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THE SJA's ARTICLE 34 VETO: A FORCE AWAKENING?

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I. Introduction

The work environment, incentives, motivations, and culture drive the actions of well-trained people within an organization.[1] These factors have been energetically managed for the last several years to change the way servicemembers view and respond to apparent sexual misconduct. To encourage reporting, victim/survivors[2] are quickly provided personal legal counsel, a victim advocate, and a sexual assault response coordinator.[3] De facto immunity for associated minor misconduct is standard, along with a transfer, if desired, to almost any location.[4] Report everything! No bystanders!

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1 *See* Allison Rossett, *Analysis of Human Performance Problems*, *in* HANDBOOK OF HUMAN PERFORMANCE TECHNOLOGY 101–02 (James A. Pershing ed., 1992); *see also* Gary Felicetti, *The Limits of Training in Iraqi Force Development*, 36 PARAMETERS 74 (2006) (illustrating how these factors are often more significant than training).

2 The terms "survivor" and "victim" are commonly used within the U.S. Armed Forces to describe individuals reporting some type of sexual offense but are said *not* to presume the commission of a crime or the guilt of any individual. *See, e.g.*, U.S. DEP'T OF DEF., ANN. REP. ON SEXUAL ASSAULT IN THE MIL. 5 (2014).

3 National Defense Authorization Act (NDAA) for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1704, 1716, 1724, 1725, 127 Stat. 672 (2013). Each service also provides a vehicle for confidential or "restricted" reports of sexual assault. *E.g.*, U.S. COAST GUARD, COMMANDANT INSTR. M1754.10D, SEXUAL ASSAULT AND RESPONSE PROGRAM ¶3.C.2. (2012).

4 U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 8-5.o. (6 Nov. 2014). As an incentive to file unrestricted reports, the Coast Guard reinforces that

The incentives, culture, and environment for military commanders are equally clear.[5] You are being closely watched and evaluated on your response to sexual assault allegations.[6] Anyone who declines to refer a penetrative sexual allegation to a general court-martial must report himself/herself to superiors.[7] The career of anyone who grants clemency or leniency in a sexual misconduct matter is at significant risk.[8] Support victim/survivors!

While the desired behaviors, culture, and results are clear, debate continues about the role and utility of the lawyers involved in the pretrial process. Some political leaders view lawyers as the solution to the problem of underwhelming prosecution rates.[9] Others find that cautious lawyers are the problem.[10]

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victims can reasonably anticipate a transfer to a desired location with suitable support resources for his or her recovery. All Coast Guard Message, 362/14, 291230Z Aug. 14, U.S. Coast Guard, subject: Fiscal Year 14 NDAA Sexual Assault Prevention and Response CG-1 Implementation.

[5] Article 37 of the Uniform Code of Military Justice (UCMJ), only explicitly addresses the judicial acts of a convening authority, which do not include exercising prosecutorial discretion by referring a case to a court-martial. In other words, generalized pressure to refer sexual cases to a general court-martial as part of a "zero tolerance" policy appears to be lawful command influence, especially since it is based on the application of the NDAA for Fiscal Year 2014 section 1744 and other laws. *See* United States v. Simpson, 58 M.J. 368 (C.A.A.F. 2003); *contra* Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 144 (2014).

[6] Murphy, *supra* note 5, at 138–39; Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense its Own Worst Enemy?*, 11 OHIO ST. J. CRIM. L. 579, 579–82, 589–92 (2014); NDAA for Fiscal Year 2014 § 1721, 1751.

[7] NDAA for Fiscal Year 2014 § 1744. The Coast Guard voluntarily adopted the requirements of section 1744 in September 2014. *See* All Coast Guard Message, 372/14, 051427Z Sept. 14, U.S. Coast Guard, subject: Higher Level Review of Cases Involving Certain Sex-Related Offenses.

[8] *See* Robert E. Murdough, *Barracks, Dormitories, and Capitol Hill: Finding Justice in the Divergent Politics of Military and College Sexual Assault*, 223-2 MIL. L. REV. 234, 244 n.53, 245 nn.52, 62 (discussing Air Force Lieutenant General Craig Franklin and Air Force Lt Gen Susan Helms); Murphy, *supra* note 5, at 129–30, 149 n.106, 163 n.182. The NDAA for Fiscal Year 2014, sections 1752 and 1753, expresses Congress's "sense" that commanders should court-martial rape, sexual assault, forcible sodomy cases, and attempts, and if they decide not to do so, a written justification for their decision should be placed in the file. A convening authority's ability to grant leniency or clemency was also severely limited. NDAA for Fiscal Year 2014 § 1702(b).

[9] Andrew Tilghman, *Military sex assault: Just 4 percent of complaints results in conviction*, MIL. TIMES (May 5, 2016), http://www.militarytimes.com/story/veterans/2016/05/05/military-sexual-assault-complaints-result-few-convictions/83980218/ (discussing the total number of sexual assault reports, prosecution rates, and conviction

Few, if any, appear to understand the statutory and ethical responsibilities of the staff judge advocate (SJA).[11] Is his or her independent legal judgment a critical part of statutory due process? Or is the SJA just another advisor—in other words—a tool of discipline? This ambiguity may be due, in part, to the serious misalignment between the Uniform Code of Military Justice (UCMJ) and the *Manual for Courts-Martial* (*MCM*).[12] This article seeks to clearly identify the misalignment, explicitly acknowledge the potential ethical dilemmas, and stimulate discussion on how SJAs may exercise their lawful authority within the current environment while maintaining the commander's confidence.

II. Brief History of the SJA's Pretrial Role

Under the 1920 Articles of War, a pretrial investigation and pre-referral case review by the SJA was required before a general court-martial.[13] Both pretrial steps provided only non-binding advice to the

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rates for 2015). A new article in Senator Kirsten Gillibrand's Military Justice Improvement Act (MJIA) would have given independent military attorneys in the grade of O-6 the sole authority to decide whether to refer certain charges, notably including sexual assault, to courts-martial. Murdough, *supra* note 8, at 262 n.127. While the MJIA did not pass, some aspects of the lawyer-as-solution model became law. NDAA for Fiscal Year 2014 § 1744, *amended by* NDAA for Fiscal Year 2015, Pub. L. No. 113-291, § 541, 128 Stat. 3292 (2014). For example, a convening authority who declines to refer a sexual allegation to a general court-martial with the concurrence of his Staff Judge Advocate (SJA) need only report the non-referral to the next superior military commander. *Id.* However, direct reviews by the service secretary are required if the SJA, or the newly created "chief prosecutor," disagrees with the original convening authority. *Id.*

[10] Murdough, *supra* note 8, at 157 n.151.

