

Discretion and Discontent: A Discourse on Prosecutorial Merit Under the Uniform Code of Military Justice

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The magnitude of the charging decision does not dictate that it be made timidly, but it does dictate that it should be made wisely with the exercise of sound professional judgment.¹

I. Introduction

You are a trial counsel who has just been assigned a new case. You review the investigation and learn that Corporal Jones is accused of slapping the buttocks of a female subordinate. During an interview with law enforcement, he denied the allegation, but volunteered that he recently smoked marijuana as a result of stress the allegation has caused. A subsequent probable cause urinalysis is negative. During a search of Corporal Jones's vehicle, an agent discovered within the glove compartment a small bag of a substance later confirmed to be cocaine. Charges have already been preferred for abusive sexual contact, wrongful use of marijuana, and wrongful possession of cocaine.

After discussing the case with the investigating agent and interviewing the relevant witnesses, you conclude your review and correctly identify that there is no evidence to corroborate Corporal Jones's confession of using marijuana. Also, you believe the defense would prevail on a motion to suppress the seized cocaine as the fruit of an illegal search. You are confident that with the alleged victim's testimony you have evidence supporting the elements of abusive sexual contact. However, as you glance at the stack of pending rape and sexual assault cases on the corner of your desk, you decide that a court-martial is not the appropriate forum to address an alleged over-the-clothes buttocks slap. Based on your experience, this does not rise to the level of conduct warranting the time and expense of a court-martial or deserving of possible sex offender registration.

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¹ NAT'L DISTRICT ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS, Standard 4-2.4 cmt. (3d ed. 2009) [hereinafter NATIONAL PROSECUTION STANDARDS].

You convey your concerns with the preferred charges to the staff judge advocate and convening authority. You recommend administrative action rather than a court-martial. Emphasizing "good order and discipline" and "setting an example," the convening authority disagrees and refers the charges to a special court-martial. Dejectedly, you return to your office to begin preparing for trial—or to ponder your next move.

This scenario raises significant issues not only about the proper weighing of prosecutorial merit, but also the implications when trial counsel disagree with convening authorities' referral decisions. Recent efforts to strip convening authorities of the discretion to take action on certain alleged offenses under the Uniform Code of Military Justice (UCMJ) and vest it with independent, experienced trial counsel have thus far fallen short.² The merits and pitfalls of the existing system have been the topic of extensive debate and inquiry³ and will not be explored here. Instead, this article examines the reality of a system in which different governmental players, governed by different standards, may come to different conclusions regarding the merits and appropriate disposition of a case.

Significant scrutiny has been directed toward the exercise of discretion by convening authorities when such discretion results in action short of referral of charges to a

² See Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2013). Introduced by Senator Kirsten Gillibrand, the Military Justice Improvement Act of 2013 would give discretion to prosecute certain offenses to commissioned officers in the pay grade of O-6 or above, who have significant experience as trial counsel, and are outside of the accused's chain of command. On March 6, 2014, the Senate rejected a cloture motion on the bill by a vote of 55-45. *U.S. Senate: Roll Call Vote*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=2&vote=00059 (last visited July 6, 2015) (providing a roll call vote on S. 1752, the Military Justice Improvement Act of 2013). Senator Gillibrand's renewed push for a vote on the bill, reintroduced as S. 2992, was blocked on December 11, 2014. Rob Groce, *Sen. Lindsey Graham: Bill Addressing Military Rape Only a 'Political Cause'*, EXAMINER (Dec. 11, 2014, 8:55 PM), <http://www.examiner.com/article/sen-lindsey-graham-bill-addressing-military-rape-only-a-political-cause>. The Act failed a Senate vote again on June 16, 2015 as an amendment to H.R. 1375, the National Defense Authorization Act for Fiscal Year 2016. *U.S. Senate: Roll Call Vote*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=2&vote=00059 (last visited July 6, 2015) (providing a roll call vote on S.Amdt. No. 1578, the Military Justice Improvement Act of 2015).

³ See, e.g., REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, ANNEX B; REPORT OF THE ROLE OF THE COMMANDER SUBCOMMITTEE (May 2014) [hereinafter RSP REPORT]; Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129 (2014).

court-martial, particularly if taken against the recommendation of a staff judge advocate.⁴ Less scrutinized is the opposite situation in which a convening authority refers charges to a court-martial against the recommendation of the staff judge advocate or assigned trial counsel.⁵ This article focuses on the legal and ethical considerations of such a situation.

The convening authority retains ultimate discretion, but his disposition decision is informed by the assessments and recommendations of others, to include subordinate commanders,⁶ the staff judge advocate,⁷ and trial counsel.⁸ In “an overwhelming majority of cases,” there will be a meeting of the minds between the staff judge advocate and the convening authority on the appropriate disposition.⁹ The same is likely true with the assessments of trial counsel, but disagreements arise periodically as convening authorities and trial counsel consider different factors—and consider factors differently—while weighing prosecutorial merit. This may implicate additional considerations on the part of trial counsel; they have legal and ethical obligations beyond that of simply advising the convening authority, and, in some instances, they may not be relieved of responsibility when their advice is not heeded.

This article discusses the concept of prosecutorial merit as it relates to the considerations of both trial counsel and convening authorities while weighing the appropriate action to be taken in cases. Those considerations often overlap, but not always. First, the mandatory components of prosecutorial merit—the minimum standards for preferential, referral, and the beginning of trial—must be considered. Each standard is different, and the quantum and quality of evidence to support one may not necessarily support the next. Then, this article examines numerous discretionary

⁴ See, e.g., National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1744(c)–(d) (2013) (requiring that decisions of convening authorities not to refer charges for certain sexual offenses be reviewed by the relevant department secretary if such decision is made against the advice of a staff judge advocate, or by the next superior general court-martial convening authority if made in concurrence with the advice of a staff judge advocate); Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 541 (2014) (requiring that decisions of convening authorities not to refer charges for certain sexual offenses be reviewed by the relevant department secretary if requested by the department’s “chief prosecutor”).

⁵ But see RSP REPORT, *supra* note 3, at 23 (recommending repeal of section 1744 of the 2014 NDAA out of concern that the heightened scrutiny on non-referral decisions creates “real or perceived undue pressure . . . on convening authorities to refer, in situations where referral does not serve the interests of victims or justice”).

⁶ Exec. Order No. 13,669, 79 Fed. Reg. 34,999, 35,013 (June 18, 2014) [hereinafter EO 13,669] (amending Rule for Court-Martial 306(b) discussion); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 401(c)(2)(A) (2012) [hereinafter MCM].

⁷ UCMJ, art. 34 (2012); MCM, *supra* note 6, R.C.M. 406.

⁸ MCM, *supra* note 6, R.C.M. 502(d)(5) discussion (B).

⁹ RSP REPORT, *supra* note 3, at 129.

considerations for prosecutorial merit. Lastly, this article explores the legal and ethical implications when trial counsel disagree with the decision of convening authorities to refer charges to a court-martial.

