Acoustic Separation in Military Justice: Filling the Decision Rule Vacuum with Ethical Standards

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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 [DoJ] 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

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hortatory standards of conduct dovetail with the U.S. military’s culture of ethical professionalism and can help better educate and guide commanders’ prosecutorial and disciplinary decisions, thus reinforcing the “justice” component of the military justice system.

INTRODUCTION

A commander in the U.S. military justice system wields much authority. Instead of a district attorney choosing which charges to file against which individuals in his or her jurisdiction, the power to prosecute in the military resides with non-lawyer unit commanders. He or she is given the independent authority to dispose of criminal charges in a variety of ways, including dismissal of accusations or in the alternative, by convening a court-martial (criminal trial) to prosecute the individual. Commanders also possess wide-ranging authority to enter into binding plea bargains, as well as the authority to choose the pool of jury members for those they decide to prosecute. Furthermore, these unit commanders are in a sense “mini-governors” regarding their pardon-like power to entirely, or in

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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 NEWS (Apr. 14, 2013), http://www.cbsnews.com/8301-18563_162-57579529/top-general-calls-for-new-evaluations-amid-many-military-scandals/.


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 MCM, supra note 2, 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.
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.\(^7\) 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 itself is not currently guided

\(^6\) 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 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. 626, 627–31 (1984) (outlining two types of laws: conduct laws which provide instructions 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); see supra at 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 LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 4 (2010) (“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, 88 (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
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 demonstrates—that 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. 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” legal system with touted procedural safeguards for the accused, the military justice system’s governing statutes and executive guidance include surprisingly few to a command’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 THE AIR FORCE, INSTR. 36-6001, SEXUAL ASSAULT AND PREVENTION RESPONSE PROGRAM, at 29 (2008) (requiring that commanders must receive advice from their staff judge advocate before disposing of sexual assault cases in the Air Force); Sexual Assault in the Military, Before the S. Comm. on Armed Services, 113th Cong., (2013) (statement of Admiral Jonathan Greenert, U.S. Navy Chief of Nav. Ops. & Vadm Nanette M. Derenzi, U.S. Navy Judge Advocate General), 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 military lawyer regarding all sexual assault cases); see Morris, supra note 9, at 57–58 (describing the judge advocate role in the military justice system); Colonel Kenneth M. Theurer & James W. Russell III, Why Military Justice Matters, THE REPORTER 10 (Summer 2010) (“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 9, 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).

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. 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 crisis, is at the opposite end of the World War II spectrum. Concerns now abound that misconduct that should be prosecuted is instead being ignored or inappropriately handled via lesser measures other than criminal prosecution.

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. 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.

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 MCM, which is issued by the President and supplements the UCMJ with specific Executive Orders providing rules for courts-martial and rules of evidence; and judicial opinions resulting from military appellate courts as well as the U.S. Supreme Court.

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. (Sept. 28, 2012, 9:32 PM), http://www.sfgate.com/nation/article/Victims-say-military-condones-rape-3904221.php; see also MORRIS, supra note 9, ch. 7 (overviewing major changes to military justice system since World War II).

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.


See generally MORRIS, supra note 9, ch. 7 (discussing military justice practices during World War II and the resultant changes to the UCMJ).

See Donna Cassata & Richard Lardner, Sexual Assaults Force Changes to Military Justice, MILITARY.COM NEWS (June 4, 2013), http://www.military.com/daily-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, WASH. POST (June 15, 2013),
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 system. 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. This Article concludes that commanders, and the military members they lead, are 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 decisions 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. This rationale is illogical


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.

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
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. 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.

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 Abottabad. 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.

The situation is markedly different regarding commanders’ exercise of 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 UCMJ’s list of criminal conduct rules. 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 comment.


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), http://savannahnow.com/la/coastal-empire/2009-08-19/fort-irwin-training-center-villages-re-create-feel-iraq (discussing Iraqi village established in California for Army training).

28 Cf. Dan-Cohen, supra note 7, at 627 (outlining the two primary reductionist conflagrations of decision and conduct rules, rules originally based on Jeremy Bentham’s categorization of the same).
interdependence.\textsuperscript{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.\textsuperscript{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 require\textsuperscript{31} does not lend itself to easily-applied, bright-line rules, as opposed to simple conduct rules.\textsuperscript{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,\textsuperscript{33} decision rules “frequently must be complex, based on subjective criteria, and expressed in relatively vague and judgmental standards.”\textsuperscript{34}

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.\textsuperscript{35} In the absence of decision rules, as this Article suggests is largely the case in the military justice system, commanders as prosecutorial decisionmakers 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

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\textsuperscript{29} Id.