[11] Murphy, *supra* note 5, at 166 (highlighting congressional hearings on a bill to move prosecutorial discretion for sexual offenses from convening authorities to military lawyers).

[12] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. II, (2012) [hereinafter MCM].

[13] The first statutory requirement for pre-referral SJA advice appeared in the 1920 Articles of War: "Before directing the trial of any charge by general court-martial the appointing authority will refer it to his SJA for consideration and advice." Articles of War, Article 70 (1920). The *Army Manual for Courts-Martial* expanded on this, stating,

> Subject to the provisions of this paragraph (35b) reference to a SJA will be made and his advice submitted in such manner and form as the appointing authority may direct. No appointing authority shall direct the trial of any charge by general court-martial until he has considered the advice of his staff judge advocate based on all the

convening authority.[14] As remains true today, the pretrial investigation and SJA review were closely linked. The SJA, however, often had only a superficial, or even no, pretrial investigation to consider.[15] In a post-war reform, the requirements for a pretrial investigation and SJA review became more prominent.[16] Both procedures were incorporated without controversy into the new Uniform Code of Military Justice (UCMJ) as Articles 32 and 34, respectively.[17] As with the Articles of War, the SJA's pretrial input to the commander was purely advisory.[18]

The 1950 UCMJ corrected many of the abuses perceived by the citizen-warriors who fought World War II and provided significant due process for the accused.[19] Yet, it was still largely a disciplinary system controlled by the military commander. Article III courts acknowledged the improved due process, but remained critical.[20] Most significantly, a divided U.S. Supreme Court limited court-martial jurisdiction to "service connected" offenses for almost twenty years.[21] The Court stated a court-

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> information relating to the case, including any report made under 35c, which is reasonably available at the time trial is directed.

MANUAL FOR COURTS-MARTIAL, U.S. Army pt. VII, ¶35b (1928 corrected to Apr. 20, 1943). For a detailed military justice history, see *Report of the Military Justice Review Group, Part I: UCMJ Recommendations* 41 (Dec. 22, 2015), http://www.dod.gov/dodgc/images/report_part1.pdf [hereinafter MJRG Report].

[14] *Id.*

[15] Pretrial investigations were often "precursory, a mere matter of form." *The Administration of Military Justice* 7 (July 1946), http://www.loc.gov/rr/frd/Military_Law/pdf/Vanderbilt-A_Summary.pdf. Investigating officers were "generally inexperienced, uninformed, uninterested, and not thorough." *Id*. "The provision of Article of War 70, that no charge will be referred to a general court-martial for trial until after a thorough, impartial investigation thereof shall be made, should be enforced." *Report of U.S War Department, Advisory Committee on Military Justice* 13 (Dec. 1946), http://www.loc.gov/rr/frd/Military_Law/pdf/report-war-dept-advisory-committee.pdf.

[16] The Selective Service Act of 1948, Pub. L. No. 80-759, § 223, 62 Stat. 627 (amending 1920 Articles of War, Article 47b).

[17] UCMJ art. 34 (1950); Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 107.

[18] *Id.*

[19] Murdough, *supra* note 8, at 238–39.

[20] *Id.* at 239 n.19 (discussing several Supreme Court decisions); MJRG Report, *supra* note 13, at 71 (discussing judicial decisions during the same period). The Secretary of Defense directed the General Counsel of the Department of Defense to conduct a comprehensive review of the military justice system. MJRG Report, *supra* note 13, at 13. To carry out the review, the General Counsel established the Military Justice Review Group. *Id*. at 14.

[21] O'Callahan v. Parker, 395 U.S. 258, 272–73 (1969) (*rev'd*, Solorio v. United States, 843 U.S. 435 (1987)). As a result, a soldier on liberty in 1956, who admitted breaking

martial lacked the competence to address the subtleties of constitutional law and was "not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."[22]

Congress and the public heartily agreed.[23] The existing procedures did not adequately protect the constitutional rights of service members—especially from the improper influence of military commanders.[24] Significant reforms discussed in the 1960s included the following: (1) independent military judges "to assure that accused servicemen receive due process" and a "fair and impartial trial;" (2) a Judge Advocate General's Corps in the Navy; and (3) broadened prohibitions on command influence over a court-martial.[25] In October 1968, Congress established an independent trial judiciary with a role comparable to those of civilian judges and reinforced the prohibition against unlawful command influence.[26]

The general trend toward a more universally recognized justice system continued. In 1980, the President promulgated the Military Rules of Evidence, modeled after the Federal Rules of Evidence.[27] In 1983, along with other significant changes, Congress authorized the service secretaries to remove defense counsel from the supervision of the convening authority,[28] amended the UCMJ to state that qualified defense

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into a hotel room and assaulting and attempting to rape a young girl, could not properly be tried by court-martial. *Id*.

[22] *Id.* at 265. The Court called attention to "sobering accounts of the impact of so-called military justice on civil rights of members" documented in a series of congressional reports. *Id*. at 266 n.7. However, the "service connected" doctrine proved unworkable and was abandoned in 1987. *Solorio*, 843 U.S. at 435. The *Solorio* Court emphasized the plenary power of Congress under the Constitution to strike the balance between justice and discipline. *Id*. at 440–41 (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953) and discussing U.S. CONST. art. I, § 8, cl. 14).

[23] *Infra* notes 24–26.

[24] *Constitutional Rights of Military Personnel, Summary Report of Hearings by the Subcommittee on Constitutional Rights of the Committee of the Judiciary, United States Senate Pursuant to S. Res. 58*, 88th Cong. 15–22, 26–30 (1963).

[25] *Joint Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary and a Special Subcommittee of the Committee on Armed Services, United States Senate*, 89th Cong. 3, 464, 468 (1966).

[26] Military Justice Act of 1968, Pub L. No. 90-632, § 2-21, 82 Stat. 1335, 1336–40.

[27] Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980). There had been a longstanding requirement to follow the Federal Rules of Evidence to the extent practicable. UCMJ art. 36 (1950).

