Hofstra Law Review

Volume 49 | Issue 1 Article 8

9-1-2020

Probable Cause and the Provable Case: Bridging the Ethical Gap That Exists in the Military Justice System

Mitchell M. Suliman

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/hlr

 Part of the Law Commons

Recommended Citation

Suliman, Mitchell M. (2020) "Probable Cause and the Provable Case: Bridging the Ethical Gap That Exists in the Military Justice System," *Hofstra Law Review*: Vol. 49: Iss. 1, Article 8.
Available at: https://scholarlycommons.law.hofstra.edu/hlr/vol49/iss1/8

This document is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

PROBABLE CAUSE AND THE PROVABLE CASE: BRIDGING THE ETHICAL GAP THAT EXISTS IN THE MILITARY JUSTICE SYSTEM

*Mitchell M. Suliman**

"The virtue of justice consists in moderation, as regulated by wisdom."
Aristotle[1]

I. INTRODUCTION

When deciding whether to bring a case to trial or "refer" charges, probable cause is the *only* standard that binds the commander or the "convening authority." This incredibly low standard fuels an unrestrained system of justice in the military—one in stark contrast to its civilian counterparts, which require both probable cause *and* sufficient admissible evidence to support a conviction. The Military Justice Act of 2016 has implemented specific recommendations of the Military Justice Review Group ("MJRG") to comport military justice to its federal counterparts.[2] One such recommendation is to provide commanders with non-binding disposition guidance.[3] The Uniform Code of Military

* Major, Judge Advocate, United States Army. Presently assigned as the United States Army Consolidated Rehearing Center Officer in Charge & Special Victim Prosecutor, Fort Leavenworth, Kansas. LL.M., 2020, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; J.D., 2014, University of California at Davis School of Law, King Hall; B.S., 2008, United States Military Academy at West Point. Previous assignments include Defense Counsel, 1st Infantry Division, Fort Riley, Kansas, 2017–2019; Trial Counsel, 7th Infantry Division & 2d Stryker Brigade Combat Team, Joint Base Lewis-McChord, Washington, 2016-2017; Administrative Law Attorney, I Corps, Joint Base Lewis-McChord, Washington, 2015-2016; Military Intelligence Officer and Platoon Leader, Combat Aviation Brigade, 4th Infantry Division, Fort Hood, Texas, Camp Taji, Iraq, Mazar-e-Sharif and Kunduz, Afghanistan 2008-2011. Member of the Bar of California. This Article was submitted in partial completion of the Master of Laws requirements of the 68th Judge Advocate Officer Graduate Course.

1. SAMUEL AUSTIN ALLIBONE, PROSE QUOTATIONS FROM SOCRATES TO MACAULAY 374 (J.B. Lippincott ed. 1903).

2. *See* MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP—PART I: UCMJ RECOMMENDATIONS (2015) [hereinafter MIL. JUST. REV. GRP. REP.] (proposing substantive additions to the Uniform Code of Military Justice to enhance the purpose of military law).

3. *Id.* at 25.

Published by Scholarship @ Hofstra Law, 2020

Hofstra Law Review, Vol. 49, Iss. 1 [2020], Art. 8

Justice ("UCMJ") now implements this non-binding guidance through Appendix 2.1 of the Manual for Courts-Martial ("MCM").[4] While helpful, the disposition guidance fails to bridge an important ethical gap between the military and civilian justice system.

The MCM generally employs probable cause as the standard for proceeding with a case at most decision points in the military justice process. The requirement for probable cause is consistent with the first standard but omits the second significant standard of the American Bar Association ("ABA") guidelines concerning the exercise of prosecutorial discretion in the charging decision: there must be sufficient admissible evidence to support a conviction.[5] This Article will examine how the military justice system can bridge this gap by implementing both the "probable cause" standard and the "sufficient admissible evidence" standard without sacrificing the indispensable role of the commander in military justice.

First, this Article examines the problem of sexual assault in the military and the resulting imbalanced system of justice.[6] Second, the Article discusses the current debate of the commander's role in military justice as a backdrop to this proposal.[7] Next, it will examine how the military justice process differs from other prosecutorial ethical standards, such as the ABA, the Department of Justice ("DOJ"), and the National District Attorneys Association ("NDAA") standards.[8] Specifically, the Article will recommend implementing the status quo's non-binding consideration of having sufficient admissible evidence as a binding principle before a convening authority can refer a case.[9] The Article will propose modifications to Article 34 of the UCMJ and the corresponding Rules for Courts-Martial ("RCM") to ensure that both the "probable cause" standard and the "sufficient admissible evidence" standard be implemented in the military justice system.[10]

4. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 2.1 (2019) [hereinafter 2019 MCM].

5. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION pt. 1, § 3-4.3(a) (AM. BAR ASS'N 2019) [hereinafter ABA STANDARDS FOR PROSECUTION FUNCTION] ("A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.").

6. *See infra* Part II.

7. *See infra* Part III.

8. *See infra* Part IV.

9. 2019 MCM, *supra* note 4, app. 2.1, para. 2.1(h).

10. *See infra* Part V.

Suliman: Probable Cause and the Provable Case: Bridging the Ethical Gap Th

II. THE PROBLEM: SEXUAL ASSAULT IN THE MILITARY

For over a decade, there has been an increasing awareness of how the military responds to sexual assault.[11] Arguably, the attention to the military's response to sexual assault has never been greater, making it a top priority to military commanders and their respective formations.[12] The Department of Defense's ("DOD") Annual Report to Congress regarding Sexual Assault in the Military estimated a near forty percent increase of instances of unwanted sexual contact from 2016 to 2018.[13] The military created and revamped several programs over the years to respond to sexual crimes within its ranks.[14] Consequently, and justifiably so, there has also been increased pressure to prosecute sexual assault cases within the military.

Since April 2012, the DOD requires at least the O-6 Special Court-Martial Convening Authority (Colonel or Navy Captain) to have initial disposition decision authority for sexual assault crimes.[15] Should a General Court-Martial Convening Authority decide not to refer sexual assault charges to court-martial, the next superior competent authority must review the non-referral decision, regardless of the underlying Staff Judge Advocate ("SJA") advice.[16] Furthermore, the Secretary of the

11. *See* Dave Philipps, *'This Is Unacceptable.' Military Reports a Surge of Sexual Assaults in the Ranks*, N.Y. TIMES (May 2, 2019, 9:10 PM), https://www.nytimes.com/2019/05/02/us/military-sexual-assault.html.

12. *Pending Legislation Regarding Sexual Assaults in the Military, Address Before the S. Armed Services Comm.*, 113th Cong. (2013) (statement of General Raymond T. Odierno, United States Army Chief of Staff) (transcript available in the United States Senate Committee on Armed Services Library at https://www.armed-services.senate.gov/imo/media/doc/Odierno_06-04-13.pdf) ("In a video conference with Army commanders on May 17, I told my commanders that combating sexual assault and sexual harassment within our ranks is now the Army's #1 priority.").