II. The Components of Prosecutorial Merit

Prosecutorial merit is an amorphous concept with no formal definition, but it can be viewed simply as a determination that the ends of military justice will be served by exercising prosecutorial discretion to refer charges to a court-martial following the consideration of various legal and equitable factors.¹⁰ Whatever other permissive characteristics a case meriting prosecution under the UCMJ possesses, there are a few legal imperatives. Most importantly, determinations of prosecutorial merit and the exercise of prosecutorial discretion should be guided by the purpose of military law: “[T]o 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.”¹¹

A. The Bare Minimum: Mandatory Considerations for Prosecutorial Merit

1. *Requisites for Preferential and Referral*

Preferential of charges requires an accuser to swear that she “has personal knowledge of or has investigated the matters set forth in the charges and specifications and that they are true in fact to the best of that person’s knowledge and belief.”¹² If a general court-martial is contemplated, a preliminary hearing must be conducted pursuant to Article 32, UCMJ.¹³ The preliminary hearing officer must submit a report addressing, among other things, “whether there is probable cause to believe an offense has been committed and the accused committed the offense,” and “[r]ecommending the disposition that should be made of the case.”¹⁴

The convening authority may refer charges if he “finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial

¹⁰ See generally ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-4.3(a) (4th ed. 2015) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE] (“A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes 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 best interests of justice.”).

¹¹ MCM, *supra* note 6, pmbl.

¹² *Id.* R.C.M. 307(b)(2).

¹³ UCMJ, art. 32 (2014).

¹⁴ *Id.*

has been committed and that the accused committed it, and that the specification alleges an offense”¹⁵ Notably—and sometimes problematically—“[t]he convening authority or judge advocate may consider information from any source,” and the finding of reasonable grounds “may be based on hearsay in whole or in part.”¹⁶ Furthermore, “[t]he convening authority is not required to screen the evidence to ensure its admissibility. In fact, the decision to prosecute may be premised on evidence which is incompetent, inadmissible, or even tainted by illegality.”¹⁷

2. Requisites for Beginning Trial

The expediencies of military justice often prevent evidentiary infirmities from being truly realized until well after referral, perhaps even as late as the eve of trial. This is particularly true in light of guidance to military justice practitioners to “try all known offenses at once,”¹⁸ and to “[e]rr on the side of liberal charging and be prepared to withdraw as the case develops.”¹⁹ When prosecutorial discretion is exercised liberally, trial counsel must tread conservatively; the above standards for preferral and referral may be satisfied despite lacking a legally sound basis for beginning trial.²⁰

¹⁵ MCM, *supra* note 6, R.C.M. 601(d)(1). Advice from a staff judge advocate that “the specification is warranted by the evidence” is required prior to referral to a general court-martial. UCMJ, art. 34(a) (2012). The Army requires such advice by policy for special courts-martial as well. U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-28.b. (3 Oct. 2011) [hereinafter AR 27-10].

¹⁶ MCM, *supra* note 6, R.C.M. 601(d)(1). However, along with pretrial advice to the convening authority, the staff judge advocate *should* provide a “brief summary of the evidence,” to include evidentiary infirmities, but “there is no legal requirement” to do so, “and failure to do so is not error.” *Id.* R.C.M. 406(b) discussion; *see also* United States v. Pastor, No. 88-2618, 1990 C.M.R. LEXIS 281, at *10–11 (N.M.C.M.R. Mar. 30, 1990) (“[W]e do not believe the staff judge advocate had a legal responsibility to advise the convening authority as to the evidentiary problems surrounding the need for corroboration of appellant’s admissions, although he would do well to at least identify the problem in advance for the convening authority . . .”).

¹⁷ United States v. Howe, 37 M.J. 1062, 1064 (N.M.C.M.R. 1993), *overruled on other grounds by* United States v. Driver, 57 M.J. 760 (N.M. Ct. Crim. App. 2002) (citing *Lawn v. United States*, 355 U.S. 339, 349 (1958)); *see also* MCM, *supra* note 6, R.C.M. 601(d)(1) (“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.”).

¹⁸ DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 6-1 (8th ed. 2012); *see also* U.S. DEP’T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE attachment 3, Standard 3-3.9 discussion (6 June 2013) [hereinafter AFI 51-201] (“Judicial economy would suggest that an accused should be charged with all known offenses and tried once; however, this is not required.”).

¹⁹ CRIM. LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, PRACTICING MILITARY JUSTICE, at 7-2 (Apr. 2013).

²⁰ *See* United States v. Asfeld, 30 M.J. 917, 929 (A.C.M.R. 1990) (“The [probable cause] standard is so slight and prosecutorial discretion so broad that there is no constitutional requirement for an independent judicial determination of probable cause in the absence of pretrial restraint. However, as the case proceeds to prosecution, the Government must make a

A number of cases have highlighted the distinction between probable cause to refer charges and the quantum and quality of evidence sufficient to begin trial—and the danger of conflating the two. This issue arises on appeal in cases in which an accused is tried on multiple charges or specifications, only some of which are supported by admissible evidence. In one of the earliest military appellate court opinions on the subject, the U.S. Coast Guard Board of Review framed the issue as follows:

As a matter of basic fairness in a criminal trial, if a charge preferred against an accused can not be substantiated by competent legal evidence, it should not be brought to the notice of the court which is trying him on other charges. The accused is entitled to be protected against the risk of having a mere accusation influence a determination of guilty.²¹

The U.S. Court of Military Appeals first addressed the issue in the oft-cited opinion in *United States v. Phare*,²² which “stands for the proposition that it is error for the Government to present specifications and charges to the members of a court knowing that it has no evidence on such specifications and charges.”²³ Subsequent cases have flushed out the due process implications of proceeding to trial on unsupported charges or specifications. For example, the U.S. Army Court of Military Review (ACMR) explained in a scathing opinion on the subject:

[J]ust as misjoinder and multiplicity in charging may result in a denial of due process, so may the prosecution of unwarranted charges result in a denial of due process. The due process hazards inherent in such charging are clear: the mere allegation of a baseless charge can influence the finder of fact by suggesting that the accused is a bad character worthy of punishment. Likewise, it may induce cumulative consideration of the evidence of separate offenses and result in a finding of guilty which would not have resulted had the fact-finder considered the evidence separately. In short, the sheer number of accusations may influence the fact-finder.²⁴

This line of cases demonstrates that trial counsel must continue to evaluate the state of the government’s case at each stage leading up to trial. Developments, rulings, and

good-faith assessment of its case and withdraw any charge which it cannot substantiate by competent, legal evidence.” (citations omitted)).

²¹ United States v. Bird, 30 C.M.R. 752, 755 (C.G.B.R. 1961).

²² United States v. Phare, 45 C.M.R. 18 (C.M.A. 1972).

²³ United States v. Duncan, 46 C.M.R. 1031, 1033 (N.C.M.R. 1972).