[28] Military Justice Act of 1983, Pub L. No. 98-209, § 3, 98 Stat. 1394, 1394–95.

counsel must be appointed in almost all special courts-martial,[29] authorized interlocutory appeals by the prosecution of certain adverse trial rulings,[30] permitted the accused's defense counsel to submit a rebuttal to the SJA's post-trial recommendation before the convening authority took action on the case, and provided for a direct appeal of rulings to the U.S. Supreme Court by the accused.[31]

III. The SJA's Mere Legal Advice Transformed into Veto Power

In 1983, Congress also made a significant change to the SJA's pretrial role under Article 34, UCMJ. As it originally appeared,

> The convening authority may not refer a charge to a general court-martial for trial unless *he has found* that the charge alleges an offense under this chapter and is warranted by evidence indicated in the report of investigation.[32]

The convening authority was required to refer the charge to his SJA, or legal officer, for "consideration and advice" prior to making his own determination.[33] However, the 1950 UCMJ specifically reserved the final determination to the convening authority.[34] In other words, the convening authority personally made legal findings as to the legality of the charge, legal sufficiency of the evidence, and (implicitly) court-martial jurisdiction.[35]

The Military Justice Act of 1983 explicitly shifted this responsibility

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[29] *Id.* § 3(c)(2).
[30] *Id.* § 5.
[31] *Id.* § 10.
[32] UCMJ art. 34(a) (1950) (emphasis added). The long-standing phrase "warranted by the evidence" has never been defined in the statute. It is contained in the first draft of the UCMJ commonly known as the "Morgan Draft." UCMJ (1949).
[33] UCMJ art. 34(a) (1950).
[34] *Id*.
[35] *See* S. REP. NO. 98-53 at 16–17 (1983) (discussing the existing Article 34). "Current law requires the convening authority, normally a layman, to assess the legality of prospective general courts-martial." H. REP. NO. 98-549 at 14 (1983). In practice, the SJA did the actual legal sufficiency evaluations. S. REP. NO. 98-53 at 16 (1983); Hearings Before the Subcommittee on Manpower and Personnel 16–17, 29–30, 45–46, 72–73 (Sept. 1982), http://www.loc.gov/rr/frd/Military_Law/pdf/act_1982.pdf. However, the law permitted the convening authority to overrule the SJA. *See also supra* note 32.

for technical legal determinations to the SJA.[36] The law replaced the prior language with:

> The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that—(1) the specification alleges an offense under this chapter; (2) the specification is warranted by the evidence indicated in the report of investigation under section 832 of this title (article 32) // 10 USC 832. // (if there is such a report); and (3) a court-martial would have jurisdiction over the accused and the offense.[37]

This statutory text is clear, as is what changed. The substantive pretrial requirements did not vanish. After 1983, however, these legal tasks were exclusively reserved to the officer trained, developed, and qualified to perform them. Only the SJA could make the required findings. The convening authority, therefore, lacked the power to refer a specification to a general court-martial unless he had been advised in a signed writing by the SJA that, *inter alia*, it was "warranted by the evidence" presented at the Article 32 Investigation.[38]

Of course, this explicit prohibition remained in Article 34, UCMJ, titled "Advice of the Staff Judge Advocate and Reference for Trial."[39] The title was not changed to something along the lines of the SJA's advice and consent.[40] The law continued to crowd the roles of the SJA and convening authority into one article. So the new statutory text, while clear, has the commander being "advised" on critical legal conclusions.[41] These binding legal conclusions are provided in the same "advice" document as the SJA's non-binding disposition recommendation.[42] In short, the new Article 34 made a significant change with, perhaps, too

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[36] Military Justice Act of 1983, Pub. L. No. 98-209, § 4.
[37] Act of Dec. 6, 1983, Pub. L. No. 98-209, § 4, 97 Stat. 1393, 1395.
[38] *Id*. The statutory phrase "warranted by the evidence indicated in the report of investigation" probably leaves room for the SJA to consider evidence developed and available at the Article 32 procedure but not fully discussed in the written report. *Id*.; *see* Hearings Before the Subcommittee on Manpower and Personnel, *supra* note 35.
[39] UCMJ art. 34 (1984). The title remains unchanged in 2016.
[40] *C.f.* U.S. CONST. art. II, § 2 (regarding advice and consent of the Senate).
[41] UCMJ arts. 34(a), 34(b) (1984).
[42] UCMJ art. 34(b) (1984).

few words.

Nonetheless, the significance was obvious. It convinced at least one Senator, or some Senate staff, it was necessary to emphasize that military commanders remained in command. They referred charges, not the SJAs. The resulting report language was, unfortunately, imprecise, and can be interpreted as affirming that absolutely nothing changed.[43] Deleting language granting commanders authority to make pretrial legal determinations did not change anything. Replacement language requiring the SJA to communicate specific legal conclusions before a charge could be referred to a general court-martial was likewise nothing new. Under this interpretation of the Senate report[44], the commander still determines court-martial jurisdiction, if each specification states an offense, and if each specification is "warranted by the evidence" indicated in the Article 32 report.[45] The SJA's input is merely advice, as it always had been. The legislative act was substantively pointless.

This interpretation of the Senate report language contradicts the statute's plain text and the contemporaneous views of the executive branch on the bill.[46] These "views letters" were sent to the House Armed Services Committee, which took up S.974 next.[47] The House substituted its own language for the entire Senate bill and returned the House substitute bill to the Senate where it passed without amendment.[48] In

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[43] S. REP. NO. 98-53, *supra* note 35, at 16–17. Section 4 amends Article 34 of the UCMJ to require that the convening authority receive written advice of the SJA before referral of charges to a general court-martial. The authority to refer cases to trial is a fundamental responsibility of commanders, and *nothing in the amendments made by the Committee changes the convening authority's role in this regard*. *Id*. (emphasis added). Current law, however, requires that a commander, prior to referring a case to a general court-martial, must make specific legal determinations as to the legality of the charge, legal sufficiency of the evidence, and court-martial jurisdiction. *Id*. These questions can involve complex legal determinations, and commanders normally rely on SJAs for advice on such legal conclusions. The amendments to Article 34 will provide formal recognition of current practice, *without any derogation of the commander's prerogative to make a command decision about whether a case should be tried. Id*. (emphasis added). The author of this report language appears to believe that all convening authorities always defer to the legal determinations of the SJA.

[44] S. REP. NO. 98-53 on S.974, *supra* note 35.

[45] *Id.*; *see also* Hearings Before the Subcommittee on Manpower and Personnel, *supra* note 35.

[46] H. REP. NO. 98-549 at 17 (1983). The executive branch articulated the same position on administration-proposed bill language included in S.2521 during the prior Congress. *See* Hearings Before the Subcommittee on Manpower and Personnel, *supra* note 35.

