is not undertaken without recourse first to overarching principles of warfare, neither should prosecuting a subordinate, or choosing not to prosecute despite strong evidence, be pursued without reference first to transparent governing guidelines. Even hortatory, aspirational principles are value-added in a military culture which functions on strict adherence to rules, and one that inculcates the expectation that rules exist to guide all areas of decision-making.

²⁵⁶ Of course, as noted *infra* Part II.AB.1, convening authorities are required to receive pre-trial advice from their staff judge advocate that probable cause exists prior to referring charges to court-martial in general courts-martial. Such advice is not required for referral to a special or summary court-martial. Even with such a finding of probable cause the commander is not required to refer charges, and no other pre-referral advice is required from their military lawyer to help them make this difficult decision. Hence this attorney-provided imprimatur (that probable cause exists prior to charges being referred to a general court-martial) is a far cry from the comprehensive set of dispositional decision standards that this Article recommends.

This Article's proposed decision rules are offered in service to military commanders' wide discretion, acting to shape, not remove, such authority. Without them, the status quo—well-intentioned but normatively unguided and legally-uneducated military officers making prosecutorial decisions just as weighty as those made on the battlefield, but without similar normative investment—will continue to erode the perception, and sometimes the reality, of justice in military justice.²⁵⁷

* * *

²⁵⁷ “We don’t let commanders practice medicine. So why do we let them practice law?” Interview with Colonel Raymond A. Jackson, U.S. Army Judge Advocate (July 4, 2013) (notes on file with author).