\textsuperscript{30} See generally id. 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.

\textsuperscript{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).

\textsuperscript{32} See Paul Robinson, Rules of Conduct, 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.

\textsuperscript{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.”).

\textsuperscript{34} Id. at 759. For example, convening authorities are supposed to be “unbiased and 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.”).

\textsuperscript{35} What level of selective transmission is necessary (of the decision rules to the society in question) is beyond the scope of this Article.
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misconduct disposition decisions. 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 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.” Therefore, the primary purpose of this Article is to highlight what little formal decision rules are already present in the military justice system, and to contrast those with the standards of conduct and ethical guidelines utilized in the civilian prosecutorial sector in order to develop decisional touchstones for commanders.

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. Decision rules, in one sense, operationalize morals. This Article’s recommended code of conduct includes

36 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. PROBS. 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.”). This Article does not intend to imply that the current decision rules applicable to civilian prosecutors have 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 spans 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 treatment high-ranking officers often seem to receive. See Lolita C. Baldor, William Ward, Four Star General, Demoted For Lavish Spending, Ordered To Repay $82,000, HUFFINGTON POST (Nov. 13, 2012), 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, 277 (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 HARY. L. REV. 1214, 1215 (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 Millemann, Good Judgment: Ethics Teaching in Dark Times, 9 GEO. J. LEGAL ETHICS 31, 50 (1996) (arguing that today’s attorney ethical codes have become “de-
decision rules which attempt to legitimize certain morals currently 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.”

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 decisionmaking, and is a foundational premise for the law of armed conflict’s four general principles regarding the use of armed force. Both disparate areas of the 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, organized armed forces require the element of discipline, and obedience to orders, to be successful. Maintenance of that essential discipline is the primary goal and hallmark of the military justice

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42 Id. at 39, 49–50 (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.”).
44 See Michael Gibson, Canada’s Military Justice System, 12 CAN. MIL. J. 61, 62 (Spring 2012); see also Richard A. Gabriel & Karen S. Metz, A Short History of War: The Evolution of Warfare and Weapons, ch. 3 (1992), available at http://www.au.af.mil/au/awc/awegate/gabrmetz/gabr0010.htm (discussing the need for discipline in armies such as the Roman Legion or Greeks in “Training”).
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 The Committee on the Uniform Code of Military Justice, Good Order, and Discipline in the Army, U. S. DEP’T OF DEF., Report to the Honorable Wilber M. Brucker, Secretary of the Army 11 (Jan. 18, 1960) (defining discipline as a “state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed”).
system. The preamble to the MCM 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.” This need to maintain discipline within the military via 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.”

This concept of “[d]iscipline as the soul of an army” 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

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 4, 4–5 (Summer 2010) (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. 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, § C, at A-1. Additional reasons traditionally given for the 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.” The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, I Criminal Law Deskbook, at A-1 (Winter 2011) (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 (“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.”) (quoting In re Grimley, 137 U.S. 147, 153 (1890)).

50 Robert A. Nowlan, The American Presidents, Washington to Tyler 69 (2012). One will rarely find an article or essay on military justice that lacks this favored quote from George Washington’s Letter to the Captains of the Virginia Regiments on July 29, 1759.
deaths.\textsuperscript{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.\textsuperscript{52} 

Because of the assumption\textsuperscript{53} that commanders must be able to 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.\textsuperscript{54} 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.\textsuperscript{55} Commanders possess the authority to respond to misconduct with a range of responses, up to and including the discretionary power to criminally prosecute.\textsuperscript{56} 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.\textsuperscript{57} 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.\textsuperscript{58} Typically referred to as...
administrative actions, such responses include, for example, letters of reprimand, demotions, extra training, and promotion withholdings.59

Furthermore, commanders possess nonjudicial punishment authority, as provided in UCMJ Article 15; this process allows the commander to serve as the judge, jury and executioner.60 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.61 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.62 A service member who refuses an Article 15 risks a potential criminal conviction, whereby accepting Article 15 punishment avoids a potential court-martial.63 Therefore, most nonjudicial punishment offers are accepted by military members.64


59 See MCM, supra note 2, R.C.M. 306(c)(2) (listing administrative corrective measures available to commanders); see, e.g., UNFAVORABLE INFORMATION FILE (UIF) PROGRAM, supra note 58, at 29 (providing guidance on administrative reprimands, counselings and admonitions within the Air Force); see generally THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, 1 CRIMINAL LAW DESKBOOK, at A-1 (Winter 2011) (delineating some adverse administrative actions).

60 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 also Hansen, supra note 2, at 429 (describing commander’s role as “the sole adjudicator of charges brought by the commander against the service member”).