[47] *Id.*

[48] An Act of Dec. 6, 1983, Pub. L. No. 98-209, 97 Stat 139.

other words, the House version became the law. Tellingly, the House report also contradicted the relevant language in the Senate report.[49]

In other words, the House report recognized that the pre-existing law explicitly established the then-current practice. That is, the convening authority received legal advice and then determined if the charge stated an offense and was warranted by the evidence.[50] It was counterproductive to amend Article 34 if the goal was to preserve or recognize the perfectly clear status quo. A significant change was being made, albeit one with no practical impact for the convening authority who always acceded to the SJA's legal sufficiency analysis.

This change aligned with the historical context and trend. The dominant issue in 1983 was more justice for the accused.[51] *O'Callahan v. Parker* remained the law of the land.[52] Both the Supreme Court and general public distrusted the court-martial process.[53] Insufficient control over that process by military commanders was not the problem being solved. A "nothing changed" interpretation would eliminate, without discussion, a significant reform of the late 1940s and UCMJ, that is, a pretrial finding that each specification state an offense, be subject to court-martial jurisdiction, and be warranted by the evidence.[54] In other

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[49] H. REP. NO. 98-549, *supra* note 35, at 14.

> Current law requires the convening authority, normally a layman, to assess the legality of prospective general courts-martial. This burdens line commanders with the need to make complex legal judgments, even though in current practice the staff judge advocate advises the convening authority on the matter. *The committee amendment would require these judgments to be made by the staff judge advocate* to relieve the commanders of an unnecessary task while fully protecting the rights of the accused.

Id. (emphasis added).

[50] United States v. Hardin, 7 M.J. 399, 403–04 (C.M.A. 1979). Article 34 advice is a fundamental right of the accused, but non-binding at this time. *Id*.

[51] *See supra* Section II for further discussion.

[52] O'Callahan v. Parker, 395 U.S. 258, 272–73 (1969).

[53] *Id*.

[54] The original UCMJ Article 34 required the convening authority to determine that each specification is warranted by the evidence. UCMJ art. 34(a) (1950). The new Article 34, as interpreted by one view of the Senate report, has the SJA making this determination but permitting the convening authority to ignore it. S. REP. NO. 98-53, *supra* note 35, at 16-17. Thus, the pretrial requirement that someone determine that all specifications state an offense and be warranted by the evidence has been eliminated, unless the language removed in 1983 implicitly survived. *C.f.* UCMJ art. 34(a) (1984); UCMJ art. 34(a)

words, it would give the commander more control over a discipline-centric system.

Given this alternative, the actual statute appears even clearer.[55] The contemporaneous "statutory history" is also supportive.[56] While many courts engage in it, there is no need to divine an ambiguous, after-the-fact Senate report written by staff, never voted on by any member of Congress, and, in many instances, never even read by any member of Congress.[57] The imperfect statute means exactly what it says. The SJA provides "advice" to the commander; the commander is prohibited from referring a specification to a general court-martial unless this "advice" states the mandatory legal sufficiency conclusions.[58] This is a polite and genteel veto-in-advance.

Most recently, Article 34, UCMJ was amended to account for the new Article 32, UCMJ: "No charge or specification may be referred to a general court-martial for trial until completion of a *preliminary hearing.*"[59] The statute goes on to define the purpose and procedures for

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(1950); S. REP. NO. 98-53, *supra* note 35, at 16–17. In other words, the commander still has statutory authority to make his or her own legal sufficiency findings. The *Manual for Courts-Martial (MCM)* Rule based on this interpretation of Senate Report 98-53 implicitly takes this approach. *See* MCM, *supra* note 12, R.C.M. 601(d)(1) (2012).

[55] *See* United States v. Harrison, 23 M.J. 907, 910 (N.M.C.M.R. 1987); United States v. Hardin, 7 M.J. 399, 403–04 (C.M.A. 1979) (finding that Article 34 advice, while non-binding in 1979, is both a prosecutorial function and a fundamental right of the accused).

[56] Comparing a law's final language with the original and amended bill that produced the law is a generally recognized form of legislative history since it reflects actual votes by the members of Congress. *See* Norman J. Singer & J.D. Shambie Singer, *The Use of Legislative History in a System of Separated Powers*, *in* SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION ch. 5 § 5A:5 (6th ed.). Members' remarks during floor argument may be helpful, but the comments may only reflect the speaker's views or be directed toward unrelated political concerns. *Id.* Committee reports or other published "legislative histories" are written by congressional staff, often after the bill becomes law. *Id.* They are not voted on, or even viewed in many instances, by the members. *Id.* This form of "legislative history," therefore, normally receives less, or in some cases no, consideration. *Id.*

[57] *Id.*; GEORGE COSTELLO, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 41–44 (Mar. 30, 2006). This form of legislative history, moreover, is sometimes intentionally misleading. *See* Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 MIL. L. REV. 87, 87–93 (2003) (documenting the intentionally false and misleading legislative history of the Posse Comitatus Act).

[58] UCMJ arts. 34(a), 34(b) (2015).

[59] 10 U.S.C. §832 (2013) (emphasis added). The change to Article 32 was accomplished in two steps. The first was the NDAA for Fiscal Year 2014, which established the new

this new "preliminary hearing" which replaced the "thorough and impartial investigation" required by Article 32 prior to December 27, 2014.[60]

The slightly modified text of Article 34 remains explicit, however.[61] The convening authority may not refer a specification under a charge to a general court-martial for trial unless he or she has been advised in a signed writing that the staff judge advocate concludes: (1) the specification states an offense under the UCMJ; (2) the specification is "warranted by the evidence" indicated in the report of the preliminary hearing officer (if there is such a report);[62] and (3) a court-martial would have jurisdiction over the accused and offense.[63]

In short, the three technical legal conclusion required by Article 34 are binding on the convening authority—and have been since 1983.[64]

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process but limited its application to offenses committed on or after December 26, 2013. NDAA for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013). The second was the NDAA for Fiscal Year 2015, which applied the new process to all Article 32 hearings conducted on or after December 26, 2014. NDAA for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014). In other words, only the date of the hearing mattered.

[60] UCMJ art. 32 (2015); *See* Murphy, *supra* note 5, at 154–56.

[61] MJRG report, *supra* note 13, at 18, 343.