²⁴ *Asfeld*, 30 M.J. at 929 (citations omitted).

simple realizations along the way may affect the ability of trial counsel to legally and ethically proceed. Common blunders include proceeding to trial on offenses premised only upon uncorroborated confession,²⁵ suppressed evidence,²⁶ or the testimony of unavailable witnesses.²⁷ Blatant overcharging has also drawn the ire of courts in this regard.²⁸

Whether these errors result in prejudice to the accused depends on the specific facts of a case.²⁹ “Where such error occurs the court must determine its prejudicial effect by thorough examination of all of the evidence relating to any charge and specification on which the accused has been found guilty.”³⁰ Courts must determine if the findings or sentence related to the viable charges or specifications were influenced in some manner by the mere appearance of the unviable ones on the charge sheet.³¹ Courts are more likely to find prejudice when the military judge fails to give the members a cautionary instruction to not consider the unsupported charges or specifications for any reason when reaching findings or a sentence.³² Further, courts are likely to find prejudice when they are unconvinced that the

strength of the evidence is so great that the members or military judge would have reached its findings or sentence despite being aware of the unsupported charges or specifications.³³ When courts find error and prejudice, remedial action ranges from reassessing the sentence³⁴ to dismissing the charges outright.³⁵

Courts-martial before a military judge alone are not immune from these issues. Some courts have found error when the military judge, as the fact-finder and sentencing authority, is made aware of charges or specifications that the government cannot or does not offer any evidence to support.³⁶ Rarely is prejudice found.³⁷

As will be discussed in the next section, the “availability and admissibility of evidence” is among numerous permissive considerations in the exercise of prosecutorial discretion,³⁸ but practically, as demonstrated by the legal principles of these cases, it must be viewed as a mandatory component of prosecutorial merit. Instructively, the American Bar Association views it as such: “A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes the charges are supported by probable

²⁵ *Bird*, 30 C.M.R. 752; *United States v. Howe*, 37 M.J. 1062 (N.M.C.M.R. 1993), *overruled on other grounds by* *United States v. Driver*, 57 M.J. 760 (N-M. Ct. Crim. App. 2002); *United States v. Pastor*, No. 88-2618, 1990 C.M.R. LEXIS 281 (N.M.C.M.R. March 30, 1990).

²⁶ *Phare*, 45 C.M.R. 18; *United States v. Whittington*, 36 C.M.R. 691 (A.B.R. 1966).

²⁷ *United States v. Hall*, 29 M.J. 786 (A.C.M.R. 1989); *United States v. Showers*, 48 C.M.R. 837 (A.C.M.R. 1974); *Pastor*, 1990 C.M.R. LEXIS 281. *Pastor* further serves as a cautionary tale against the government placing its hope for supporting a charge on the testimony of a co-accused without first obtaining a proffer, describing such as “serendipity at best and border[ing] on the reckless.” *Id.* at *12.

²⁸ *Asfeld*, 30 M.J. 917; *United States v. Henderson*, No. 200101076, 2002 C.C.A. LEXIS 133 (N-M Ct. Crim. App. June 14, 2002) (Finnie, S.J., concurring).

²⁹ See UCMJ, art. 59(a) (2012) (“A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.”).

³⁰ *United States v. Duncan*, 46 C.M.R. 1031, 1033 (N.C.M.R. 1972).

³¹ See *Asfeld*, 30 M.J. at 929 (“When the court finds a lack of sufficient admissible evidence to warrant prosecution, this court must consider the effect, if any, on the legality and fairness of the proceedings and findings even though the charge may have been supported by probable cause.”).

³² See *United States v. Phare*, 45 C.M.R. 18, 22 (C.M.A. 1972) (finding error and prejudice, stating that “prejudice might have been avoided had the military judge instructed the court not to consider [the unsupported charges and specifications], for any purpose”); *Hall*, 29 M.J. at 792 (finding error, but no prejudice, when “the military judge gave appropriate cautionary instructions”); *Pastor*, 1990 C.M.R. LEXIS 281, at *15 (finding error, but no prejudice, when “the military judge did instruct the members that they could not consider in any way . . . those specifications upon which not guilty findings had been entered”). *But see* *United States v. Whittington*, 36 C.M.R. 691 (A.B.R. 1966) (finding error and prejudice “notwithstanding the cautionary instruction given the court”); *United States v. Young*, 12 M.J. 991 (A.F.C.M.R. 1982) (finding error, but no prejudice, even though the military judge “did not instruct the court to disregard [the unsupported] specification when voting on a sentence”).

³³ See *Phare*, 45 C.M.R. at 21 (finding error and prejudice, stating, “[W]e cannot say the evidence in this case is so overwhelming that the unsubstantiated specifications did not influence the court's findings”); *Asfeld*, 30 M.J. at 930 (finding error and prejudice, stating, “Because the members returned a finding of guilty to a charge not supported by competent evidence and another finding of guilty refuted by evidence introduced by the Government itself, we find that their deliberations were influenced by the sheer weight of accusations in the case and not by the evidence—or lack thereof—adduced at trial”); *United States v. Showers*, 48 C.M.R. 837, 838 (A.C.M.R. 1974) (finding error, but no prejudice, stating that “the posture of the evidence adduced by the prosecution . . . does not compel our concluding . . . that the military judge would not have found the appellant guilty without regard to his knowledge of the charges that were not prosecuted”); *Young*, 12 M.J. at 993 (finding error, but no prejudice, stating that “the evidence of guilt on the contested specifications is so compelling that the presence of the unsubstantiated specification did not influence the court's findings or affect the sentence”); *United States v. Bird*, 30 C.M.R. 752, 755 (C.G.B.R. 1961) (finding error, but no prejudice, stating that “the error could scarcely have had any impact on the findings [as] there is no real question as to whether the accused did or did not commit the [offenses] of which he is being held guilty.”).

³⁴ *Whittington*, 36 C.M.R. 691; *United States v. McCowen*, No. 72-1050 (N.C.M.R. June 23, 1972).

³⁵ *Asfeld*, 30 M.J. 917.

³⁶ *Showers*, 48 C.M.R. 837 (finding error); *United States v. Howe*, 37 M.J. 1062 (N.M.C.M.R. 1993) (finding error), *overruled on other grounds by* *United States v. Driver*, 57 M.J. 760 (N-M. Ct. Crim. App. 2002); *United States v. McCowen*, No. 72-1050 (N.C.M.R. June 23, 1972) (finding error); *United States v. Duncan*, 46 C.M.R. 1031 (N.C.M.R. 1972) (finding error). *But see* *United States v. Knopick*, 47 C.M.R. 201 (N.C.M.R. 1973) (finding no error); *United States v. Gutierrez*, 47 C.M.R. 181 (N.C.M.R. 1973) (finding no error).

³⁷ See *Showers*, 48 C.M.R. 837 (finding no prejudice); *Howe*, 37 M.J. 1062 (finding no prejudice); *Duncan*, 46 C.M.R. 1031 (finding no prejudice). *But see* *United States v. McCowen*, No. 72-1050 (N.C.M.R. June 23, 1972) (finding prejudice).

³⁸ EO 13,669, 79 Fed. Reg. at 35,014.

cause that *admissible evidence will be sufficient to support conviction beyond a reasonable doubt*, and that the decision to charge is in the best interests of justice.”³⁹ Convening authorities, as advised by staff judge advocates or trial counsel, should similarly scrutinize the evidence before referring charges.