61 10 U.S.C. § 815(b).

62 Id. 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, 27 GA. ST. U. L. REV. 239, 246–50 (2011) (emphasizing the “administrative theory” linking the rise of plea bargains to the enhanced power of the prosecutor).

63 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. Pierce, 27 M.J. 367 (C.MA. 1989); but see United States v. McKeel, 63 M.J. 81 (C.A.A.F. 2006); United States v. Bracey, 56 M.J. 387, 388–89 (C.A.A.F. 2002).

64 See, e.g., MORRIS, supra note 9, 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, Apr. 1, 2011 at 1–2, available at http://www.communitywarvets.org/article8_412011.htm (describing high rate of Article 15, NJP acceptance rates).
As provided in the Rules for Court-Martial [RCM], which are military procedural rules promulgated by the president, military criminal prosecution of specific misconduct formally consists of preferral and referral of charges. The immediate commander of the suspected service member typically decides how to initially dispose of the alleged offense. However, 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. The preferral oath must be administered “before a commissioned officer of the armed forces authorized to administer oaths,” which is limited to judge advocates, adjutants, and naval and coast guard commanding officers.

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. 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.

The primary step in initiating an actual trial by court-martial involves the

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

67 See id. at 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 Judge Advocate Gen.’s Sch., U.S. Air Force, The Military Commander and the Law 171, 171 (11th ed. 2012) (“By Air Force custom, the accused’s immediate commander ordinarily prefers the charge.”).

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

69 Id. at R.C.M. 307(b)(1).


71 See MCM, supra note 2, R.C.M. 307 app. at A21-22 (quoting Fed. R. Crim. P. (7)(c)(1)).

72 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.
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, 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. When deciding to refer charges, commanders are bound by no legally required standard besides that of probable cause, despite the fact that the standard for conviction is beyond a reasonable doubt.

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.

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74 MCM, supra note 2, R.C.M. 601(a).
75 See Morris, supra note 9, 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 also Lindsy Nicole Alleman, Note, Who is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems, 16 DUKE J. COMP. & INT’L L. 169 (2006). See generally Hansen, supra note 2.
76 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 JUDGE ADVOCATE GEN.’S SCH., U.S. AIR FORCE, THE MILITARY COMMANDER AND THE LAW 154, 171 (11th ed. 2012) (“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).
77 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.
78 In fact, Air Force staff judge advocates [SJA] 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).
79 MCM, supra note 2, R.C.M. 306. The discussion to subsection (b) of RCM 401, titled
which gives each commander the “discretion to dispose of offenses by members of that command.”80 In a subsection expressly labeled as policy, it provides that “[a]llegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition listed in subsection (c) of this rule.”81 Subsection (c) then lists the allowable levels of disposition, starting with the option of no action.82 The other disposition levels include administrative measures, nonjudicial punishment under Article 15, forwarding the matter to another commander, and pursuing criminal charges.83

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.84 While the rules themselves do not explain what constitutes an “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 they are considered secondary authority.85 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

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80 MCM, supra note 2, R.C.M. 306(a). It further provides that “[o]rdinarily 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.

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

82 Id. at R.C.M. 306(c).

83 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.

84 See id. app. at A21-2 (noting that each rule is considered as stating “binding requirements”).

85 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, 3; 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.”).
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.86

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.87 The majority of these factors are based on the ABA Criminal Justice Standards for Prosecution Function 3-3.9(b) (ABA Prosecution Function Standards),88 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.89

86 MCM, supra note 2, R.C.M. 306(b) discussion.
87 These factors were added to the discussion section in the 1984 revision of the MCM. See MCM, supra note 2, R.C.M. 306 app. at A21-21.
88 Several factors are based on the AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(b) (1993) [hereinafter STANDARDS FOR PROSECUTION FUNCTION]. 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 app. at A21-21; STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(b) (1993).
89 MCM, supra note 2, R.C.M. 306(b).
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). 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.

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 Prosecutorial Function Standards. For example, ABA Prosecutorial Function Standard 3-3.9(b)(i) advises prosecutors to consider, as a relevant factor when weighing criminal charges, “the prosecutor’s reasonable doubt that the accused is, in fact, guilty.”

The Discussion drafters considered this decision rule “inconsistent with the convening authority’s judicial function,” and therefore omitted it from their list of recommended factors guiding prosecutorial discretion.

