

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

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This Article outlines a reasoned alternative to recent legislative proposals regarding the exercise of prosecutorial discretion in the military. It proposes requiring that commanders and their military lawyers jointly make all prosecutorial decisions. Elevating the staff judge advocate to an equal role in prosecutorial decision-making emphasizes and promotes justice and fairness, and formalizes what typically already occurs in court-martial decision-making. Simultaneously, this approach preserves a wide

SW service member misconduct, including criminal acts. Such preservation is necessary to ensure that commanders maintain their essential responsibility and accountability for good order and discipline in their units, given both

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I. INTRODUCTION

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

of their vast prosecutorial decision-making authority represents the greatest divergence among participants in this debate. Proponents of this change

judgments of military lawyers, thereby aligning the military prosecutorial process with that in civilian jurisdictions. Opponents insist that while the exercise of this authority must rely heavily on the advice of the military legal adviser, it is the commander who is ultimately responsible for the establishment of good order and discipline in the military unit, and therefore the commander who must possess the ultimate say on who, when, and what allegations should be referred to trial by court-martial.

decision be shared by *both*?

decisions regarding sexual assault cases be jointly made by *both* the commander and their lawyer? And taking the matter further -

heads-are-better-than-

in the military appropriately balances the unique military and jurisprudential factors at play why not extend such a Solomon-like strategy to *all* prosecutorial decisions in the military justice system?

II. AN OVERVIEW OF THE MILITARY JUSTICE SYSTEM

A. *Background*

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

First and foremost, it is imperative to understand that military society, and in turn the military justice system, stands apart from U.S. civil society in many respects. The American military justice system, first established as the Articles of War b17.31 Tm[syst

unchanged since the original Articles of War.⁶ Half a century later, in World War II alone there were roughly 1.8 million courts-martial that

investigation.¹³ Unless authority over a particular offense or offender is withheld by a superior commander, the immediate commander has full

Court-martial convening authorities, pursuant to the UCMJ and Service regulations, determine the level of courts-martial summary, special, or general

controversial Military Justice Improvement Act of 2013 stemmed from assaults, and came just five votes short of advancement to a vote on the Senate floor.³⁰ encompassed remain very much in play.

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

Proponents of such change argue that inverting the commander/lawyer roles in the prosecutorial decision-making process will increase the likelihood that those suspected of sexual violence will be brought to justice. They seemingly base this approach largely on the unsupported assumptions that (1) the U.S. civilian criminal system, in which lawyers serve as the sole prosecutorial decision-makers, produces better results in the sexual assault arena and that this supposed higher rate has a causal nexus to the attorney assault cases is primarily due to the commander as the prosecutorial

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

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

The lack of firsthand evidence supporting a proposal like Senator [redacted] and its lack of consideration of the military justice ethical decision-making venue in general [redacted] are not the only flaws in its foundation. In addition, the nature of the decision-making instincts of commanders and the lawyers who support them reveal the short-sightedness of placing prosecutorial decision-

Commanders are in the business of making difficult decisions involving situations of immense uncertainty and gravity. They rely on their subordinates³⁸ to execute those decisions to the best of their ability. Commanders also know that complex missions involve the risk of failure, and that no matter how well a mission is planned, resourced, and executed, success is never guaranteed. After all, in a military operation, *the enemy gets a vote*. This is the nature of the culture in which military commanders are groomed, and it is this cultivated ability to make difficult decisions with full knowledge of the risk of failure that helps define successful commanders. Indeed, the courage to accept necessary risk in pursuit of vital objectives is an essential component of command responsibility. It is probative that many experienced military lawyers believe that commanders should retain a role in the referral process.³⁹ These military legal officers have extensively worked with senior commanders entrusted with court-martial convening authority; they recognize the inherent value of vesting those trained and experienced in risk-laden decision-making with the power to select cases for trial. Such decisions reflect the inherent nature of

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

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39. See, e.g., Pending Legislation Regarding Sexual Assaults in the Military: Hearing on S. 967 Before the S. Comm. On Armed Services, 113th Cong. 12-15 (2013), <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg88639/pdf/CHRG-113shrg88639.pdf> (collaboration and co-the

command, and are inextricably linked to command, good order and discipline, and mission effectiveness.⁴⁰

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

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

-making abilities

organizational role regarding good order and discipline, support retaining

40. *See e.g.*, JOHN FABIAN WITT, LINCOLN S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 19

causally linked to the

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

proposal is founded on the belief that the gravity of any decision to refer an allegation to trial by court-martial appropriately belongs to *both* the military commander *and* the judge advocate.⁴⁴ A joint-approval referral process offers several benefits over the existing system while addressing the concerns of its critics. First, a team process is more favorable to fundamental fairness in the military justice system, without sacrificing traditional good order and discipline. Additionally, requiring prosecutorial decisions to be made jointly ntf

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

But what if the commander and the judge advocate come to an immovable disagreement on a decision to refer charges? How would a joint-referral process handle such a dilemma? In this instance, which would be practically rare, the case would then be forwarded to the next highest

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

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

The Military Justice Improvement Act of 2013 derived from legitimate concerns regarding the implementation of military justice. Though it met defeat, retaining the status quo is ill advised. Insisting that the commander retain plenary prosecutorial authority is inconsistent with *actual* customary practice and ignores the legal dimensions of the decision to prosecute in the military. It also creates a danger, albeit rarely manifested, of allowing a comm

the victims of crime.⁴⁶ Lawyers are educated and trained to exercise such judgment, and their professional legal expertise can and must complement

collaborative dialogue, usually reach a consensus opinion regarding when and whom to prosecute. However, there are instances in which commanders overrule their legal advisors, thereby potentially allowing injustice. This must be prevented. Furthermore, the system is currently shrouded in

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

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

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dispositional responses, given their lack of analogy to classic crimes and their dependence on a subjective assessment by the commander as to wrongfulness. U.C.M.J. art. 86, 92 (2014).

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the impact

1. Legitimacy

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

of fairness, justice, or goals of the criminal system.⁶⁰ Currently buried in the -binding Discussion section are eleven unelaborated factors for commanders to consider in dispositional decisions.⁶¹ These factors lack explanation, comment, context and clarity.⁶² While these factors are

Justice Standards: Prosecution Function,⁶³ they are not inclusive and fail to include contextual commentary. In fact, the Department of Defense drafters of this section cherry- incorporate all of the latter.⁶⁴

recommendation that the prosecutor should consider their own reasonable ⁶⁵ The drafters chose to explain this

guilt should not be a factor in the commander's arsenal of dispositional considerations becau

⁶⁶ Such illogical arbitrariness demands revision and refinement. Furthermore, while the military appellate courts weigh

vindictiveness and use of impermissible classifications such as race or gender, neither the Manual for Courts-Martial, nor the service regulations translate these concerns into ethical standards or dispositional factors for commanders or their advising lawyers to consider.

In reality, commanders are essentially left to their own good judgment to decide when to prosecute, as long as the low standard of probable cause is met.⁶⁷

60. MCM, *supra*

61. *Id.*

62. *See id.*