13. U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 3 (2018), https://int.nyt.com/data/documenthelper/800-dod-annual-report-on-sexual-as/d659d6d0126ad2b19c18/optimized/full.pdf [hereinafter DOD REPORT 2018] ("Using these rates, the Department estimates 20,500 Service members, representing about 13,000 women and 7,500 men, experienced some kind of contact or penetrative sexual assault in 2018, up from approximately 14,900 in 2016.").

14. For example, the military created the Special Victims' Counsel Program to advocate for victims' rights and revamped the way the military prosecutes sex crimes, in part, by creating the special victims' prosecutor role. *See* Memorandum from Charles N. Pede, U.S. Lieutenant General, Judge Advoc. Gen., to Judge Advoc. Legal Servs. Pers. (Dec. 1, 2017) (on file with author); Angel M. Overgaard, *Redefining the Narrative: Why Changes to Military Rule of Evidence 513 Require Courts to Treat the Psychotherapist-Patient Privilege as Nearly Absolute*, 224 MIL. L. REV. 979, 997-98 (2016); U.S. DEP'T OF ARMY, INTERIM REGUL. 27-10, LEGAL SERVS.: MILITARY JUST. para. 17-7 (Jan. 1, 2019) [hereinafter AR 27-10].

15. *See* MCM, *supra* note 4, R.C.M. 306(a) discussion; Memorandum from Sec'y of Def. to Secretaries of the Mil. Dep'ts et al. (Apr. 20, 2012), https://jpp.whs.mil/Public/docs/03_Topic-Areas/09-Withholding_Authority/20160408/01_SecDef_Memo_WithholdingAuthority_20120420.pdf.

16. AR 27-10, *supra* note 14, para. 5-28(c).

Published by Scholarship @ Hofstra Law, 2020

Army must review a non-referral decision if the SJA recommends referral to court-martial.[17] This mandatory review process effectively binds the hands of the convening authority and typically leads to the path of least resistance: refer the case to trial so long as there is probable cause to believe the accused committed the crime.[18]

The results are illustrative of why probable cause should not be the sole standard for bringing a case to trial in the military. Only approximately three percent of the total 7,825 sexual assault cases reported (both restricted and unrestricted) in Fiscal Year 2019, DOD-wide, resulted in a sexual assault conviction.[19] In Fiscal Year 2019, commanders had the legal authority to take some form of disciplinary action for an alleged sexual assault offense in 2,339 cases.[20] In other words, there was sufficient evidence to substantiate the alleged misconduct and support action by the commander in 2,339 cases.[21] Of those 2,339 cases, there were 795 cases with a preferral of court-martial charges for at least one sexual assault.[22] Of those 795 cases, there were only 264 subjects convicted of *any* charge at trial, with only 138 subjects convicted of a qualifying sex offense.[23] Even more alarming, over one-quarter of the approximately 363 sexual assault cases actually referred to trial last year resulted in a full acquittal.[24] These statistics are more than just mere numbers and are in stark contrast to the civilian counterparts.[25] On both sides of the aisle—victims and those accused—

17. *Id.*

18. Rachel VanLandingham & Geoffrey Corn, *Two for One: The Ethical Pursuit of Justice in the Military, and Battlefield Success, Through Joint Prosecutorial Decisions*, 45 SW. L. REV. 495, 500-02, 512-13 (2016).

19. U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY app. B at 4, 7, 23 (2019), https://media.defense.gov/2020/Apr/30/2002291671/-1/-1/1/3_APPENDIX_B_STATISTICAL_DATA_ON_SEXUAL_ASSAULT.PDF ("DOD uses the term 'sexual assault' to refer to a range of crimes, including rape, sexual assault, forcible sodomy, aggravated sexual contact, abusive sexual contact, and attempts to commit these offenses, as defined by the Uniform Code of Military Justice (UCMJ). For the purpose of data analysis in this report, DOD organizes analyses by the most serious sexual assault allegation made by a victim or investigated by a Military Criminal Investigative Organization (MCIO).").

20. *Id.* at 18.

21. *Id.*

22. *Id.* at 23.

23. *Id.* A qualifying sex offense in this context is one requiring the convicted individual to register as a sex offender. *Id.*

24. *Id.* In 2018, over one-third of sexual assault cases referred to trial resulted in a full acquittal. DOD REPORT 2018, *supra* note 13, at 24.

25. Between 2013 and 2017, the DOJ attained convictions at a rate no less than ninety-three percent. *See* U.S. DEP'T OF JUST., U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT (2017); U.S. DEP'T OF JUST., U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT (2016); U.S. DEP'T OF JUST., U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT (2015); U.S. DEP'T OF JUST., U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT (2014); U.S. DEP'T OF JUST., U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT (2013). Note, however, that this figure is representative of *all* criminal convictions—not exclusively sexual offenses. *But see* BRIAN A. REAVES, U.S. DEP'T OF JUST.

interests are at stake. The commander, the person charged with prosecutorial discretion in the military, makes decisions that have a profound impact on the victim, the victim's family, the soldier charged, the accused's family, the unit, and the community as a whole. Such a matter of significance requires greater scrutiny and attention, presently unguided by the low probable cause standard.

III. THE DEBATE: PRESERVING THE ROLE OF THE COMMANDER IN MILITARY JUSTICE

The military justice system differs from the civilian justice system in that the military commander, not a prosecutor, makes the final decision on whether to bring a case or "refer" a case to trial. The commander's role is critical to the seminal purpose of military justice: "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."[26] Since the foundation of military law in 1775, military justice and military discipline have always been inseparable and indispensable at their core.[27] Thus, the need to promote good order and discipline requires a system of justice that is different from civilian justice systems. A primary difference is prosecutorial authority.

The commander's prosecutorial authority is unique in nature. The scope and placement of this unique prosecutorial authority have been a subject of intense debate over the last decade and remain so today.[28] Recent legislative proposals recommend taking this prosecutorial authority away from the commander and vesting all prosecutorial decisions with the military lawyer.[29] Proponents of the modification

---

BUREAU OF JUST. STAT., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES, at 24 (2013) (reporting a 68 percent conviction rate for rape in the seventy-five largest counties in the United States).

26. 2019 MCM, *supra* note 4, app. 2.1 para. 1.1 n.1 (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, para. 3 (2016) [hereinafter 2016 MCM]).

27. *See* COMM. ON THE UNIF. CODE OF MIL. JUST. GOOD ORD. & DISCIPLINE IN THE ARMY, REP. TO HONORABLE WILBER M. BRUCKER SEC'Y OF THE ARMY 11-12 (1960), http://www.loc.gov/rr/frd/Military_Law/pdf/Powell_report/pdf ("In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable. . . . Once a case is before a court-martial, it should be realized by all concerned that the sole concern is to accomplish justice under the law. . . . It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.").