[62] Practice caution: Rule for Courts-Martial (RCM) 601(d)(1) states the convening authority or judge advocate may consider information from any source prior to referral. MCM, *supra* note 12, R.C.M. 601(d)(1). This would appear to authorize pre-referral input from alleged victims. *C.f.* UCMJ art. 60(d) (2015) (victim opportunity to submit matters to the convening authority taking action on sentence), UCMJ art. 6B(a)(5) (victim right to confer with counsel representing the government). However, by its express terms, Article 34 limits what the SJA may consider when making the mandatory legal conclusions. UCMJ art. 34(a) (2015). The Article 34 advice should, therefore, explicitly state what is, and is not, being relied on.

[63] Table 1: Mandatory Pretrial Findings (excluding disposition recommendation).

Preliminary Hearing Officer—Art. 32	SJA—Art. 34
Determining whether there is probable cause	Conclusion each specification is warranted by the evidence indicated in the report of the preliminary hearing officer
Determining whether the convening authority has court-martial jurisdiction	Conclusion a court-martial would have jurisdiction
Considering the form of charges	Conclusion each specification alleges an offense

UCMJ art. 34, tbl. 1 (2015).

[64] United States v. Harrison, 23 M.J. 907, 910 (N.M.C.M.R. 1987). *But see infra* notes 77–81 and accompanying text.

The SJA has de facto veto power over referral of any specification to a general court-martial.[65]

IV. The Less Clear Rules for Courts-Martial

Unfortunately, the *MCM* does not match the statute's ultimate clarity. The rules, unlike Article 34, helpfully separate the actions of the SJA and convening authority. This provides an opportunity for more precision. However, both Rules for Courts-Martial (RCMs) 406 and 407 omit a lot. Rule for Court-Martial 406, the "Pretrial advice," only requires that the charges be routed for the SJA's "consideration and advice" which must include legal sufficiency conclusions.[66] There is no requirement here that the SJA actually find the charges legally sufficient. The next step, at RCM 407, indicates that the commander may refer them to a general court-martial upon receipt. This decision is subject only to RCM 601(d), "When charges may be referred."[67]

Subsection RCM 601(d)(1) is the "[b]asis for referral." The title sounds universal but it was not originally thought to apply to general courts-martial.[68] Some parts of it do not make sense in this setting.[69] However, it contains the only explicit requirement that *anyone* find the evidence and specifications legally sufficient before referral to a general court-martial.[70] A mandatory pre-referral legal sufficiency finding was a significant reform of the 1950 UCMJ.[71] This may be why RCM 407(a)(6) explicitly subjects the convening authority's referral decision to all of RCM 601(d) instead of just the general court martial section at

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[65] *Harrison*, 23 M.J. at 907; MJRG report, *supra* note 13, at 343; United States v. Mercier, 75 M.J. 643, 646 (C. G. Ct. Crim. App. 2016).

[66] MCM, *supra* note 12, R.C.M. 406(a).

[67] *Id.* R.C.M. 407(a)(6).

[68] *Id.* R.C.M. 601(d) analysis, at A21-27 & 28 (1984).

[69] For example, a commander who dislikes the SJA's Article 34 advice probably cannot seek a second legal opinion from "a judge advocate" who is not the SJA. *Id*. R.C.M. 601(d)(1).

[70] *Id*. R.C.M. 601(d)(2). The rule merely requires receipt of the SJA's Article 34 advice, which will occasionally conclude that the charges are not warranted by the evidence or are otherwise defective. *Id.* If RCM 601(d)(1) does not apply to all referral decisions, it would be lawful for the commander to refer even baseless charges to a general court-martial. *Id*.

[71] *See supra* notes 16–18, 32.

RCM 601(d)(2).[72] It may also be why the discussion following RCM 406(b) directs the SJA who is drafting pretrial advice to see RCM 601(d)(1).[73]

In any event, the interlocking RCMs significantly cloud the picture, as does the *MCM*'s analysis. The analysis indicates that the rules and discussion were adjusted to account for changes to Article 34, UCMJ in the Military Justice Act of 1983.[74] Digging deeper, the analysis splits into conflicting positions. It cites an improbable interpretation of Senate Report 98-53 on S.974 (the bill changed nothing) yet also states that the SJA must make the pre-referral legal sufficiency determination.[75] Ultimately, it appears that the conflict was resolved with ambiguous RCM language and confusing cross-references that appear to reject the most explicit language of Article 34, UCMJ.[76]

Under the resulting RCMs, the convening authority may refer any specification to a general court-martial after receiving the SJA's Article 34 advice.[77] The content does not matter.[78] The convening authority may make his or her own determination that there are "reasonable grounds to believe" an offense triable by a court-martial has been committed and that the specification states an offense.[79] Moreover, the convening authority is not limited to the information developed in the Article 32 hearing.[80] He or she may consider anything, including inadmissible information not provided to the defense.[81] In other words,

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[72] MCM, *supra* note 12, R.C.M. 601(d)(2) (requiring mere receipt of the SJA's Article 34 advice and substantial compliance with the Article 32, UCMJ procedure). The SJA is only required to discuss legal sufficiency. *Id.* R.C.M. 406 (2012) (showing that there is no requirement that the SJA conclude the charges are legally sufficient).

[73] MCM, *supra* note 12, R.C.M. 406(b) discussion (indicating that the standard of proof used by the SJA when making the "warranted by the evidence" determination is "probable cause" due to RCM 601(d)(1)).

[74] MCM, *supra* note 12, R.C.M. 601(d)(1) analysis, at A21-27, 32.

[75] *Id*. at 27–28; S. REP NO. 98-53, *supra* note 35. Ironically, the analysis of the rule on the SJA's pretrial advice given in RCM 406 alludes to the improbable interpretation of Senate Report No. 98-53. It does not say that the legal sufficiency determination must be made by the SJA. *Id.*

[76] Act of Dec. 6, 1983, *supra* note 36.

[77] MCM, *supra* note 12, R.C.M. 406, 407(a)(6), 601(d)(2)(B).

[78] *Id*. A portion of the rule text directly contradicts the analysis section: "In general courts-martial, the legal sufficiency determination must be made by the staff judge advocate." *Id*. R.C.M. 601(d)(1) analysis, at A21-31.

[79] *Id*. R.C.M. 601(d)(1).

[80] *Id*.