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.” The drafters explained

90 Id.
91 Id.
92 STANDARDS FOR PROSECUTION FUNCTION, supra note 88, at § 3-39(b)(i). This standard was 3-3.9(b)(i) in the 1980 edition, as well. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-39(b)(i) (1980).
93 MCM, supra note 2, R.C.M. 306(b), 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) (“[W]hen a convening authority refers a case to court-martial he is functioning in a prosecutorial rather than a judicial role.”).
94 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, NAT’L PROSECUTION STANDARDS § 4-1.3(a) (2009), http://www.ndaa.org/pdf/NDAA%20NPS%20rd%20Ed.%20w%20Revised%20Commentary.pdf [hereinafter DA STANDARDS] (“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 . . . ”).
95 STANDARDS FOR PROSECUTION FUNCTION, supra note 88, at § 3-3.9(a). Most states utilize the probable cause standard, but the DoJ 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
the omission of both guidelines by stating that “probable cause is followed in the rule.”96 RCM 601, Referral, at (d)(1) indeed requires as a basis for referral for all types of courts-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.97 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 a lawyer’s advice.98 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.99

The Discussion drafters further noted that they disregarded several other ABA Prosecution Function Standards because they considered them “unnecessary in military practice.”100 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.101 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.”102 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
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. 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. It emphasizes that NJP should be considered on an individual basis and that “the nature of the offense, the record of the servicemember, 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.

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.” They also reinforce, to varying degrees, the concept of
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.”109

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:

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.110

3. Systemic Aspects Which Function Like Decision Rules

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

There are few formal checks and balances on commanders’ expansive disciplinary and prosecutorial discretion.111 The primary check on their prosecutorial discretion is the superior commander’s authority to withdraw both criminal prosecutorial and NJP authority from subordinate commanders, either for

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109 Sec, e.g., AR 600-20, supra note 58, at ¶ 4.6(a) (“Military authority is exercised promptly, firmly, courteously and fairly.”); see also AFI 51-202, supra note 108, at 11 (“The commander’s action must be temperate, just, and conducive to good order and discipline.”); OPNAVINST 3120.32C, supra note 108, at 1-5 (“Leadership must ensure equity for each member of the organization.”).


111 See AR 600-20, supra note 58, at ¶ 4-7(a) (“Commanding officers exercise broad disciplinary powers in furtherance of their command responsibilities.”); OPNAVINST 3120.32C, supra note 108, at 1-6 (“Leaders and supervisors have a duty to hold their subordinates accountable, and to initiate appropriate corrective, administrative, disciplinary, or judicial action when individuals fail to meet their responsibilities.”); MORRIS, supra note 9, at 4 (“Commanders 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 . . ..”).
particular types of offenses or in general.\textsuperscript{112} If such authority has not been withheld, then independent disposition discretion rests in each commander.\textsuperscript{113} 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.”\textsuperscript{114}

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.”\textsuperscript{115}

This prohibition against superior commanders directing particular disciplinary outcomes results from Article 37,\textsuperscript{116} which represents Congress’s intent to

\textsuperscript{112} 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, 24 n.9 (C.M.A. 1977) (“[T]he 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 108, at ¶ 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.”).

\textsuperscript{113} 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, Part V, ¶ 2(a) (“‘Commander’ means a commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area, which under pertinent official directives is recognized as a ‘command.’”).

\textsuperscript{114} MCM, supra note 2, R.C.M. 306(a).

\textsuperscript{115} Id. See, e.g., AR 600-20, supra note 58, at ¶ 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, 584 (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 41–42 (2013) [hereinafter DODI 6495.02] (“In accordance with Secretary of Defense 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 0–6 (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].”).

\textsuperscript{116} 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 exercise 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
eradicate improper commander influence on court-martial outcomes following abuses during World War II. 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. 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.

Primarily because of Article 37, commanders and the military in general have been leery to promulgate formal, comprehensive policy guidance regarding how to dispose of misconduct. 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: “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 . . .”

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. 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.”

ii. 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.” This largely case-law driven limitation is implemented by the Code’s prohibition against “accusers” referring charges to a special or general court-martial. Accusers include not only those military members who prefer or order that charges be referred, but they also include “any other person who has an interest other than an official interest in the prosecution of the accused.” That is, the commander who prefers charges cannot refer the same charges, and neither can the convening authority that was a victim of the accused’s alleged crime.

123 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 DUI will be individualized”).

124 USAM, supra note 21, at § 9-27.001 (2010).

125 Allen, supra note 123, at 584. However, this language is not found in the UCMJ itself nor in any military regulations governing military justice; practitioners must turn to military case law to find the standard.

126 See 10 U.S.C. §§ 822(b), 823(b) (2006) (providing that accusers cannot convene general or special courts-martial); see also MCM, supra note 2, R.C.M. 601, 401 (outlining referral and prefavor, respectively, and stating prohibition on accuser referring charges).