28. *See* Philipps, *supra* note 11.

29. *See* Military Justice Improvement Act of 2019, S. 1789, 116th Cong. (2019); Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013). Senator Kirsten Gillibrand proposed legislation would vest the judge advocate with referral authority instead of the commander. S. 1789;

argue that lay commanders should not have such wide and vast prosecutorial discretion.[30] Meanwhile, opponents emphasize that military justice is a critical tool that the commander must possess to ensure good order and discipline in his or her formation, a responsibility that only the commander bears.[31] Opponents argue that binding legal advice increases the lawyer's power and effectively strips away the commander's discretion to instill good order and discipline in his or her formation.[32] A recent and novel recommendation is for the commander and the lawyer to share prosecutorial authority.[33] This debate, while important, is not the focus of this Article, but rather serves as a backdrop for any proposal to modify the military justice system. The looming question remains: how will adding an additional and binding standard affect the commander's prosecutorial discretion?

This proposal fully recognizes that the commander is integral and primary to military justice decision-making. This proposal also seeks to implement an ethical standard already practiced by civilian jurisprudence: before a prosecutor can bring a case forward, there must be sufficient admissible evidence to sustain a conviction.[34] Critics will likely argue that any binding legal advice will tie the hands of the commander and further strip his or her prosecutorial discretion. However, bridging the ethical divide that exists within the military justice system will not only seek to increase good order and discipline but also promote a more fair and robust system of justice while preserving the commander's vital role.

IV. THE STATUS QUO: PROBABLE CAUSE AND NON-BINDING DISPOSITION GUIDANCE

In order to bridge the ethical gap, it is important to understand the ethical standard currently required to bring a case forward. Currently,

S. 967. The most recent introduction of MJIA of 2019 would vest this authority in judge advocates with the rank of O-6 or higher who possess significant criminal justice experience. S. 1789.

30. *See, e.g.*, Philipps, *supra* note 11 (discussing the impact of commanders' discretion in sexual assault cases).

31. Rachel E. VanLandingham, *Acoustic Separation in Military Justice: Filling the Decision Rule Vacuum with Ethical Standards*, 11 OHIO ST. J. CRIM. L. 389, 399-401 (2014) (citing James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 186 (2002) ("The maintenance of good order and discipline is an absolutely essential *function of command*.")).

32. *See id.* at 424 n.206 (noting that proposed legislation would likely strip the commander of prosecutorial discretion).

33. VanLandingham & Corn, *supra* note 18, at 508-10.

34. *See infra* Part IV.B (comparing the most significant ethical standards of prosecution in the civilian justice system).

commanders are required to seek legal counsel from their lawyer before referring charges to a general or special court-martial, while pre-trial advice need only be prepared for any charge referred to a general court-martial.[35] This "pre-trial advice" requires that the convening authority's senior military lawyer or SJA make written conclusions as to (1) whether each specification alleges an offense; (2) whether there is probable cause to believe that the accused committed the charged offense; and (3) whether a court-martial would have jurisdiction over the accused.[36] The SJA is also required to provide a non-binding recommendation as to the disposition of the case "in the interest of justice and discipline."[37] The convening authority cannot refer charges to court-martial if the SJA determines that probable cause is lacking.[38] RCM 601(d)(1) makes clear that one can use inadmissible evidence and hearsay "in whole or in part" when determining this probable cause finding.[39] Thus, this probable cause determination serves as the *only* limit to a commander's decision to refer a case to court-martial.[40] This begs the question: what is probable cause?

A. Probable Cause

Probable cause is a constitutional term, originating in the Fourth Amendment. The Fourth Amendment aims to protect individuals from unreasonable searches and seizures.[41] Yet, this constitutional search and seizure standard is now used to bring a servicemember to trial.[42] Probable cause is the standard for proceeding with a case at most decision points in the military justice system including warrants, apprehension, pre-trial confinement and restraint, and most relevant to this discussion—referral. Probable cause simply constitutes a reasonable

35. This is a new change from Military Justice Act of 2016. Previously, the convening authority was only required to seek legal advice from its judge advocate prior to referring charges to a general court-martial. *See* 2016 MCM, *supra* note 26, R.C.M. 406(a). Now, "[a] convening authority is required to consult with a judge advocate before referring charges to a special court-martial (*see* RCM 406A) and may seek advice of a lawyer before referring charges to a summary court-martial." 2019 MCM, *supra* note 4, R.C.M. 406(a) discussion.

36. *See* UCMJ art. 34(a)(1), 10 U.S.C. § 834.

37. *Id.* art. 34(a)(2), § 834(a)(2); *see also infra* Section IV.C.2 for a discussion on the new UCMJ article 33.

38. *See* art. 34(a)(1)(B), § 834(a)(1)(B).

39. 2019 MCM, *supra* note 15, R.C.M. 601(d)(1).

40. VanLandingham & Corn, *supra* note 18, at 502.

41. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, *but upon probable cause*, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (emphasis added)).

42. MIL. JUST. REV. GRP. REP., *supra* note 2, at 335. Whether the framers of the Constitution intended for this current paradigm is another question and not addressed here.

belief that the accused committed an offense.[43] In *Brinegar v. United States*, the United States Supreme Court first defined probable cause as "'the facts and circumstances . . . of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[44] This reasonable belief standard is the baseline requirement in both military and civilian justice systems.

Legally, in the United States, all that is required to bring a case to trial is probable cause. According to the Supreme Court, "[s]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury generally rests entirely in his discretion."[45] When a commander is deciding whether to refer charges to a court-martial, the legal and ethical standard of probable cause is the only standard binding the commander. Perplexingly, a reasonable belief is all that is required to bring a case to trial, yet proof beyond a reasonable doubt is required for a conviction at trial. Most ethical standards governing criminal justice address this wide gap.[46] Military justice, governed by the UCMJ, remains the outlier.

B. An Ethical Process Different from Others: Military Justice

Before 1920, military commanders were virtually unbound in their discretion to dispose of charges against an accused. The only requirement was an investigation and an "indorsement whether or not, in his opinion, the charges can be sustained."[47] The 1920 Articles of War contained the first requirement for the commander to seek legal advice prior to referring charges to court-martial.[48] Originally, this was merely a

43. The current 2019 edition of the MCM does not define the term "probable cause." *See* 2019 MCM, *supra* note 4, R.C.M. 601(d)(1) (outlining the only standard for referral of charges to a court-martial: "If the convening authority finds or is advised by a judge advocate that there is probable cause 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."). However, previous editions have defined it in terms of referral and pretrial advice. *Cf.* 2016 MCM, *supra* note 26, R.C.M. 406(b) discussion (requiring the standard known as probable cause).

44. Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (citing Carroll v. United States, 267 U.S. 132, 162 (1925)).

45. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

46. *See infra* Part V.B (discussing counterarguments and anticipated criticisms to closing this ethical gap).