B. Permissive Considerations for Prosecutorial Merit

Beyond the minimum requirements articulated above, the exercise of prosecutorial discretion is informed by the permissive consideration of various factors and guidelines. The weighing of prosecutorial merit does not adhere to a rigid formula.⁴⁰ The broad exercise of prosecutorial discretion carries with it the broad discretion of choosing what factors to consider and the relative weight to give them.

Acknowledging that prosecutorial merit comprises determinations greater than that of mere sufficient quantum and quality of evidence, the Rule for Court-Martial (RCM) 601(d)(1) discussion states, “The convening authority is not obliged to refer all charges which the evidence might support. The convening authority should consider the options and considerations under RCM 306 in exercising the discretion to refer.”⁴¹ The discussion to RCM 306(b) in turn provides:

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 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.

In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:

(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.⁴²

Use of the word “include” to introduce the list of factors indicates that it is non-exclusive.⁴³ Convening authorities retain discretion to consider other factors they deem pertinent.

The analysis to RCM 306 explains that the factors are “based [in part] on *ABA Standards, Prosecution Function* [Standard] 3-3.9(b) (1979),”⁴⁴ which states, “The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.”⁴⁵ It then provides a list of “factors which the prosecutor may properly consider in exercising his or her discretion,”⁴⁶ which are largely mirrored in the RCM 306(b) discussion.

⁴² EO 13,669, 79 Fed. Reg. at 35,013–14.

⁴³ See RSP REPORT, *supra* note 3, at 126 (“The Discussion to Rule for Courts-Martial 306 provides a *non-exclusive* list of factors military commanders should consider when deciding how to dispose of an allegation, including whether to charge a Service member with an offense.” (emphasis added)).

⁴⁴ MCM, *supra* note 6, R.C.M. 306 analysis, at A21-21.

⁴⁵ ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-3.9(b) (2d ed. 1979) (amended 2015).

⁴⁶ *Id.* The *ABA Standards for Criminal Justice, Prosecution Function* were updated in 2015, and the new equivalent standard contains a much broader list of factors. Notable additions include “the strength of the case”; “any improper conduct by law enforcement”; “potential collateral impact on third

³⁹ ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-4.3(a) (emphasis added); see also NATIONAL PROSECUTION STANDARDS, *supra* note 1, Standard 4-2.2 (“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.”) (emphasis added).

⁴⁰ See ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-3.9 cmt. (3d ed. 1993) (“By its very nature . . . the exercise of prosecutorial discretion cannot be reduced to a formula.”).

⁴¹ MCM, *supra* note 6, R.C.M. 601(d)(1) discussion.

Notably absent from the RCM 306 factors is the ABA Standards factor of “the prosecutor’s reasonable doubt that the accused is in fact guilty.”⁴⁷ The RCM 306 analysis states that this was omitted since it is “inconsistent with the convening authority’s judicial function.”⁴⁸ However, such an assessment by trial counsel should inform her recommendation to the convening authority.⁴⁹ Accordingly, this is a factor that could lead to a disagreement between trial counsel and convening authorities on the prosecutorial merit of cases.

The National Defense Authorization Act for Fiscal Year 2014 directed that “the discussion pertaining to Rule 306 of the [MCM] . . . shall be amended to strike the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense.”⁵⁰ Such amendment was made through Executive Order 13669.⁵¹ However, since the language of the discussion remains discretionary and non-exclusive in nature, convening authorities may still permissibly consider this factor in the prosecutorial merit calculus.⁵² Consistent

parties, including witnesses or victims”; “the possible influence of any cultural, ethnic, socioeconomic or other improper biases”; and “the fair and efficient distribution of limited prosecutorial resources.” *Id.* Standard 3-4.4(a) (4th ed. 2015). The National District Attorneys Association provides a similar list of factors that may be considered in determining whether filing charges is “consistent with the interests of justice,” including “[t]he probability of conviction”; “[p]otential deterrent value of a prosecution to the offender and to society at large”; “[t]he status of the victim, including the victim’s age or special vulnerability”; “[w]hether the accused held a position of trust at the time of the offense”; and “[e]xcessive costs of prosecution in relation to the seriousness of the offense.” NATIONAL PROSECUTION STANDARDS, *supra* note 1, Standard 4-2.4.

⁴⁷ ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-3.9(b)(i) (2d ed. 1979) (amended 2015). This factor was amended in 2015 to remove the word “reasonable.” *Id.* Standard 3-4.4(a)(ii) (4th ed. 2015).

⁴⁸ MCM, *supra* note 6, R.C.M. 306 analysis, at A21-21.

⁴⁹ See ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-4.3(d) (“A prosecutor’s office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence.”).

⁵⁰ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1708 (2013).

⁵¹ EO 13,669, 79 Fed. Reg. 34,999.

⁵² See RSP REPORT, *supra* note 3, at 126 (“Since the amendment does not prohibit an initial disposition authority from considering this factor . . . it is unlikely to affect charging or disposition decisions in sexual assault or other cases.”). This conclusion is reinforced by contrasting the language in the 2014 NDAA and subsequent Executive Order with that in the original House bill: “[T]he Secretary of Defense shall submit to the President a proposed amendment to [Rule for Court-Martial (RCM)] 306 of the Manual for Courts-Martial . . . to eliminate the character and military service of the accused from the list of factors that may be considered by the disposition authority in disposing of a sex-related offense.” H.R. 1960, 113th Cong. § 546(a) (2013). The language in the House bill is non-discretionary in nature; commanders would explicitly be prohibited from considering that factor in sex-related offense cases. Alternatively, the final language in the 2014 NDAA and Executive Order retains the discussion’s discretionary nature. Further, a reading of RCM 306 that prohibits consideration of the accused’s character and military service creates an incongruence in the MCM or at least exposes a need to make further amendments. RCM 306(b)

with policy that “[a]llegations of offenses should be disposed of . . . at the lowest appropriate level of disposition,”⁵³ consideration of this factor would be particularly relevant—and noncontroversial—if previous action short of court-martial has failed to achieve the necessary deterrent effect upon a suspected repeat offender.

The views and desires of alleged victims weigh heavily in evaluating prosecutorial merit in some cases. “[C]onsistent with the [Department of Defense (DoD)] Victim Witness Assistance program,”⁵⁴ convening authorities should consider “the views of the victim as to disposition,” as well as “the willingness of the victim . . . to testify.”⁵⁵ The victim’s desires are certainly not controlling on the convening authority, but the victim’s decision not to participate in an investigation or prosecution may foreclose referral in some instances or at least make such action highly imprudent. The type of offense suffered by the victim dictates the level of deference that should be afforded to her decision not to participate.