127 10 U.S.C. § 801(9); see United States v. Dinges, 55 M.J. 308, 312 (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. 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.” Id. at 310–11 (citations omitted)).

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

129 See generally Allen, 31 M.J. at 584 (“The accuser concept differs from unlawful command
Another intended check on prosecutorial discretion, at least for general courts-martial, 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. Article 34 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. Whether the evidence warrants the charges must be determined using a probable cause standard. 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.

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.

iii. Constitutional Decision Rules

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.” (quoting United States v. LaGrange, 3 C.M.R. 76, 79 (1952)). 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.

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 §§ 816–20; see also MORRIS, supra note 9, 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).

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); id. at 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 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 9, at 55–56 (describing the Article 32 investigation and hearing).

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

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

134 See id. at R.C.M. 601(d)(1).

135 See id. at R.C.M. 601(d)(1) discussion.
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.”136 That is, while military prosecutorial decisions are granted deference and a presumption of regularity,137 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.138 Specifically, the 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.”139

Regarding selective prosecution,140 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.141

This constitutional guarantee of equal protection applies not only to the charging decision but also to the convening authority’s prosecutorial power to

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137 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, 84 (C.M.A. 1987) (“There is a strong presumption that the convening authority performs his duties as a public official without bias.”).

138 McKinley, 48 M.J. at 282 (“And although the Executive exercises broad discretion in deciding whether or not to prosecute, the decision is subject to review under the equal protection component of the Due Process Clause.”); see also Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (A prosecutorial decision may not be “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962))).


140 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 Hagen, 25 M.J. at 84 (“As with a charge of selective prosecution, an accused must show more than a mere possibility of vindictiveness; he must show discriminatory intent.”) (citing United States v. Andrews, 633 F.2d 449 (6th Cir. 1980) (en banc)).

enter into plea bargain agreements.  

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. 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.” It requires the convening authority to avoid “piling on” of charges and overreaching in their prosecutorial decision.

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. 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. 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

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142 Callahan, 2003 CCA LEXIS at *8 n.3.
143 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.”).
144 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).
145 Id. at 338. This constraint has been described as a policy-based one “established by the President in successive editions of the Manual for Courts-Martial designed to promote equity in sentencing.”; see also 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).
146 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 supra Part I.B; see, e.g., U.S. DEP’T OF AIR FORCE, INSTR. 13-1BCCV1, BATTLE CONTROL CENTER TRAINING 6 (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 (2012) (detailing the wear and composition of Army uniforms as well as providing general personal appearance guidelines).
147 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 (2007).
society. As noted by Professor Angela Davis and other criminal justice scholars, “[p]rosecutors are the most powerful officials in the criminal justice system.” 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 treatment of both victims and defendants.” 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.

A. Professional Standards for Attorneys: States’ Codes

Attorneys in the United States, as professionals, are governed by both mandatory and aspirational legal ethics. While the term ethics in general often refers to the discipline of moral philosophy, 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.” After considerable training and education, lawyers are licensed to practice law, work which is legally forbidden to non-lawyers, at least outside the military. 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

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149 Davis, supra note 39, at 276.

150 See DAVIS, supra note 147, at 13.


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


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

155 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.” ABA MODEL RULES, supra note 151, at pmbl. ¶ 1.

156 See ABA MODEL RULES, supra note 151 at 5.5 (2013).

157 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).
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 sanctions overseen by the same. Sanctions for violating state codes of conduct range from censure to disbarment.

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. 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; and remedial measures regarding evidence of wrongful convictions. 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.” 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.

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). Additionally, each

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158 See generally LERMAN & SCHIRAG, supra note 153, 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.

159 State ethics codes represent “the most important source of guidance for lawyers about their ethical obligations.” See id. at 45.

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

161 ABA MODEL RULES, supra note 151. See also LERMAN & SCHIRAG, supra note 153, at 25 (discussing the ABA Model Rules as states’ template for state rules of attorney professional responsibility).

162 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, 373 U.S. 83 (1963).

163 ABA MODEL RULES, supra note 151, at R. 3.8.

164 Id. at 3.8 cmt. 1.

165 Id. at pmbl. ¶ 4.

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 civilian lawyers practicing in their courts.  

Notably, these service rules of professional conduct do not apply to commanders in their convening authority or any other role.  

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 nonlawyer assistants who practice in Air Force courts or other proceedings . . . includ[ing], but . . . not limited to, civilian defense counsel (and their associates and non-lawyer assistants) with no connection to the USAF.” 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).  