47. MIL. JUST. REV. GRP. REP., *supra* note 2, at 335 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES 19 (1905)).

48. *Id.* at 334-35 (citing Articles of War of 1920, art. 70, para. 3) ("Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge

procedural safeguard and not binding on the commander.[49] Probable cause first became a legal standard for referral when the UCMJ was originally enacted in 1950.[50] Congress prescribed that convening authorities must determine whether probable cause supports a charge prior to referring the charge to court-martial.[51] It was not until 1983 that Congress transferred the probable cause standard of Article 34 from the commander to his or her lawyer.[52] This was the first instance in which the lawyer's advice bound the commander's decision-making.

This low threshold of probable cause has drawn much criticism from courts and legal scholars alike.[53] The critiques spurred several jurisdictions to heighten the ethical standard required to prosecute a case, leading to a divide between military practice and civilian practice with respect to the principles used when deciding whether to bring charges to trial.[54] In civilian practice, probable cause is only part of the ethical equation to bring a case forward. A more robust system of standards guides civilian attorneys and assists with the exercise of their prosecutorial discretion. Common to all is the additional requirement to have *sufficient admissible evidence to sustain a conviction*. The ABA Standards are the predominant guidelines, which guide all attorneys on the ethical practice of law.

1. The ABA's Criminal Justice Standards for the Prosecution Function

The ABA prescribes standard ethical guidelines for those who practice law, including federal prosecutors, state prosecutors, and military legal practitioners. In fact, the services' specific professional responsibility rules take after this core-guiding document for ethical practice.[55] Recently, the ABA updated its rules pertaining to

advocate for consideration and advice.").

49. *Id.* at 335. The commander could still refer the case even if the Staff Judge Advocate determined that there was insufficient evidence to prosecute.

50. *Id.*

51. *Id.* at 335-36 n.4 (citing Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108).

52. *Id.* at 335-36 n.5 (citing Military Justice Act of 1983, Pub. L. No. 98-209, § 4(a)(2), 97 Stat. 1393, 1395).

53. *See* Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 284-85, 290-91 (2008) (arguing that a standard closer to beyond a reasonable doubt should be used by prosecutors in lieu of the inappropriately low standard of probable cause).

54. *See id.*; *infra* Part IV.B.1–3.

55. *See* U.S. DEP'T OF ARMY, REGUL. 27-26, LEGAL SERVS.: RULES PRO. CONDUCT FOR LAWYERS para. 7(b) (June 28, 2018) [hereinafter AR 27-26] ("These Army Rules of Professional Conduct for Lawyers are adapted directly from the American Bar Association (ABA) Model Rules of Professional Conduct, with important contributions from the Navy Rules of Professional Conduct and the Air Force Rules of Professional Conduct.").

prosecutorial charging decisions. In relevant part, the ABA prescribes that "[a] prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice."[56]

The ABA requires all prosecutors to engage in this quantum of evidence calculus before bringing a case forward. While this is the predominant standard for prosecutors to follow, the military rules have not adopted this ethical standard in practice. On the contrary, the DOJ adopted the ABA Standard for all United States Attorneys to follow.[57]

2. The DOJ's Principles of Federal Prosecution

The United States Attorneys' manual, in its Principles of Federal Prosecution, prescribes the basic requirement of probable cause in order to initiate prosecution.[58] However, the comment to Rule 9-27.200 explains that the probable cause requirement is the "minimal requirement" and a "threshold consideration only."[59] The United States Attorneys' Manual Rule 9-27.220 prescribes additional guidelines for federal civilian prosecutors in their exercise of prosecutorial discretion. In relevant part, the DOJ prescribes the following:

> The attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense and *that the admissible evidence will probably be sufficient to obtain and sustain a conviction*, unless (1) the prosecution would serve no substantial federal interest; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution.[60]

Moreover, the comment to the Rule provides that:

> [B]oth 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 attorney for the government believes that

56. ABA STANDARDS FOR PROSECUTION FUNCTION, *supra* note 5, § 3-4.3(a).
57. U.S. DEP'T OF JUST., U.S. ATT'YS' MANUAL § 9-27.200 (2018).
58. *Id.*
59. *Id.* § 9-27.200 cmt.
60. *Id.* § 9-27.220 (emphasis added).

> the admissible evidence is sufficient to obtain and sustain a guilty verdict by an unbiased trier of fact.[61]

In addition to this baseline-charging rule, the DOJ provides specific and structured guidance on several other matters affecting prosecutorial decisions including plea agreements, alternative dispositions, and non-criminal alternatives.[62] While the military recently attempted to provide disposition guidance with the Military Justice Act of 2016, it failed to incorporate the second ethical standard of having sufficient admissible evidence to sustain a conviction. The prosecution guidelines for all district attorneys are also contrary to military practice.

3. The NDAA National Prosecution Standards

The NDAA is the oldest and largest nonpartisan national organization that provides resources and training to prosecutors across the United States.[63] The NDAA, often regarded as the foremost source of expertise on the prosecution function, provides nationwide standards, resources, training, and assistance to prosecutors.[64] The NDAA's National Prosecution Standards, in relevant part, prescribe that "[a] prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial."[65] The NDAA also dictates that "[t]he prosecutor should only file those charges that are consistent with the interests of justice" and lists several factors relevant to this decision including the probability of conviction.[66] The NDAA makes clear that prosecutors must apply a higher standard than mere probable cause when deciding to charge. The relevant commentary follows:

> While commencing a prosecution is permitted by most ethical standards upon a determination that probable cause exists to believe that a crime has been committed and that the defendant has committed it, the standard prescribes a higher standard for filing a criminal charge. To suggest that the charging standard should be the prosecutor's reasonable belief that the charges can be substantiated by admissible evidence at trial is recognition of the powerful effects of the

61. *Id.* § 9-27.200 cmt.

62. MIL. JUST. REV. GRP. REP., *supra* note 2, at 337.

63. *About NDAA*, NAT'L DIST. ATT'YS ASS'N, https://ndaa.org/about/aboutndaa (last visited Nov. 7, 2020).

64. *Id.*

65. NAT'L PROSECUTION STANDARDS § 4-2.2 (NAT'L DIST. ATT'YS ASS'N, 3d ed. 2009).

66. *Id.* § 4-2.4.

> initiation of criminal charges. Pursuant to the prosecution's duty to seek justice, the protection of the rights of all (even the prospective defendant) is required.[67]

The leading national organization on the prosecutor function recognizes that the threshold standard of probable cause is too low to check prosecutors' massive discretion in charging. While there may be guidance on the exercise of prosecutorial discretion in the military, this recent guidance is non-binding in nature.[68] Unlike its civilian counterparts, the military commander's prosecutorial function is currently unchecked, legally bound only by the low probable cause standard.