Department of Defense Instruction 1030.2, pertaining to victims of any offenses, states, “Although the victim’s views should be considered, this Instruction is not intended to limit the responsibility or authority of . . . officials to act in the interest of good order and discipline.”⁵⁶ However, DoD Instruction 6495.02, pertaining only to victims of sexual offenses, states, “The victim’s decision to decline to participate in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases”⁵⁷ Furthermore, “[a] victim of an offense under [the UCMJ] has . . . [t]he right to be treated with fairness and with respect for the dignity and privacy of the victim”⁵⁸ This certainly includes the right not to be compelled to testify against her will. Accordingly, a willingly participating victim may be a component of prosecutorial merit in some cases. If the government’s case rests primarily upon the testimony of a

states, “Allegations of offenses should be disposed of . . . at the lowest appropriate level of disposition in subsection (c) of this rule.” MCM, *supra* note 6, R.C.M. 306(b). Subsection (c)(3) in turn states, “A commander may consider the matter pursuant to Article 15, nonjudicial punishment. See Part V.” *Id.* R.C.M. 306(c)(3). Part V, paragraph 1.e. states, “Nonjudicial punishment may be imposed for acts or omissions that are minor offenses Whether an offense is minor depends on several factors,” including “the offender’s age, rank, duty assignment, record and experience” *Id.* pt. V, para. 1.e. (emphasis added).

⁵³ MCM, *supra* note 6, R.C.M. 306(b).

⁵⁴ *Id.* R.C.M. 306 analysis, at A21-21.

⁵⁵ EO 13,669, 79 Fed. Reg. at 35,013–14.

⁵⁶ U.S. DEP’T OF DEF., INSTR. 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES para. 6.3.3. (4 June 2004).

⁵⁷ U.S. DEP’T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES enclosure 4, para. 1.c.(1) (28 Mar. 2013) [hereinafter DoDI 6495.02].

⁵⁸ UCMJ, art. 6b(a)(8) (2013).

“non-participating victim,”⁵⁹ referral of charges is highly imprudent.

Lastly, since “[a]llegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition,”⁶⁰ a case may be lacking in prosecutorial merit if the ends of justice and good order and discipline can be thoroughly and effectively achieved through means other than trial by court-martial. A convening authority should consider the appropriateness of taking action short of referral of charges, such as administrative action, nonjudicial punishment, and even no action.⁶¹ Wide-ranging administrative actions include counseling, reprimand, derogatory rating or evaluation, extra military instruction, administrative reduction, bar to reenlistment, security classification changes, and administrative separation.⁶²

The courses of action available to convening authorities are as vast as the factors available to weigh in choosing the appropriate one. Given the nearly unfettered discretion in both assessing prosecutorial merit and taking action, referral decisions by convening authorities may at times be at odds with the assessments and recommendations of trial counsel. This may impose additional responsibilities upon trial counsel in some instances.

III. Trial Counsel’s Dilemma

A. The Distinct and Solemn Responsibilities of Trial Counsel

Many discussions on the responsibilities of prosecutors begin with this cogent quotation from the Supreme Court:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard

blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.⁶³

Seamlessly substituting “United States Attorney” with “prosecutor” or “prosecuting attorney,” CAAF has prefaced discussions on the responsibilities of trial counsel with the same quotation.⁶⁴ Trial counsel are measured by this standard despite not being the ones wielding prosecutorial discretion. Just as their tactics during trial can draw scrutiny for prosecutorial misconduct, so can their actions—and inactions—leading up to trial.⁶⁵

Trial counsel’s role in assessing prosecutorial merit and facilitating the proper exercise of prosecutorial discretion does not end upon referral by the convening authority. Trial counsel’s interest in seeing justice done at times requires pushing back against convening authorities, and trial counsel may be taken to task for failing to do so. For example, when courts find error for the government proceeding to trial on unsupported charges or specifications, they most often lay blame, in whole or in part, at the feet of trial counsel.⁶⁶ Faulted less often are staff judge advocates⁶⁷ and, when they are aware of the deficiency and do nothing about it, military judges.⁶⁸ Rarely are errors such as these found to be the

⁵⁹ DoDI 6495.02, *supra* note 57, at 90.

⁶⁰ MCM, *supra* note 6, R.C.M. 306(b).

⁶¹ *Id.* R.C.M. 306(b)–(c); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-4.4(f) (“The prosecutor should consider the possibility of a noncriminal disposition . . . when deciding whether to initiate or prosecute criminal charges.”).

⁶² MCM, *supra* note 6, R.C.M. 306(c)(2); R.C.M. 306(c)(2) discussion.

⁶³ *Berger v. United States*, 295 U.S. 78, 88 (1935).

⁶⁴ *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005); *United States v. Strother*, 60 M.J. 476, 478 (C.A.A.F. 2005).

⁶⁵ *See, e.g., United States v. Phare*, 45 C.M.R. 18 (C.M.A. 1972).

⁶⁶ *Phare*, 45 C.M.R. 18; *United States v. Hall*, 29 M.J. 786 (A.C.M.R. 1989); *United States v. Showers*, 48 C.M.R. 837 (A.C.M.R. 1974); *United States v. Bird*, 30 C.M.R. 752 (C.G.B.R. 1961); *United States v. Howe*, 37 M.J. 1062 (N.M.C.M.R. 1993), *overruled on other grounds by United States v. Driver*, 57 M.J. 760 (N-M. Ct. Crim. App. 2002); *United States v. Pastor*, No. 88-2618, 1990 C.M.R. LEXIS 281 (N.M.C.M.R. Mar. 30, 1990); *United States v. Duncan*, 46 C.M.R. 1031 (N.C.M.R. 1972); *United States v. McCowen*, No. 72-1050 (N.C.M.R. June 23, 1972).

⁶⁷ *But see United States v. Henderson*, No. 200101076, 2002 C.C.A. LEXIS 133, at *5 (N-M Ct. Crim. App. June 14, 2002) (Finnie, S.J., concurring) (“I cannot overlook the responsibility of the Staff Judge Advocate and trial counsel in this matter. They are charged with the duty of advising the convening authority on the appropriate disposition of an offense.”).

⁶⁸ *But see Phare*, 45 C.M.R. 18, 21–22 (“[T]he military judge erred in failing to exercise his discretion by conducting further inquiry when presented with the assertion of defense counsel that the Government did not intend to nor could it present any evidence with regard to Charges I and II. His failure to act made it possible for trial counsel to bring before the court members charges for which the Government knew no evidence would be presented.”); *United States v. Young*, 12 M.J. 991, 992–93 (A.F.C.M.R. 1982) (“During an Article 39(a) session the Government stated it did not intend to present any evidence to prove that the accused [committed Specification 3]. Rather than have the trial counsel discuss the matter with the convening authority, the military judge permitted the specification to go before the members knowing that no evidence would be offered. . . . The Government concedes it was error for the military judge to allow the unsubstantiated specification to be given the members. We agree . . .”) (citation omitted).

product of the convening authority obstinately refusing to withdraw unsupported charges.⁶⁹ The logical inference from this trend is that error is largely avoided when trial counsel fulfill their responsibilities.