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, state, and local prosecutors and include the above-discussed Rule 3.8 for prosecutors, there are specific, comprehensive standards designed solely for prosecutors, such as the National

\[167\] See TJAG POLICY MEMORANDUM TJS-2, AIR FORCE RULES OF PROFESSIONAL CONDUCT AND STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT 3 (2005); see generally TJAG POLICY MEMORANDUM TJS-2, AIR FORCE RULES OF PROFESSIONAL CONDUCT AND STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT (2005); U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1992); U.S. COAST GUARD, INSTR. M5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM (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 (2012) [hereinafter JAGINST 5803.1D] (outlining each service’s respective professional standards for attorneys).

\[168\] Id.

\[169\] See, e.g., AFI 51-201, supra note 110, at 16 (outlining applicability of Air Force ethics and standards of conduct).

\[170\] See TJAG POLICY MEMORANDUM TJS-2, supra note 167, at 3 (citing source of Air Force rules and applicability); id. at 16 (outlining the “Special Responsibilities of a Trial Counsel.”).

\[171\] 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, Federal Prosecutors, State Ethics Regulations, and the McDade Amendment, 113 HARV. L. REV. 2080–97 (2000).
District Attorneys Association’s National Prosecution Standards [NDAA Standards]. However, by far the most important standards are those issued by the ABA, which has promulgated hortatory criminal justice standards since the late 1960s, including guidelines specifically for prosecutors designed “to be used as a guide to professional conduct and performance.” While the principles themselves are non-binding, they are influential, with more than forty states incorporating at least some of the ABA MODEL RULES into their criminal codes. The ABA MODEL RULES are also widely cited by the Supreme Court, appellate and state courts, and law review articles when discussing the propriety of prosecutorial conduct. As noted above in Part II, the drafters of the Discussion component of the Rules for Courts-Martial utilized the ABA MODEL RULES when crafting the RCM 306(b) Discussion prosecutorial discretion section.

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

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172 See generally DA STANDARDS, supra note 94. 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.

173 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 role versus as a basis for disciplinary action).

174 STANDARDS FOR PROSECUTION FUNCTION supra note 88, at § 3-1.1.

175 See LERMAN & SCHRAG, supra note 153, 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 (Dec. 13, 2012), available at http://www.uchastings.edu/news/articles/2012/12/criminal-standards-revised.php [hereinafter Revising Criminal Standards] (describing the Standards as having been cited over one thousand times in the lower courts and over one hundred times by the Supreme Court).


177 The American Bar Association is currently considering the proposed revisions to the Standards. See generally Revising Criminal Standards, supra note 175 (discussing multi-year process of revisions as likely not being complete until late 2014).
or her functions.” They stipulate that, “[t]he duty of the prosecutor is to seek justice, not merely to convict.” They further detail recommendations covering everything from the organization of a prosecutor’s office, to investigatory procedures and relations with victims, to sentencing. 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” as well as the exhortation currently not directly adhered to in the military. Furthermore:

[where 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.]

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. As mentioned previously, the Discussion section of the RCM utilizes several of these factors as considerations for commanders regarding their disposition decisions, such as the nature of the harm of the offense and the disproportionate nature of the punishment. 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 “[i]n making the decision to 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.”

Furthermore, the ABA Prosecution Function Standards emphasize the

178 See Standards for Prosecution Function, supra note 88, at § 3-1.2.
179 Id.
180 Id. §§ 3-1.1–3-6.2.
181 Id. § 3-2.9.
182 The ABA Prosecution Function Standards include a rule dedicated to prosecutors’ responsibilities towards victims. Id. § 3-3.2(h).
183 Id. § 3-3.9.
184 See supra Part II.B.1.
185 Standards for Prosecution Function, supra note 88, at § 3-3.9(d).

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 courts-martials and are judged on conviction metrics, etc.).
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. 186 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.”187 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. 188

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. 189 Army regulations, for 
example,190 specifically state that the ABA Prosecution Function Standards apply 
to military attorneys, judges and legal support staff to the extent “they are not 
inconsistent with” the UCMJ, MCM, and Army regulations governing military 
justice, though the regulations do not specify the inconsistencies.191

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.192 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.193 Importantly, the Air Force

186 Id. § 3-1.2(a).
187 Id. § 3-2.1.
188 Id. § 3-1.2(e).
189 Instead of carving out the rules, which specifically apply to the decisions reserved to 
commanders, the military services make essentially 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.
190 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 (June 1, 2005); JAGINST 5803.1D, supra note 167, encl. 1.
191 AR 27-10, supra note 108, ¶ 5-8(c).
192 AFI 51-201, supra note 110, at 288.
193 Id.
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.” Therefore, the ABA Prosecution Function Standards’ factors which guide prosecutorial discretion, are not relevant to military lawyers (except for the standard requiring probable cause).\footnote{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, “[a]n 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.}

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 DoJ [DOJ] for analysis regarding how that bureaucracy provides decision-making touchstones to guide prosecutorial discretion. This Article does not 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.\footnote{See Guide to Criminal Prosecutions in the United States, Org. of Am. 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 Rep., 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.”).} 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. These guiding considerations are found in the USAM 9-27.000, entitled Principles of Federal Prosecution [DOJ Principles]. 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.” Their stated purpose is to “promote the reasoned exercise of prosecutorial discretion” among federal prosecutors.