4. Military Rules of Professional Responsibility

Common to all ethical standard-bearers in the civilian system is this concept of *sufficient admissible evidence to sustain a conviction*. The civilian system attempts to fill the gap between the standard of "probable cause" and the standard of "beyond a reasonable doubt" for conviction with this critical standard. No such gap-filler exists in the military. Yet, military appellate courts have applied this higher ethical standard in courts-martial and even cited to the ABA Standards when examining actions by a trial counsel in the prosecution of criminal cases.[69] In *United States v. Howe*, the Navy-Marine Corps Court of Military Review distinguished between the referral standard and the ethical standard required to proceed to trial.[70] The *Howe* court held that, in accordance with RCM 601, the convening authority can refer a case based solely on the standard of probable cause and that "the decision to prosecute may be premised on evidence which is incompetent, inadmissible, or even tainted by illegality."[71] The court presumed good faith when examining the commander's decision to refer based on probable cause and refused to inquire further into the decision-making.[72]

The *Howe* court distinguishes this referral standard from what trial counsel must have to continue to trial. In doing so, the Court of Military Review applied the ABA Standards for Criminal Justice to the Government's prosecutorial actions in the case holding that "[t]he

67. *Id.* § 4-2 cmt.

68. *See infra* Part IV.C.2 (discussing the recent non-binding guidance contained in Article 33, UCMJ, 10 U.S.C. § 833 and 2019 MCM, *supra* note 4, app. 2.1).

69. *See* United States v. Howe, 37 M.J. 1062, 1064 (N.M.C.M.R. 1993); United States v. Dancy, 38 M.J. 1, 5 (C.M.A. 1993); United States v. Hamilton, 41 M.J. 22, 26 (C.M.A. 1994); United States v. Meek, 44 M.J. 1, 5-6 (C.A.A.F. 1996).

70. *Howe*, 37 M.J. at 1064.

71. *Id.*

72. *Id.*

Government's prosecutorial duty requires that it not 'permit the continued pendency of criminal charges in the absence of sufficient evidence to support a conviction.' ABA, Standards for Criminal Justice (1986), Standard 3.8(a)."[73] Accordingly, the "trial counsel had an ethical obligation to recommend that any charge or specification not warranted by the evidence be withdrawn."[74] Clearly, military appellate courts have applied the same ethical standards guiding civilian practice to military prosecutors.

Since the appellate courts have applied this higher ethical standard to military prosecutors, one would expect the military-specific rules of professional responsibility to follow suit. However, both the Army and Navy standards of professional responsibility require only that the trial counsel recommend to the convening authority to withdraw any charge or specification not supported by probable cause.[75] The corresponding comments explain, "[t]rial counsel may have the duty, in certain circumstances, to bring to the court's attention any charge that lacks sufficient evidence to support a conviction."[76] However, the rules do not explain what these "certain circumstances" are, nor do they heighten the ethical standard as stipulated by the ABA rules, by the DOJ rules, and by certain military appellate courts. Despite attempts by the military courts and the service-specific professional responsibility rules to address the ethical divide, the gap remains today in both the Army and the Navy. Interestingly, not all services follow suit. The Air Force rules come the closest to addressing this ethical divide.

The rules guiding ethical practice for Air Force judge advocates require both an evaluation of both probable cause and whether there is sufficient admissible evidence to sustain a conviction.[77] The discussion to this rule makes clear that "[t]rial counsel must inform the SJA for the convening authority immediately upon discovering that there is insufficient evidence to support a conviction of any charge."[78] Although the Air Force is the only service department to address the ethical concern of having sufficient admissible evidence to sustain a conviction,

73. *Id.*

74. *Id.*

75. *See* AR 27-26, *supra* note 55, app. B, r. 3.8(a); U.S. DEP'T OF NAVY, JUDGE ADVOC. GEN. INSTRUCTION 5803.1E, PRO CONDUCT ATT'YS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOC. GEN. (Jan. 20, 2015) encl. 1, r. 3.8(a)

76. *See* AR 27-26, *supra* note 55, app. B, r. 3.8(a) cmt. 1 (citing United States v. Howe, 37 M.J. 1062 (N.M.C.M.R. 1993)).

77. U.S. DEP'T OF AIR FORCE, INSTRUCTION 51-110, PRO RESP. PROGRAM para. 3-3.9 (Dec. 11, 2018) ("It is unprofessional conduct for a trial counsel to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A trial counsel should not institute or permit the continued pendency of criminal charges in the absence of admissible evidence to support a conviction.").

78. *Id.* para. 3-3.9 discussion.

the corresponding rules within the MCM do not. In essence, the rules for referral and the ethical guidelines for Air Force judge advocates are at odds with the UCMJ and impose a tougher standard for the legal practitioner as opposed to the commander. This quandary, in some respects, worsens the ethical gap and creates conflicting guidance on what is required to refer a case to trial. Congress attempted to fix this ethical concern with the implementation of the Military Justice Act of 2016.[79]

C. The Attempted Fix: Non-Binding Disposition Guidance

1. The Old: The Discussion to RCM 306(b)

The commander has always been responsible for disposing of charges within his or her command, an arduous responsibility.[80] The implementation of the original UCMJ in 1950 first codified this lofty command responsibility, requiring convening authorities to dispose of charges "in the interest of justice and discipline."[81] In 1984, President Reagan first set forth RCM 306, which provides an express policy for the disposition of offenses by the commander.[82] Prior to the Military Justice Act of 2016, the discussion to RCM 306(b) provided a non-exclusive list of disposition factors for the commander to consider when deciding how to dispose of offenses.[83] The previous law included the following disposition factors:

> [T]he 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; when applicable, the views of the victim as to disposition; existence of jurisdiction over the accused and the offense; availability and admissibility of evidence; the willingness of the victim or others to testify; cooperation of the accused in the apprehension or prosecution of another accused; possible improper motives or biases of the person(s) making the

79. *Compare id.* para. 3-3.9, *with* UCMJ art. 34, 10 U.S.C. § 834. The Military Justice Act of 2016 was signed into law as part of the National Defense Authorization Act for Fiscal Year 2017. *See* National Defense Authorization Act for Fiscal Year 2017, S. 2943, 114th Cong. § 5205 (2016) (enacted).

80. *See* 2019 MCM, *supra* note 4, R.C.M. 306(b); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306(b) discussion (2012) ("The disposition decision is one of the most important and difficult decisions facing a commander.").

81. UCMJ art. 30, 10 U.S.C. § 830.

82. Exec. Order No. 12473, 49 Fed. Reg. 28825 (July 13, 1984); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306 (1984).

83. 2016 MCM, *supra* note 26, R.C.M. 306(b) discussion.