By nature of their different backgrounds and responsibilities, convening authorities and trial counsel weigh prosecutorial merit differently.⁷⁰ The Response Systems to Adult Sexual Assault Crimes Panel (RSP) recently cited testimony from senior military officials demonstrating the differing priorities and resulting assessments of prosecutorial merit between convening authorities and lawyers:

Commanders have consistently shown willingness to go forward in cases where attorneys have been more risk adverse. Commanders zealously seek accountability when they hear there's a possibility that misconduct has occurred within their units, both for the victim and in the interest of military discipline . . . Army commanders are willing to pursue difficult cases to serve the interests of both the victims and our community. . . . [C]ommanders consider factors, including responsibility for good order and discipline and accountability to the organization, which legal advisors may not.⁷¹

The practical effect of these dissimilar perspectives is significant, as demonstrated in at least one measurable way noted by the RSP: “[C]ommanders took recent action in roughly one hundred cases where civilian prosecutors had declined to prosecute. . . . The Judge Advocate General of the Army described seventy-nine cases where Army commanders chose to prosecute off-post offenses after civilians declined to prosecute or could not prosecute.”⁷²

Most disagreements between trial counsel and convening authorities are relatively inconsequential, and trial counsel may proceed with prosecution without any legal or ethical implications. However, this is not always the case, particularly when trial counsel recommend against referral

due to evidentiary deficiencies. In these rare instances, further action is required of trial counsel.

B. Professional Responsibility Standards for Trial Counsel

Service ethics rules delineate the responsibilities of trial counsel in these situations,⁷³ but provide limited practical guidance that must be supplemented by reference to case law and other sources. The Navy-Marine Corps *Rules of Professional Conduct* states, “A trial counsel in a criminal case shall . . . recommend to the convening authority that any charge or specification not supported by probable cause be withdrawn”⁷⁴ The other services’ rules provide slightly different instruction, at least semantically, stating, “A trial counsel shall . . . recommend to the convening authority that any charge or specification *not warranted by the evidence* be withdrawn”⁷⁵

However, since more than mere probable cause is required to begin trial, trial counsel’s legal and ethical responsibilities exceed simply ensuring its existence. *ABA Standards*, Standard 3-4.3(b) provides:

After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that evidence will be sufficient to support conviction beyond a reasonable doubt.⁷⁶

The Air Force has implemented *Standards for Criminal Justice*, adapted from the *ABA Standards*.⁷⁷ The Air Force’s Standard 3-3.9(a) states:

⁷³ Trial counsel must also consult and comply with the rules of their licensing state; however, service rules supersede state rules in any instances of conflict. U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 8.5(f) (1 May 1992) [hereinafter AR 27-26]; U.S. DEP’T OF AIR FORCE, INSTR. 51-110, PROFESSIONAL RESPONSIBILITY PROGRAM attachment 2, R. 8.5(b) (5 Aug. 2014) [hereinafter AFI 51-110]; U.S. DEP’T OF NAVY, JAGINST 5803.1E, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL enclosure 1, R. 8.5.a. (20 Jan. 2015) [hereinafter JAGINST 5803.1E].

⁷⁴ JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 3.8.a.

⁷⁵ AR 27-26, *supra* note 73, R. 3.8 (emphasis added); *accord* AFI 51-110, *supra* note 73, attachment 2, R. 3.8; U.S. COAST GUARD, COMMANDANT INSTR. M5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM enclosure 1, R. 3.8 (1 June 2005) [hereinafter COMDTINST M5800.1]. The difference in language is likely inconsequential since the phrases “probable cause” and “warranted by the evidence” are used without distinction in other areas of military justice practice. *See* MCM, *supra* note 6, R.C.M. 406(b) (“The advice of the staff judge advocate shall include . . . that person’s: . . . (2) [c]onclusion with respect to whether the allegation of each offense is warranted by the evidence”) (emphasis added); *Id.* R.C.M. 406(b) discussion (“The standard to be applied in R.C.M. 406(b)(2) is probable cause.”).

⁷⁶ ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-4.3(b) (emphasis added).

⁷⁷ AFI 51-201, *supra* note 18, attachment 3, at 288.

⁶⁹ *But see* United States v. Whittington, 36 C.M.R. 691, 694 (A.B.R. 1966) (“While we are convinced that the convening authority referred Specifications 2 and 3 of Charge I to trial in good faith we are of the opinion that his refusal to withdraw these charges, when faced with the knowledge that the law officer would, when moved for a finding of not guilty, grant such motion, constituted error.”).

⁷⁰ *See* RSP REPORT, *supra* note 3, at 129 (“Staff judge advocates who testified before the Panel stressed that convening authorities weigh factors differently than lawyers when assessing whether cases should be tried by court-martial.”).

⁷¹ *Id.* (footnotes omitted) (internal quotation marks omitted).

⁷² *Id.* (footnotes omitted).

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

Use of two separate sentences clearly establishes two separate responsibilities. Fulfilling the first does not necessarily fulfill the second.

Regardless of whether their services have specifically adopted the *ABA Standards* or some version thereof, all trial counsel may be held accountable for failing to adhere to them. Both the Army and Navy-Marine Corps appellate courts have applied the *ABA Standards* in assessing the conduct of trial counsel and evaluating for error. Quoting Standard 3-3.9(a) from a previous edition of the *ABA Standards* and directing attention to the Army's *Rules of Professional Conduct for Lawyers*, the ACMR has stated, "The Government's prosecutorial duty requires that it not 'permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction,'" prior to finding error and dismissing charges in the case then under review.⁷⁹ The U.S. Navy-Marine Corps Court of Criminal Review (NMCMR) has quoted the same language from the *ABA Standards* and further emphasized trial counsel's "ethical obligation to recommend that any charge or specification not warranted by the evidence be withdrawn."⁸⁰

Coast Guard trial counsel must similarly be mindful of the responsibilities imposed by the *ABA Standards*.⁸¹

⁷⁸ *Id.* attachment 3, Standard 3-3.9(a).

⁷⁹ *United States v. Asfeld*, 30 M.J. 917, 929 (A.C.M.R. 1990) (quoting *ABA STANDARDS FOR CRIMINAL JUSTICE*, *supra* note 10, Standard 3-3.9(a) (2d ed. 1979) (amended 2015)); *see also* AR 27-10, *supra* note 15, para. 5-8.c. ("[C]ounsel . . . will comply with the American Bar Association Standards for Criminal Justice (current edition) to the extent they are not inconsistent with the UCMJ, the MCM, directives, regulations . . . or other rules governing provision of legal services in the Army.").

⁸⁰ *United States v. Howe*, 37 M.J. 1062, 1064 (N.M.C.M.R. 1993), *overruled on other grounds by* *United States v. Driver*, 57 M.J. 760 (N.M. Ct. Crim. App. 2002) (citations omitted); *see also* JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 3.8.e.(6) ("The 'ABA Standards for Criminal Justice: The Prosecution Function,' (3d ed. 1993), has been used by appellate courts in analyzing issues concerning trial counsel conduct. To the extent consistent with these Rules, the ABA standards may be used to guide trial counsel in the prosecution of criminal cases.") (citations omitted).