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

This emphasis on the purposes of criminal law, contrasted with its absence in the ABA MODEL RULES, 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 USAM provides much greater discussion in several keys areas, such as in its

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196 See USAM, supra note 21, at § 9-27.110 cmt.
197 Id. § 9-27.000.
198 Id. § 9-27.001.
199 Id. § 9-27.110.
200 See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2 (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 (2009) (“The primary responsibility of a prosecutor is to seek justice. . . .”).
201 See USAM supra note 21, § 9-27.250 cmt. (“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).
202 USAM, supra note 21, § 9-27.220 cmt.
203 Id. § 9-27.110 cmt.
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. 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. 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.

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. 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. 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. 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.

204 Id. § 9-27.230 cmt.
205 Id. § 9-27.300.
206 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 note 6.
207 See supra Part I (discussing necessity and benefits of decision rules).
208 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.”).
209 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
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. Furthermore, 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 merely focuses on RCM 306(b) and the overall administration of military justice—that is, on form over substance.

While detailed prosecutorial policies outlining which offenses to prioritize are encouraged in the civilian sector, such limiting direction is anathema to the commander-based system in the military that prizes independent commander discretion. Therefore, it appears the only permissible way to better educate,
inform, and therefore guide command prosecutorial decisions in the current military justice construct—particularly regarding the charging and pre-trial agreement decisions—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. They are not intended as creating a litigable right for an accused to use against the Government during courts-martial. 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.

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 UCMJ requires otherwise or where specific military requirements render such conformity impracticable.”

Given that federal prosecutors have prosecutorial guidelines, then military commanders should as well. While the DOJ Guidelines have been criticized as ineffective, primarily

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214 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).

215 See, e.g., STANDARDS FOR PROSECUTION FUNCTION, supra note 88, § 3-3.9 (1993).

216 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.

217 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 supra 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’être. Commanders are simply not held accountable for their prosecutorial decisions.

218 MCM, supra note 2, R.C.M. introduction to analysis, at A21-1.

219 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.B.1 (describing commanders’ prosecutorial role). For U.S. civilian prosecutors, the prosecutorial-specific rules and guidance discussed above apply in a complementary fashion with their other ethical obligations as outlined in their respective state rules, as emphasized in STANDARDS FOR PROSECUTION FUNCTION, supra note 88, § 3-1.2. 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
due to lack of remedies available for non-compliance, they serve an important “educative role” 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.”

B. Authority to Issue New Rules

Article 36, recognizes the President’s authority to prescribe rules regarding pretrial, trial, and post-trial procedures. These rules “shall, so 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.” 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 to be amended by Congress to either include the standards outright, or to reconcile the president’s authority to issue them with the contrary provisions.

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, authority as Commander-in-Chief. This may be a more logical approach than role, such as diligence.

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221 Podgor, supra note 31, at 1161 (discussing role of DOJ Guidelines).

222 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).

223 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, at R.C.M. introduction to analysis A21-1.


225 Id.

226 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 PROSECUTION FUNCTION, supra note 88, § 3-1.1. Given that Article 98 makes it a criminal offense for a commander to “knowingly and intentionally [fail] to enforce or comply with provisions of the” UCMJ, the Article does not intend its recommended rules to function as the basis of an Article 98 offense. See generally 10 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).

227 U.S. CONST. art. II, § 2, cl. 1.
basing the recommended standards’ issuance on Article 36, which would require contorting their round contours into the square box of “procedures.”

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). 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 Conduct

The following standards, compiled from the UCMJ, the MCM, the ABA Model Rules of Professional Conduct, the ABA Criminal Justice Standards: Prosecution and Defense Function, the NDAA Standards, and the USAM, are recommended as a template of guiding principles and decision rules for commanders to utilize in their military justice roles. They are intended as exemplary, non-exclusive principles.

228 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.

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

230 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.

231 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.

232 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.

233 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.
1) **Purpose of Rules**\(^{234}\)

   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**\(^{235}\)

   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, 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.\(^{236}\)

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\(^{235}\) See generally MCM, supra note 2, Part 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, 826–27 (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.).