> allegation(s); availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction; appropriateness of the authorized punishment to the particular accused or offense.[84]

The factors listed above were largely based on the 1979 version of the ABA Standards for Prosecution Function but purposefully omitted the evaluation of "sufficient admissible evidence to sustain a conviction" standard that guides civilian charging decisions.[85] In fact, the drafters of the previous non-binding discussion section of RCM 306(b) selected a few of the ABA Standards and purposefully omitted important others.[86] The drafters explained particular omitted factors as being "inconsistent" with the commander's judicial function.[87] This dispositional guidance, albeit non-binding, was previously buried in the discussion section of the rule and was criticized as "lack[ing] explanation, comment, context and clarity."[88] This lack of clarity and structure spurred changes in the Military Justice Act of 2016.

2. The New: UCMJ Article 33 and Appendix 2.1 to the MCM

The MJRG, which reviewed the UCMJ in its entirety for Congress, recognized that the disposition decision-making guidance under Article 30 and RCM 306(b) was unstructured and differed significantly from civilian practice.[89] The MJRG proposed changes to align military practice to civilian practice.[90] Congress adopted the MJRG's recommendations and created a new statutory provision to establish non-binding guidance for commanders, convening authorities, staff judge advocates, and judge advocates to consider when exercising their respective military justice duties. To do this, Congress completely revised Article 33, which formerly pertained to the forwarding of charges. The new Article 33, as implemented by the Military Justice Act of 2016, established non-binding guidance that key military justice players should take into account and further prescribed that this non-binding guidance incorporate the principles guiding federal civilian practice.[91] Congress, when drafting this law, sought to modify current

84. *Id.*

85. MIL. JUST. REV. GRP. REP., *supra* note 2, at 295-96 n.25.

86. VanLandingham & Corn, *supra* note 18, at 519.

87. *Id.*

88. *Id.*

89. MIL. JUST. REV. GRP. REP., *supra* note 2, at 297-98.

90. *Id.* at 300-01.

91. UCMJ art. 33, 10 U.S.C. § 833 ("Such guidance shall take into account, with appropriate consideration of military requirements, the principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases in

military charging practice to comport with the standards and principles applicable in most civilian jurisdictions.[92] Accordingly, the DOD implemented Article 33 by including the disposition guidance in the MCM as Appendix 2.1.

Appendix 2.1 provides guidance and supports the exercise of discretion with respect to (1) initiating and declining UCMJ action, (2) selecting appropriate charges, (3) selecting the appropriate level of court-martial or alternative disposition, and (4) considering plea agreements.[93] Paragraph 2.1 of Appendix 2.1 provides fourteen different factors that the commander or convening authority, in consultation with a judge advocate, should consider in all cases.[94] These factors define what the commander should consider in the "interests of justice and good order and discipline" as required by Article 30 of the UCMJ. Buried in this fourteen-factor list is the eighth factor: "Whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial."[95] While this disposition guidance is helpful, it falls short of bridging the gap between the probable cause standard and the beyond a reasonable doubt standard. This guidance, created to comport with the civilian justice system, includes this heightened standard solely as a non-binding consideration.[96] Moreover, the guidance only replicates the previous standard of probable cause as the sole referral standard in Appendix 2.1.[97] Thus, the deliberate problem still exists in the military justice system: probable cause, without more, is the only binding standard necessary to bring a case to trial.

---

accordance with the principle of fair and evenhanded administration of Federal criminal law.").

92. *See* 2019 MCM, *supra* note 4, app. 2.1 analysis at A2.1-4 ("The disposition factors contained in this appendix are adapted primarily from three sources: the Principles of Federal Prosecution issued by the Department of Justice; the American Bar Association (ABA), Criminal Justice Standards for the Prosecution Function; and the National District Attorneys Association (NDAA), National Prosecution Standards. Practitioners are encouraged to familiarize themselves with the disposition factors contained in this appendix as well as these related civilian prosecution function standards. The disposition factors have been adapted with a view toward the unique nature of military justice and the need for commanders and convening authorities to exercise wide discretion to meet their responsibilities to maintain good order and discipline.").

93. *Id.* § 1, para. 1.2.

94. *Id.* § 2, para. 2.1.

95. *Id.* § 2, para. 2.1(h).

96. *Id.* §§ 1-2, paras. 1.1–1.2.

97. *Id.* § 2, para. 2.3 ("Referral. Probable cause must exist for each charge and specification referred to a court-martial. However, when making a referral decision, the convening authority should also consider the matters described in paragraph 2.1 of this appendix.").

V. THE SOLUTION: THE PROVABLE CASE

A. A Necessary Change: Sufficient Admissible Evidence to Sustain a Conviction

Moving from a mere probable cause standard to more of a provable case standard is not a revolutionary idea. On the contrary, during the congressional hearings on the first proposed UCMJ in 1949, there was a proposal that the "standard for referral of charges to general court-martial should be raised to 'beyond a reasonable doubt.'"[98] This proposal attempts to comport the military justice system to the applicable civilian felony charging standards of the time. However, the committee did not adopt the proposal.[99] The status quo necessitates closing the divide between probable cause and beyond a reasonable doubt in the military justice system.

A commander, guided by his or her judge advocate, ought to have sufficient admissible evidence to support a conviction when referring charges to court-martial. A commander's discretion to charge is an enormous exercise of power, and it should be checked by something greater than mere probable cause. The standard of having sufficient admissible evidence to sustain a conviction requires the commander and the judge advocate to evaluate the quality and sufficiency of the evidence in a case before referral, hardly a practice to be discouraged. An evaluation of the strength or sufficiency of evidence needed to establish proof is a necessary practice when proceeding to trial anyway. Doing so in preparation for trial, post-referral, is a backwards practice and one that may encourage bringing cases to trial prematurely.

B. Anticipated Criticism

Critics will argue that imposing this standard on the commander will necessarily limit his or her ability to maintain good order and discipline in the formation because the change would give the lawyer greater binding power while giving the commander less. Presently, commanders are required to receive binding legal advice regarding the probable cause determination from their judge advocate.[100] A probable cause determination, assisted by the Article 32 process, is necessarily a

98. MIL. JUST. REV. GRP. REP., *supra* note 2, at 336 n.4 (quoting Colonel Melvin Maas, *Uniform Code of Military Justice: Hearings on H.R. 2498 Before Subcomm. of the Comm. On Armed Servs.*, 81st Cong. 712 (1949)).

99. *Id.*

100. UCMJ art. 32, 10 U.S.C. § 832; THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, COMMANDER'S LEGAL HANDBOOK 3 (2019).

legal function. Similarly, an evaluation as to the sufficiency of the evidence is also a legal function best completed by the judge advocate. A judge advocate is best suited to determine what evidence is likely admissible at trial and the quality and quantity of evidence needed to obtain and sustain a conviction beyond a reasonable doubt at trial. Simply said, commanders, who lack formal legal education and training, are not suited to evaluate the sufficiency of evidence.