⁸¹ *See* U.S. COAST GUARD, COMMANDANT INSTR. M5810.1E, MILITARY JUSTICE MANUAL para. 6.C.1. (13 Apr. 2011) ("As far as practicable and not inconsistent with law, the MCM, and Coast Guard Regulations, COMDTINST M5000.3 (series), the following American Bar Association Standards for the Administration of Criminal Justice are also applicable to Coast Guard courts-martial: The Prosecution Function and the Defense Function . . .").

Furthermore, the Coast Guard provides detailed instructions to trial counsel and places a greater onus on convening authorities in instances of disagreement regarding the merits and appropriate disposition of a case:

a. In any case in which, after a full development and evaluation of the evidence, trial counsel is of the opinion there is a lack of merit in the case to be prosecuted, and that as a matter of ethical conscience the charge(s) and specification(s) should be reduced or dismissed, he or she shall communicate in writing such belief, together with the reasons therefor, to the convening authority together with a recommendation as to the appropriate disposition of the case.

b. In the event that the convening authority is in disagreement with trial counsel and does not approve the recommendations submitted by trial counsel, the convening authority shall state such disagreement and disapproval in writing, along with the reasons therefor and provide directions to trial counsel.

c. All matters submitted to the convening authority by trial counsel pursuant to this section and the decision of the convening authority shall be attached to the record of trial [ROT] as appellate exhibits.⁸²

Trial counsel's duties toward convening authorities are not limited to candor relating solely to the sufficiency of the evidence. "Trial counsel should . . . bring to the attention of the convening authority any case in which trial counsel finds trial inadvisable for lack of evidence or *other reasons*."⁸³ Further, "[a] charge should be dismissed when it fails to state an offense, when it is unsupported by available evidence, or when there are *other sound reasons* why trial by court-martial is not appropriate."⁸⁴

"Other reasons" contemplates the necessity of trial counsel to draw upon their expertise and experience to advise convening authorities beyond mere evidentiary issues, revealing compelling reasons to withdraw and dismiss a charge or specification, or not to refer it to begin with. Of course, trial counsel must be vigilant for abuses in prosecutorial discretion that violate the constitutional guarantee of equal protection,⁸⁵ but the role contemplated

⁸² *Id.* para. 6.C.2.

⁸³ MCM, *supra* note 6, R.C.M. 502(d)(5) discussion (B) (emphasis added).

⁸⁴ *Id.* R.C.M. 401(c) discussion (emphasis added).

⁸⁵ *See, e.g., United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[A] prosecutor's discretion is subject to constitutional constraints. One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, is that the decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or

here is more than that of a mere guardian against such gross abuses. In any given case, the consideration of one or several of the factors described above may provide sound reasons to make trial by court-martial inadvisable or inappropriate.

Trial counsel's responsibilities do not end upon recommending against referral or recommending withdrawal of unsupported charges if their advice is not heeded. In *United States v. Howe*, the NCMCMR stated, "When he knew . . . that he could not corroborate the accused's admissions to those offenses, the trial counsel's duty was to seek to withdraw that charge or at least to inform the military judge that he did not have sufficient evidence to support it."⁸⁶ Referencing *Howe*, comment to Rule 3.8 of the Navy-Marine Corps's *Rules of Professional Conduct* states:

Trial 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. Such action should be undertaken only after consultation with a supervisory attorney and the convening authority. Applicable law may require other measures by the trial counsel. Knowing disregard of those obligations . . . could constitute a violation of Rule 8.4.⁸⁷

In a situation contemplated by the above rule, the U.S. Coast Guard Court of Military Review recited the following facts of a case then under review: "Following the military judge's ruling suppressing the marijuana and cocaine[,] the government conceded that the specification alleging possession of marijuana could not be proved and was subject to dismissal under the doctrine of *U.S. v. Phare* The military judge dismissed the specification" ⁸⁸ Accordingly, the trial counsel effectively resolved the ripe

other arbitrary classification." (citations omitted) (internal quotation marks omitted)).

⁸⁶ *United States v. Howe*, 37 M.J. 1062, 1064–65 (N.M.C.M.R. 1993), *overruled on other grounds by* *United States v. Driver*, 57 M.J. 760 (N-M. Ct. Crim. App. 2002); *see also* *United States v. Henderson*, No. 200101076, 2002 C.C.A. LEXIS 133, at *5 (N-M Ct. Crim. App. June 14, 2002) (Finnie, S.J., concurring) ("[I]f for some reason the convening authority had refused to withdraw the charge, the trial counsel, in the spirit of candor to the tribunal, should have brought it to the attention of the military judge that the charge was not supported by the evidence.").

⁸⁷ JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 3.8.e.(1) (citations omitted). Rule 8.4.a. states, "It is professional misconduct for a covered attorney to: (1) violate or attempt to violate these Rules . . . (4) engage in conduct that is prejudicial to the administration of justice . . ." *Id.* R. 8.4.a.

⁸⁸ *United States v. Butler*, 16 M.J. 789, 790 (C.G.C.M.R. 1983) (citation omitted); *see also* *United States v. Garces*, 32 M.J. 345, 348 (C.M.A. 1991) ("[The Government] was unable to obtain attendance of a number of civilian witnesses. On its own motion, it moved to dismiss two specifications of larceny which would have been the subject of testimony by those witnesses. Next . . . the Government disclosed that it did not intend to call [other witnesses] to testify as to their losses. As a result, the military judge dismissed the four specifications related to those entities *sua sponte*." (footnotes omitted)).

legal and ethical issues related to an unsupported specification through candor to the court.

C. Trial Counsel's Last Resort

Trial counsel may not assist convening authorities in perpetuating an injustice and, as a last resort, may seek to withdraw from a case to avoid doing so. All services' *Rules of Professional Conduct* require or permit counsel to seek to withdraw from representation in certain situations. ⁸⁹ Counsel "*shall* seek to withdraw from the representation of a client if . . . the representation will result in violation of [the] Rules of Professional Conduct or other law or regulation."⁹⁰ Further, a trial counsel *may* seek to withdraw from a case if she has a "fundamental disagreement"⁹¹ with the convening authority's actions or considers them to be "repugnant"⁹² or "imprudent."⁹³ However, whether mandatorily or permissibly seeking to withdraw from representation, "[w]hen ordered to do so by a tribunal or other competent authority, a lawyer shall continue representation notwithstanding good cause for terminating the representation."⁹⁴

A convening authority obstinately insisting upon trying offenses not supported by admissible evidence to support a conviction, as described above, constitutes a violation of not only professional responsibility standards, but also the due process rights of the accused. Accordingly, such would be a situation requiring a trial counsel to attempt to distance herself from the proceedings should all other corrective measures fail. However, a trial counsel should not attempt to absolve herself of the responsibility of ensuring the justness of the proceedings by hastily seeking to withdraw at first sight of an ethical quandary. This would accomplish nothing other than "simply foist[ing] the issue on the next attorney,"⁹⁵ and placing her successor in the same dilemma.

⁸⁹ AFI 51-110, *supra* note 73, attachment 2, R. 1.16; AR 27-26, *supra* note 73, R. 1.16; COMDTINST M5800.1, *supra* note 75, enclosure 1, R. 1.16; JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 1.16.