[81] MCM, *supra* note 12, R.C.M. 601(d)(1).

the commander remains in total control. The SJA's legal sufficiency conclusions are merely advice from a component of the discipline system.[82]

This is not the law and may not be the intent behind the RCMs, however, many continue to reasonably rely on the rule text, perhaps via direct references to them in service policy,[83] out of long habit, or maybe even a bit of institutional blindness.[84] In the past, it probably didn't matter. Most convening authorities were reluctant to embark on a prosecution when the SJA said the evidence was weak.[85] Given the current environment and incentives for commanders, however, this may be less true.[86] Referral = Action Supporting Victims/Survivors, even on Twitter.[87]

V. Warranted by the Evidence and Rules of Professional Responsibility

Updating the *MCM* to align with Article 34, UCMJ will provide an

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[82] *Id.* Rule for Courts-Martial 601(d)(1), as applied to general courts-martial, also appears to contradict the statutory requirements imposed on the SJA. The rule states that the convening authority *or judge advocate* may consider information from any source and is not limited to the information reviewed by any previous authority. *Id.* (emphasis added). Article 34 of the UCMJ, however, clearly requires that the SJA's legal conclusions be based on the evidence indicated in the report of the preliminary hearing officer (if there is such a report). Act of Dec. 6, 1983, *supra* note 36.

[83] *See* U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE § 4.5 (2013); U.S. DEP'T OF ARMY REG. 27-10, MILITARY JUSTICE 5-19 (3 Oct. 2011) [hereinafter AR 27-10] (referencing RCM 601 in the referral of charges section); U.S. COAST GUARD COMMANDANT INSTR. M5810.1E, MILITARY JUSTICE MANUAL 3.G.3, 3.A.3.a (2011) [hereinafter COMDTINST M5810.1E].

[84] *See* Murphy, *supra* note 5, at n.62, 136. "One constant that has remained from the Articles of War to the present-day *MCM* is that military commanders have full disposition authority, or ultimate prosecutorial discretion, for offenses committed by those subject to the UCMJ." *Id.* David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 8–10 (2013) (making no mention of the SJA in an extensive discussion of the pretrial process).

[85] *See* S. REP. NO. 98-53, *supra* note 35, at 16–17. The author of this report language appears to believe that all convening authorities always defer to non-binding advice from the SJA that the evidence does not warrant a charge or specification. *Id.*

[86] *See supra* notes 6–8 and accompanying text. *See also* Keaton H. Harrell, *Discretion and Discontent: A Discourse on Prosecutorial Merit Under the Uniform Code of Military Justice*, ARMY LAW., Aug. 2015, at 26–27.

[87] *Twitter* is an online social networking service that enables users to send and read short, 140-character messages called "tweets." TWITTER, https://twitter.com/?lang=en&logged_out=1.

opportunity to address the mandatory "warranted by the evidence" conclusion, which the law never defined.[88] Long practice placed it somewhere at or near the familiar "probable cause" or "that degree of proof which would convince a reasonable, prudent person there is probable cause to believe a crime was committed and the accused committed it."[89] That's the approach taken in the *MCM*.[90]

However, the foundation of the *MCM*'s approach is less solid than it initially appears. The discussion to the rule on the SJA's pretrial advice states, "[t]he standard of proof to be applied in RCM 406(b)(2) is *probable cause*." [91] It then directs the reader to RCM 601(d)(1) which states,

> If the convening authority finds or is advised by a judge advocate that there are *reasonable grounds to believe* that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification states an offense, the convening authority may refer it.[92]

Neither the "probable cause" nor "reasonable grounds to believe" standard appears in the relevant statute[93] or in any previous *MCM*.[94] According to the *MCM* analysis, they are based on the "warranted by the evidence" language in Article 34, UCMJ.[95] The theory reflected in the *MCM* analysis appears to be: (1) the statutory "warranted by the evidence" finding is based on the report of investigation under Article 32, UCMJ; (2) the legislative history of Article 32 indicates that the advisory report of investigation was to use a "reasonable grounds to

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[88] UCMJ art. 34(a) (1950). The undefined phrase "warranted by the evidence" is contained in the first draft of the UCMJ commonly known as the "Morgan Draft." UCMJ (1949).

[89] *See* Gerstein v. Pugh, 420 U.S. 103 (1975).

[90] MCM, *supra* note 12, R.C.M. 601(d)(1); R.C.M. 406(b)(2) discussion (2012). The 2012 *MCM* offers two formulations of "warranted by the evidence": reasonable grounds to believe and probable cause. *Id.*

[91] *Id.*, R.C.M. 406(b) discussion (emphasis added). The standard of proof was added to the discussion in 1991. *Id.* analysis, at A21-27, 28.

[92] *Id.*, R.C.M. 601(d) (1984) (emphasis added). The rule remains unchanged in the 2012 *MCM*. *Id.*, R.C.M. 601(d)(1).

[93] UCMJ art. 34 (2012) (applying only to a general court-martial); UCMJ art. 34(a) (1950).

[94] MCM, *supra* note 12, R.C.M. 601(d)(1) analysis, at A21-32; MCM (1969 (Rev.))

[95] *Id.* at A21-32.

believe" standard; (3) therefore, "warranted by the evidence" also means "reasonable grounds to believe."[96] In other words, the Article 34 referral decision is a continuation of the advisory Article 32 process; they merge. One can, therefore, reverse-engineer the statutory definition of the "warranted by the evidence" standard from the Article 32 legislative history.[97]

The analysis to RCM 601(d) broadens the merger concept by comparing the prosecution decision under Article 34 with a preliminary hearing before a federal magistrate judge.[98] A preliminary hearing, however, occurs *after* the prosecution decision and an initial hearing/arraignment.[99] The preliminary hearing, if held, is a mini-trial to determine if probable cause exists.[100] If the judge concludes there is probable cause, a trial will be scheduled. If not, the charges will be dismissed.[101] While there are some parallels to the SJA's and convening authority's pretrial roles, the comparison with a federal preliminary hearing is inapt. The more appropriate federal reference for the legal sufficiency of the evidence when initially exercising prosecutorial discretion is the U.S. Attorney's Manual.[102]

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[96] *Id*.

[97] Applying this comparison technique to the current Article 32 and Article 34 could produce a different result now that the Article 32 standard of proof is explicitly contained in the statute. *See supra* notes 59–63 and accompanying text.

[98] MCM, *supra* note 12, R.C.M. 601(d)(1) analysis, at A21-31 ("consistent with Fed. R. Crim. P. 5.1(a)").