Another criticism is that judge advocates often do not know what will be admissible pre-referral. In most cases, admissibility determinations of key evidence occur well after referral, during motions litigation. In many cases, motions hearings do not occur until days before trial. Critics will likely argue that any binding advice based on the sufficiency of admissible evidence would not only be premature but also inaccurate. Either way, this legal function would not drastically alter the current discretion maintained by the commander. If both probable cause and sufficient admissible evidence exist, as determined by the commander's lawyer, the commander still maintains the same discretion to dispose of the case "in the interest of justice and discipline." The commander can still decide to not refer the case and pursue alternative dispositions. If the commander is advised that either probable cause or the sufficiency of evidence is lacking, the commander would be prohibited from referring the case. This increased standard would better inform the commander's decision-making in bringing the case forward. At the end of the day, it would lead to a more informed and wiser exercise of his or her command discretion regarding military justice—one that will likely promote a healthier and more robust maintenance of good order and discipline in his or her formation. A fairer system, legally bound by common ethical standards, would lead to greater confidence and belief in the military justice system.

Opponents could argue that this change would likely create issues on appeal, where appellate courts would now have to determine and scrutinize the judge advocate and commander's knowledge at the time of referral. Presently, the non-binding disposition guidance in Appendix 2.1 is non-litigable.[101] While it may be difficult to predict future appellate issues and the courts' handling of those issues, it is telling what the courts have done with the current binding threshold of probable cause. The current decision to refer, based on probable cause, must be and is presumed to be made in good faith.[102] Courts have refused to inquire

101. 2019 MCM, *supra* note 4, app. 2.1, § 1, para. 1.4 ("This Appendix is not intended to, does not, and may not be relied upon to create a right, benefit, or defense, substantive or procedural, enforceable at law or in equity by any person.").

102. United States v. Hardin, 7 M.J. 399, 404 (C.M.A. 1979).

further once the referral decision has been made.[103] Although time would tell, the courts may presume good faith and be hesitant to review referral decisions based on both probable cause and sufficient admissible evidence to sustain a conviction. Certain recommendations would enable commanders, legal practitioners, and courts alike to comport the military's ethical standards to those of its civilian counterparts.

C. Recommendations

In an attempt to fix the ethical gap that exists within the military justice system, the proposed legislation that would effectuate this change in the MCM follows.[104]

1. Legislative Proposal: UCMJ Article 34

Section 834 of Title 10, United States Code (Article 34 of the UCMJ) is amended to read as follows:

> § 834. Art. 34. Advice to convening authority before referral for trial
> (a) GENERAL COURT-MARTIAL.—
> (1) STAFF JUDGE ADVOCATE ADVICE REQUIRED BEFORE REFERRAL.— Before referral of charges and specifications to a general court-martial for trial, the convening authority shall submit the matter to the staff judge advocate for advice, which the staff judge advocate shall provide to the convening authority in writing. The convening authority may not refer a specification under a charge to a general court-martial unless the staff judge advocate advises the convening authority in writing that—
> (A) the specification alleges an offense under this chapter;
> (B) there is probable cause to believe that the accused committed the offense charged;
> (C) *there is sufficient admissible evidence to obtain and sustain a conviction in a trial by court-martial*; and
> (D) a court-martial would have jurisdiction over the accused and the offense.

103. United States v. Howe, 37 M.J. 1062, 1064 (N.M.C.M.R. 1993).

104. While these recommendations solely pertain to the proposed legislative changes within the MCM, the author also recommends all Services modify their respective professional responsibility rules and standards pertaining to prosecutorial ethics to comport to its civilian justice counterparts and the ABA guidelines. *See supra* Part IV.B.

2. Legislative Proposal: RCM 406(b)(2)

RCM 406(b)(2) is amended to read as follows:

(2) Conclusion with respect to whether there is sufficient admissible evidence to obtain and sustain a conviction on the offense charged in the specification.

3. Legislative Proposal: RCM 601(d)(1)

RCM 601(d)(1) (*Basis for referral*) is amended to read as follows:

(1) *Basis for referral.* If the convening authority finds or is advised by a judge advocate that there is probable cause to believe that an offense triable by a court-martial has been committed, that the accused committed it, that the specification alleges an offense, *and that there is sufficient admissible evidence to obtain and sustain a conviction in a trial by court-martial*, the convening authority may refer it. The convening authority or judge advocate may consider information from any source and shall not be limited to information reviewed by any previous authority, but a case may not be referred to a general or special court-martial except in compliance with paragraph (d)(2) or (d)(3) of this rule. The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial, but *must consider whether there is sufficient admissible evidence to obtain and sustain a conviction at trial.*

4. Legislative Proposal: MCM Appendix 2.1, Paragraph 2.3

Paragraph 2.3. of Appendix 2.1, MCM is amended to read as follows:

2.3. Referral. Probable cause *and sufficient admissible evidence to obtain and sustain a conviction* must exist for each charge and specification referred to a court-martial. However, when making a referral decision, the convening authority should also consider the matters described in Paragraph 2.1 of this Appendix.

VI. CONCLUSION

Bridging the gap between probable cause and beyond a reasonable doubt before bringing a case to trial is a necessary change in military justice. A binding standard, requiring judge advocates and commanders to consider whether there is sufficient admissible evidence to sustain a

conviction, would lead to a more restrained exercise of the commander's prosecutorial discretion. While there may be criticisms to making the current non-binding consideration a binding principle, this change would encourage a better system of justice within the military. This necessary change would comport military justice to its civilian counterparts, bolster the credibility of the military justice system, and preserve the commander's primary role of maintaining good order and discipline in the formation.

VII. ADDENDUM

On October 19, 2020, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces ("DAC-IPAD") published its report on investigative case file reviews for military adult penetrative sexual offense cases closed in fiscal year 2017.[105] The DAC-IPAD's mission, as directed by Congress, "is to advise the Secretary of Defense on the investigation, prosecution, and defense" of allegations of sexual crimes involving members of the armed forces.[106] The DAC-IPAD conducted a three-year project examining the 1904 criminal investigative cases and any related courts-martial cases concerning adult penetrative sexual offenses closed between October 1, 2016, and September 30, 2017.[107] The committee made two key findings:

> There is not a systemic problem with the initial disposition authority's decision either to prefer a penetrative sexual offense charge or to take no action against the subject for that offense. In 94.0% and 98.5% of cases reviewed, respectively, those decisions were reasonable.
>
> There is a systemic problem with the referral of penetrative sexual offense charges to trial by general court-martial when there is not sufficient admissible evidence to obtain and sustain a conviction on the

105. The DAC-IPAD report was released while this Article was slated for publication. Readers of this Article are encouraged to consult this important study. While this Article reaches its conclusion and recommended legislative proposals with a focus on professional responsibility and ethical standards, the DAC-IPAD study reaches similar recommendations after performing in-depth quantitative and qualitative case reviews of all adult penetrative sexual offenses in the military during Fiscal Year 2017. *See* DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, AND DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL ASSAULT CASES CLOSED IN FISCAL YEAR 2017 (2020), https://dacipad.whs.mil/images/Public/08-Reports/08_DACIPAD_CaseReview_Report_20201019_Final_Web.pdf [hereinafter DAC-IPAD REPORT].