\(^{236}\) See Standards for Prosecution Function, supra note 88, § 3-1.2 (“The duty of the prosecutor is to seek justice, not merely to convict.”). See also USAM, supra note 21, § 9-27.110 cmt. (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 (Apr. 9, 2009), http://www.boston.com/news/nation/washington/articles/2009/04/09/us_attorneys_told_to_expect_scrutiny (“Your job as assistant US attorneys 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.’”).
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.\footnote{See generally USAM, supra note 21, § 9-27.110 cmt.}

3) \textbf{Competence}\footnote{See generally MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. (2013).}

\begin{itemize}
\item a) When selecting individual service members for command, consideration should be given to “age, education, training, experience, length of service, and judicial temperament.”\footnote{See 10 U.S.C. § 825(d)(2) (2006) (describing the attributes of court-martial panel members).} A commander should be an individual who exhibits sound judgment regarding fellow and subordinate service members.
\item b) The commander must exercise sound discretion in the performance of his or her duties.\footnote{See STANDARDS FOR PROSECUTION FUNCTION, supra note 88, § 3-1.2(b).}
\end{itemize}

4) \textbf{Diligence}\footnote{See generally MODEL RULES OF PROF’L CONDUCT R. 1.3 (2013); see also MCM, supra note 2, at R.C.M. 306(b) (“Allegations of offenses should be disposed of in a timely manner.”); Id. at R.C.M. 306(c) discussion (“Prompt disposition of charges is essential.”).}

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

5) \textbf{Fairness}

A commander should not invidiously discriminate against or in favor of any person on the basis of race, religion, sex, sexual preference, ethnicity, rank, source of commission, 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.\footnote{See STANDARDS FOR PROSECUTION FUNCTION, supra note 88, § 3-3.1(b) (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 USAM, supra note 21, § 9-27.260. Military rank can and should be used when determining appropriate discipline, including
Persons who commit similar crimes and have similar culpability should, to the extent possible, be treated similarly. 243

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.* 244

   b) *The commander is not obliged to prefer or refer all charges supported by the evidence.* 245

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

   The convening authority should refer charges if he or 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 or 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. 246

   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, for example, to treat lower ranking individuals more severely than higher-ranking ones out of an unjust sense of preference for higher rank.

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

   See STANDARDS FOR PROSECUTION FUNCTION, *supra* note 88, § 3-3.9(a). The ABA Prosecution Function Standard 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 of 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 USAM, *supra* note 21, § 9-27.001.

   See STANDARDS FOR PROSECUTION FUNCTION, *supra* note 88, § 3-3.9(b).


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

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.

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248 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 115, at 26.

249 See STANDARDS FOR PROSECUTION FUNCTION, supra note 88, § 3-3.9(b)(i–vii). Factors ii, ix
and x are found in the current R.C.M. 306(b) discussion. MCM, supra note 2, at 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 PROSECUTION FUNCTION, supra note 88, § 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.” USAM,
supra note 21, § 9-27.230. 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.
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 Factors

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;
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; or
4. The service member’s combat record.

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

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250 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.B.3.iii, they are progressive in that they include sexual orientation as an impermissible factor for consideration. See USAM, supra note 21, § 9-27.260; 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 responsibility exacerbates what may be a lesser infraction for a junior enlisted person) but should not be used as a basis for invidious discrimination in general.

251 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 110, 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.”).
hearing.²⁵²

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.²⁵³

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 respect to his judicial acts.²⁵⁴

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.²⁵⁵

11) Unreasonable Multiplication of Charges²⁵⁶

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.²⁵⁷

12) Relations With Victims and Prospective Witnesses²⁵⁸

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

²⁵² Id. at 375 (Air Force Uniform Code of Judicial Conduct 3B(9)); Standards for Prosecution Function, supra note 88, § 3-1.4(a).
²⁵⁴ Id.
²⁵⁵ Standards for Prosecution Function, supra note 88, § 3-3.1(d).
²⁵⁶ MCM, supra note 2, at R.C.M. 307. See cases cited supra Part II.B.3.
²⁵⁷ Holder Memo, supra note 243.
²⁵⁸ This recommended ethical rule is taken almost verbatim. Standards for Prosecution Function, supra note 88, § 3-3.2.
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.

13) **Fulfillment of Plea Agreements**

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. However, 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—

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259 Id. § 3-4.2(c).
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 not by removing prosecutorial discretion, but by infusing such discretion with decisional touchstones.

It is time to remedy the disparity between the civilian and military prosecutorial realms and 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. 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, and 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 as 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

260 Of course, as noted supra Part II.B.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.
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.

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.261

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261 “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].