⁹⁰ AR 27-26, *supra* note 73, R. 1.16(a) (emphasis added); *accord* AFI 51-110, *supra* note 73, attachment 2, R. 1.16(a); COMDTINST M5800.1, *supra* note 75, enclosure 1, R. 1.16(a); JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 1.16.a.

⁹¹ AFI 51-110, *supra* note 73, attachment 2, R. 1.16(b)(4); COMDTINST M5800.1, *supra* note 75, enclosure 1, R. 1.16(b)(4).

⁹² AR 27-26, *supra* note 73, R. 1.16(b)(3); AFI 51-110, *supra* note 73, attachment 2, R. 1.16(b)(4); COMDTINST M5800.1, *supra* note 75, enclosure 1, R. 1.16(b)(4); JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 1.16.b.(3).

⁹³ AR 27-26, *supra* note 73, R. 1.16(b)(3); JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 1.16.b.(3).

⁹⁴ AR 27-26, *supra* note 73, R. 1.16(c); *accord* AFI 51-110, *supra* note 73, attachment 2, R. 1.16(c); COMDTINST M5800.1, *supra* note 75, enclosure 1, R. 1.16(c); JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 1.16.c.

⁹⁵ *United States v. Baker*, 58 M.J. 380, 386 (C.A.A.F. 2003).

Other corrective measures must first be exhausted. Candidly acknowledging the state of the government's case to the court following the convening authority's refusal to withdraw an unsupported charge or specification will in most instances resolve the issue and satisfy the trial counsel's legal and ethical obligations.⁹⁶

Further, seeking to withdraw as trial counsel should not be used as a means of protest or attempted de facto usurpation of the convening authority's prosecutorial discretion. Though the potential for cases the trial counsel considers imprudent is vast, every disagreement with a convening authority's decision to refer charges does not merit seeking to withdraw as trial counsel. Such drastic action should be reserved for clear abuses of discretion or other situations that weigh heavily upon the trial counsel's conscience and impinge her duty to represent the government with commitment, dedication, and zeal.⁹⁷

Trial counsel pondering the implications of prosecuting a case with which they disagree should seek guidance from their supervisory counsel. "A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to [the] Rules of Professional Conduct."⁹⁸ Accordingly, supervisory counsel have a personal stake in ensuring that ethically perilous situations encountered by their junior counsel are appropriately diffused. Further, each service has an ethics council, committee, or panel from which trial counsel may solicit advice.⁹⁹ Trial counsel should certainly be armed with competent advice prior to taking drastic action in any case such as seeking to withdraw from representation or advancing an interest in conflict with the convening authority's desired course of action.

⁹⁶ See *United States v. Howe*, 37 M.J. 1062, 1064–65 (N.M.C.M.R. 1993), *overruled on other grounds by* *United States v. Driver*, 57 M.J. 760 (N-M. Ct. Crim. App. 2002); JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 3.8.e.(1).

⁹⁷ See AR 27-26, *supra* note 73, R. 1.3 cmt. ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); *accord* JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 1.3.a.(1).

⁹⁸ AR 27-26, *supra* note 73, R. 5.1(b); *accord* AFI 51-110, *supra* note 73, attachment 2, R. 5.1(b); COMDTINST M5800.1, *supra* note 75, enclosure 1, R. 5.1(b); JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 5.1.b.; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-4.3(c) ("If a prosecutor has significant doubt about the guilt of the accused or the quality, truthfulness, or sufficiency of the evidence in any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to supervisory staff. The prosecutor's office should then determine whether it is appropriate to proceed with the case.").

⁹⁹ AFI 51-110, *supra* note 73, para. 3.4, 9; AR 27-26, *supra* note 73, R. 9.1; COMDTINST M5800.1, *supra* note 75, para. 10.b.; JAGINST 5803.1E, *supra* note 73, para. 10.

IV. Conclusion

While evaluating prosecutorial merit, advising convening authorities, and in their actions before courts-martial, trial counsel must be mindful of their fundamental duty: "[A] trial counsel has the responsibility of administering justice and is not simply an advocate. This responsibility carries with it specific obligations to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."¹⁰⁰ Convening authorities' decisions to refer charges should not be viewed simply as orders to be dutifully carried out without question. Trial counsel may not blindly prosecute a case without conducting an independent assessment of its merit in compliance with constitutional, regulatory, and ethical standards.

The myriad factors to be considered and the relative weight to give them differ between convening authorities and trial counsel in many cases. Any resulting incongruities that imperil the rights of the accused or implicate professional responsibility standards must be resolved to the maximum extent possible through candid discussions among the convening authority, staff judge advocate, and trial counsel about the realities of the case and the scenarios that could play out at trial and on appeal. As "servant[s] of the law,"¹⁰¹ trial counsel may pursue the course set by convening authorities only along the path towards justice. Should the two diverge, trial counsel must advise convening authorities to correct course while being prepared to take necessary action in an attempt to do so themselves. Each case is unique, and the necessary and appropriate action by trial counsel is correspondingly so.

Returning to the pending prosecution of Corporal Jones discussed in the Introduction, it is clear that the trial counsel should recommend to the convening authority that he withdraw and dismiss the drug-related charge and specifications. The trial counsel should explain that despite properly finding reasonable grounds to refer the charges, there will be no admissible evidence to present in court to support them. Trial counsel should discuss the repercussions of the continued prosecution of these charges, to include imperiling a possible conviction and sentence for the viable abusive sexual contact charge with the taint of knowledge by the court-martial members of the other, unsupported charges. Further, the trial counsel should discuss her legal and ethical obligation to advise the court of the lack of evidence to support a conviction should the convening authority refuse to withdraw the charges.

Granted, the issue is not truly ripe unless and until the military judge suppresses the uncorroborated confession and illegally seized evidence, but there is nothing to be gained by delaying an inevitable outcome while unnecessarily

¹⁰⁰ JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 3.8.e.(1); *accord* AR 27-26, *supra* note 73, R. 3.8 cmt.

¹⁰¹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

expending resources. If the decision is made to wait until the military judge takes such action, the issue must be readdressed with the convening authority when it does become ripe. Should the convening authority continue to refuse to budge, trial counsel must fulfill her duty of candor to the court relating to the lack of evidence to support a conviction for these offenses.

The trial counsel's disagreement with the convening authority regarding the appropriate disposition of the alleged buttocks slap is a separate, less problematic issue. Referral of a charge and specification for abusive sexual contact is a permissible exercise of prosecutorial discretion by the convening authority, supported by both probable cause and sufficient admissible evidence in the form of the alleged victim's testimony. While the convening authority gave preference to different factors than the trial counsel in the prosecutorial merit calculus, he did not abuse his discretion in doing so. The trial counsel's assessment yields to the convening authority's, and the trial counsel may ethically proceed with prosecution. If the trial counsel has a fundamental disagreement with the prosecution of this offense, she may seek to withdraw from representation after consulting with her supervisory counsel, but this is not a situation in which she would be required to do so.