[99] *See Justice 101, Charging*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/usao/justice-101/charging (last visited Aug. 12, 2016); *Justice 101, Initial Hearing/Arraignment*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/usao/justice-101/initial-hearing (last visited Aug. 12, 2016); Fed. R. Crim. P. 5.1(a) (2014).

[100] *Justice 101, Preliminary Hearing*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/usao/justice-101/preliminary-hearing (last visited Aug. 12, 2016); Fed. R. Crim. P. 5.1(a) (2014).

[101] *Id*.

[102] *See Manual, Title 9, Criminal § 9-27.220.A., Grounds for Commencing or Declining Prosecution*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.200 (last visited Aug. 12, 2016).

> 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 no substantial Federal interest would be served by prosecution . . . .

Id.

Moreover, explicit judicial support for the *MCM*'s prosecution standard is elusive.[103] It appears to have originated when defense counsel moved to dismiss charges due to a lack of evidence at the Article 32 investigation.[104] The Air Force Board of Review found that the Article 32 investigation had established probable cause, thus "warranting" referral of the charges to a general court-martial.[105] Over a decade later, an appeal based on SJA disqualification compared the pretrial and post-trial review duties of the SJA.[106] Dicta in a footnote described Article 34's "warranted by the evidence" standard by citing the constitutional probable cause standard for arrest and pretrial detention.[107] This may have been the only realistic standard an appellate court could apply retroactively; however, it does not necessarily articulate the correct standard for when the SJA prospectively determines if the evidence warrants a prosecution. Fortunately, a separate line of military cases more directly articulates the prospective prosecution standard.[108]

These military cases parallel the development of, and eventually cite, the *American Bar Association Standards Prosecution Function*.[109] The analysis to RCM 601(d) also references the then-current *ABA Standards*.[110] In fact, the *ABA Standards* are thoroughly infused into state, federal, military, and local laws.[111] They are frequently cited in cases involving defense counsel ineffectiveness and prosecutorial misconduct.[112] The current *ABA Standard* for a criminal prosecution is substantively identical to the ones used by the U.S. Attorney (USA) and

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[103] *See* MCM, *supra* note 12, R.C.M. 601(d)(1) analysis, at A21-32.

[104] United States v. Kauffman, 33 C.M.R. 748, 795 (A.F.B.R. 1963) (*rev'd* on other grounds, 14 C.M.A 283 (1963)).

[105] *Id*.

[106] United States v. Engle, 1 M.J. 387, 389 (C.M.A. 1976).

[107] United States v. Engle, 1 M.J. 387, 389 n.4 (C.M.A. 1976) (citing Gerstein v. Pugh, 420 U.S. 103 (1975)). At this point, the accused had been convicted and the reviewing courts had implicitly found the evidence at trial sufficient to support the conviction. *Id.*

[108] *See infra* notes 127–31 and accompanying text.

[109] *Criminal Justice Standards*, AM. BAR ASS'N, http://www.americanbar.org/groups/criminal_justice/standards.html (last visited Aug. 12, 2016); *see also infra* notes 128–31 and accompanying text.

[110] MCM, *supra* note 12, R.C.M. 601(d)(1) analysis, at A21-31.

[111] Martin Marcus, *The Making of the ABA Criminal Justice Standards: 40 Years of Excellence*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/makingofstandards_marcus.authcheckdam.pdf (last visited Aug. 12, 2016).

[112] *E.g.*, Padilla v. Kentucky, 559 U.S. 356, 367 (2010); Cone v. Bell, 556 U.S. 449, 469 n.15 (2009); Kyles v. Whitley, 514 U.S. 419, 437 (1995); Giglio v. United States, 405 U.S. 150, 153–54 (1972).

the National District Attorneys Association:[113]

> A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.[114]

Rule for Court-Martial 601(d) does not, obviously, include the language concerning admissible evidence sufficient to support a conviction.[115] It articulates the 1970s formulation of probable cause to arrest and detain.[116] However, the rule was apparently understood to be in accord with the then-current *ABA Criminal Standard*.[117] This technique remains a common method of adopting the *ABA Standards* into legal ethics codes. The rule requires "probable cause" while the

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[113] *Manual*, *supra* note 102; *National Prosecution Standards (3d ed.), 4-2.2, Propriety of Charges* 52 NAT'L DIST. ATT'YS ASS'N , http://www.ndaajustice.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf (last visited Aug. 11, 2016) (instructing prosecutors to file charges that they believe adequately encompass the accused's criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial).

[114] AM. BAR ASS'N, *supra* note 109. *See also ABA Criminal Justice Standards for the Prosecution Function Standard (4th ed.) 3-4.4*, AM. BAR ASS'N, http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html (last visited May 4, 2016) ("the prosecutor should not file or maintain charges greater in number or degree than can reasonably be supported with evidence at trial and are necessary to fairly reflect the gravity of the offense or deter similar conduct").

[115] The non-binding discussion following RCM 406 appears to be inconsistent with the ABA/U.S. Attorney's Office/National District Attorneys Association approach and therefore precludes their application. The discussion to RCM 406 states that "warranted by the evidence" is the same as probable cause and cites RCM 601(d)(1) as authority. However, Part I of the *MCM* states that the discussion sections are unofficial, supplementary materials and do not constitute rules. In addition, the cited authority, RCM 601(d)(1), states that "reasonable grounds to believe" is the standard for referral. No such language appears anywhere in the statutory general court-martial pretrial process. *See generally* MCM, *supra* note 12, R.C.M. 601. Finally, RCM 601(d)(1), if applied to general court-martial, also appears to directly contradict Article 34, UCMJ. *Id*. A non-binding, unofficial, and incorrect or outdated *MCM* discussion should not be an impediment to application of the ABA standards.

[116] *See* United States v. Engle, 1 M.J. 387, 389 n.4 (C.M.A. 1976); MCM, *supra* note 12, R.C.M. 601(d)(1) analysis, at A21-31.

[117] MCM, *supra* note 12, R.C.M. 601(d)(1) analysis, at A21-31.

discussion/comment section, or some other mechanism, fully incorporates the *ABA Standards of Criminal Justice Relating to the Prosecution Function*.[118]

For example, Florida's Rule 4-3.8 on the special responsibilities of a prosecutor, like all other jurisdictions, requires the prosecutor to know the case is supported by probable cause.[119] The comments, however, explicitly state that Florida has adopted the *ABA Standards of Criminal Justice Relating to the Prosecution Function.*[120] In other words, Florida's Rule 4-3.8 definition of "supported by probable cause" is informed by ABA criminal justice standard 3-3.9 and ultimately means "sufficient admissible evidence to support a conviction." Other states take a less direct approach to the same result.[121]

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[118] Uncommonly, the District of Columbia Bar's *Rules of Professional Conduct* contain ABA-like language within the rule itself. *Rules of Professional Conduct, Rule 3.8—Special Responsibilities of a Prosecutor*, D.C. BAR, https://www.dcbar.org/bar-resources/legal-ethics/amended-rules/rule3-08.cfm (last visited Aug. 12, 2016). A prosecutor must know the charge is supported by probable cause and that there is evidence sufficient to establish a prima facie showing of guilt. *Id*.