106. *Id.* at 1 & n.1 (citing Carl Levin & Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 546, 128 Stat. 3292 (2014)); *see also* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 535, 133 Stat. 1198, 1362 (2019) (extending the DAC-IPAD's term from five to ten years).

107. DAC-IPAD REPORT, *supra* note 105, at 1.

> charged offense. In 31.1% of cases reviewed that were tried to verdict on a penetrative sexual offense charge, the evidence in the materials reviewed did not meet that threshold.[108]

The DAC-IPAD's findings clearly demonstrate the existing ethical gap between probable cause and sufficient admissible evidence to sustain a conviction. The committee determined that there was insufficient admissible evidence to obtain and sustain a conviction in 213 of the 517 preferred cases.[109] In other words, there was insufficient evidence to sustain a conviction in over forty percent of the preferred cases.[110] This number is both alarming and concerning, considering the accused servicemembers had to face the negative impacts associated with the preferred felonious charges when the Government did not even have sufficient admissible evidence to sustain a conviction at trial.[111] Moreover, of the 235 penetrative sexual offense cases referred and tried at a general court-martial in fiscal year 2017, seventy-three did not contain sufficient admissible evidence to convict the accused of the sexual offense.[112] As expected, all but two of those seventy-three cases resulted in acquittals of the accused on those specific offenses.[113] In one of the two cases that resulted in a conviction, the conviction was later overturned on appeal due to the factual insufficiency of the evidence.[114]

In contrast, the DAC-IPAD determined that the reviewed material "contained sufficient admissible evidence to obtain and sustain a conviction" in 68.9% (162 of 235) of the referred cases tried to verdict.[115] Of those cases with sufficient evidence to obtain a conviction, "the government obtained a conviction on the penetrative sexual offense charge in 54.9% (89 of 162)" cases.[116] The results highlight the significant difference between the minimal evidentiary threshold of "probable cause" and the "beyond a reasonable doubt" standard at trial. More importantly, the results support the demand for a mandatory review of the sufficiency of the evidence before sending a case to trial—one which would be binding on the convening authority.

---

108. *See id.* at 3 & nn.9-11.

109. *Id.* at 54.

110. *Id.*

111. *Id.* at 55, n.124 (reporting that accused servicemembers facing court-martial are among the highest suicide risks.); *see also* Barker v. Wingo, 407 U.S. 514, 533 (1972) (finding that an accused not incarcerated prior to trial is "still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility").

112. DAC-IPAD REPORT, *supra* note 105, at 3.

113. *Id.*

114. *Id.* at 13.

115. *Id.* at 56.

116. *Id.*

The DAC-IPAD determined that the prosecutorial assessment of the sufficiency of the evidence is a significant factor predicting conviction on a penetrative sexual offense charge. For example, the committee found that 97.8% of cases resulting in conviction also had sufficient admissible evidence to obtain and sustain a conviction.[117] Moreover, the study revealed that the decision to refer to general court-martial a sexual offense charge that lacked sufficient admissible evidence to obtain a conviction directly contributed to the 61.3% acquittal rate for these offenses.[118] The DAC-IPAD's findings and results from fiscal year 2017 are indicative of what could have been if the military prosecution and convening authorities were guided and equally bound by the following question of paramount importance: is there sufficient admissible evidence to obtain and sustain a conviction at trial?

Presently, the services' military justice officials concede that when making their referral recommendations to general court-martial convening authorities, they place equal or greater weight on other factors aside from the sufficiency of the evidence, such as the victim's desire to proceed to trial, community safety, and the accused's criminal history.[119] The committee recognized that sexual assault cases are often "hard cases" and determined that these hard cases "could and should proceed to trial when there was sufficient evidence to support" a conviction.[120] In other words, the committee did not focus on whether a case was a definite "winner" or if conviction was likely or even probable.[121] The committee also recognized that court-martial convening authorities feel pressure to refer penetrative sexual offenses to trial because of the statutory requirement of either a higher convening authority or the Service Secretary, depending upon the circumstances, to review any non-referral decisions.[122] As such, the DAC-IPAD's review of the 1904 adult penetrative sexual offense case files closed in fiscal year 2017 revealed a systemic problem with the referral of these charges where there was insufficient admissible evidence to obtain and sustain a conviction on the charged offense.[123]

117. *Id.* at 59. While it is a significant factor predicting conviction, the DAC-IPAD also found that there was sufficient admissible evidence in 50.7% of cases resulting in acquittal on a penetrative sexual offense charge. *Id.* The committee recognizes that not all cases with sufficient admissible evidence will, in fact, result in a guilty verdict.

118. *Id.* at 60.

119. *Id.* at 57.

120. *Id.* at 59.

121. *Id.* at 57. The committee only "evaluated whether sufficient admissible evidence to obtain a conviction was *present* in the investigative files, such that if the evidence was admitted at trial, proof beyond a reasonable doubt was an achievable result." *Id.*

122. *Id.* at 63-64, 64 n.134; *see also supra* notes 16-18.

123. *Id.* at 64.

As a result of this comprehensive study, the DAC-IPAD provided one necessary and important recommendation to Congress:

> Congress [should] amend Article 34, UCMJ, to require the staff judge advocate to advise the convening authority in writing that there is sufficient admissible evidence to obtain and sustain a conviction on a charged offense before a convening authority may refer a charge and its specification to trial by general court-martial.[124]

Similar to this Article's recommendations, the DAC-IPAD includes legislative proposals for amending Article 34, UCMJ. In doing so, the committee recommends modifications to Article 34, UCMJ (Advice to convening authority before referral for trial), RCM 406 (Pretrial advice), and RCM 601 (Referral).[125] These proposals would force military prosecutors and convening authorities to evaluate the sufficiency of admissible evidence *before* a case is brought to trial.

These legislative proposals should be adopted because the ethical gap that exists in military prosecutions is a great detriment to all parties involved—the victim, the accused, the unit, and the military justice system at large. The DAC-IPAD's findings from its three-year project examining the 2017 cases reveal the alarming impacts of such gap.[126] Further, this ethical gap remains in stark contrast to all other criminal justice practices in the United States. The military would be wise to comport its prosecutorial ethics and professional responsibility standards with its civilian counterparts to protect the credibility and fairness of the military justice system.

124. *Id.* Further recommendations to Congress are included in Appendix E of this Report and have been included in previous DAC-IPAD Reports. *See Reports*, DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, AND DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, https://dacipad.whs.mil (last visited Nov. 7, 2020); *see also supra* Part V.

125. DAC-IPAD REPORT, *supra* note 105, at I-1; *see also supra* Part V.

126. DAC-IPAD REPORT, *supra* note 105, at 5 ("Taken together, these data raise issues of grave concern regarding the fairness and integrity of the military justice system.").