[119] FL Bar Rules of Professional Responsibility, Rule 4-3.8, https://www.floridabar.org/divexe/rrtfb.nsf/FV/1535A73735C78F6C85256BBC0051BDCF(last visited May 16, 2016).

[120] *Id*.

[121] While Florida explicitly adopted the ABA's Criminal Justice Standards, North Carolina's approach of referring to them is more common.

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See the ABA Standards of Criminal Justice Relating to the Prosecution Function. A systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Rules, N.C. BAR, http://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-38-special-responsibilities-of-a-prosecutor/ (last visited May 16, 2016). In California, The ABA's *Model Rules and Standards*, while not formally binding, are a particularly influential source. Three of the California Supreme Court's seminal prosecutorial misconduct cases cite the ABA standards: People v. Hill, 17 Cal.4th 800, 833 (1998) (partially reversed on other grounds); People v. Bolton 23 Cal.3d 208, 212–13, 217 (1979); City & County of San Francisco v. Cobra Solutions, Inc., 38 Cal.4th 839, 852 (2006). Not surprisingly, the ABA's standards are prominent in formal state ethics opinions. *See, e.g*., State Bar of Cal., Formal Op. 1975-35 (1975), (citing the ABA's Standards Relating to the Defense Function stand. 3.5(c)); State Bar of Cal. Formal Op.

Many branches of the armed forces do the same via legal professional responsibility programs.[122] The service rules are modeled on the current *American Bar Association (ABA) Model Rules of Professional Conduct.*[123] Moreover, each service makes specific *ABA Standards* applicable to its personnel.[124] Of course, each attorney must

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1989-106 (1989) (citing standard 3-3.9 of the ABA's Standards Relating to the Administration of Criminal Justice).

[122] U.S. DEP'T OF ARMY REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1992) [hereinafter AR 27-26]; U.S COAST GUARD, COMMANDANT INSTR. M5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM (2005) [hereinafter COMDTINST 5800.1]; U.S. DEP'T OF NAVY, JAGINST 5803.1E, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL (2015) [hereinafter JAGINST 5803.1E]; U.S. DEP'T OF AIR FORCE, INSTRUCTION 51-110, PROFESSIONAL RESPONSIBILITY PROGRAM (2014 with 2015 amend.) [hereinafter AFRPC].

[123] *See, e.g.*, AFRPC, *supra* note 122, at 21 ("The AFRPC are directly adapted from the *American Bar Association (ABA) Model Rules of Professional Conduct*, with important contributions from [the] Army['s] *Rules of Professional Conduct for Lawyers* and the Navy instruction: *Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of The Judge Advocate General*.").

[124] AR 27-10, *supra* note 83, ch. 5–8].

> Judges, counsel, and court-martial clerical support personnel 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, the "Code of Judicial Conduct for Army Trial and Appellate Judges," or other rules governing provision of legal services in the Army.

Id. apps. C-1, C-2 (directing attention to ABA standards section 3.5, The Defense Function, and section 3.4(b), the Function of the Trial Judge); COMDTINST M5810.1E, 6.C.1. (2011), *supra* note 83.

> 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, The Function of the Trial Judge, and Fair Trial and Free Press.

JAGINST 5803.1E, Rule 3.8, cmt. 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."). *See* United States v. Howe, 37 M.J. 1062 (N.M.C.M.R. 1993); United States v. Dancy, 38 M.J. 1 (C.M.A. 1993); United States v. Hamilton, 41 M.J. 22 (C.M.A. 1994); United States v. Meek, 44 M.J. 1 (C.M.A. 1996); U.S. DEP'T OF AIR FORCE INSTR. 51-201,

be licensed and is also subject to the ethical standards of the state issuing their law license.[125] The *ABA Standard on the Prosecution Function* is also the basis for part of the discussion section of RCM 306(b) (Initial Disposition).[126]

A line of court decisions shows the integration of the *ABA Standards* for a criminal prosecution into military law. It began in 1961, at the Coast Guard Board of Review:

> As a matter of basic fairness in a criminal trial, if a charge preferred against an accused cannot 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. . . . When a prosecutor is aware before the trial begins that he is not going to be able to make out a case on one of the charges but nevertheless arraigns the accused on it, it is just as unfair to the accused as though he had given the members of the court copies of a withdrawn charge. . . . We agree with the staff legal officer's comment that the trial counsel should have advised the convening authority prior to trial that he could not produce corroborating evidence.[127]

The Court of Military Appeals approvingly quoted this language in a 1972 decision.[128] Army and Navy appellate courts of the 1990s went even further—clearly stating that the 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.[129] Both courts

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ADMINISTRATION OF MILITARY JUSTICE attachment 3 (6 June 2013) [hereinafter AFI 51-201].

[125] According to the ABA, fifty-one licensing jurisdictions have adopted the ABA's *Model Rules of Professional Conduct*. A complete list can be found at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Aug. 11, 2016).

[126] MCM, *supra* note 12, R.C.M. 306, 601(d)(1) analysis, at A21-21, A21-31.

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

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

[129] United States v. Asfeld, 30 M.J. 917, 929 (A.C.M.R. 1990).

explicitly cited the updated *ABA Criminal Standards*.[130] One emphasized the due process implications.[131]

Given this judicial and professional adoption of the ABA prosecution standard, "warranted by the evidence" has become functionally indistinguishable from it—at least when applied prospectively. Using it when evaluating pretrial legal sufficiency reflects both common sense and good stewardship. "Both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact."[132] Can this be reasonably disputed in any justice system?

Recent changes to both Article 32 and Article 34 show that "warranted by the evidence" is not the exact same as "probable cause." In 2013, Congress amended both Article 32 and 34 within the same legislative act.[133] Obviously aware of the existing "warranted by the evidence" standard in Article 34, Congress chose different language ("probable cause") for the preliminary hearing officer's determinations in the new Article 32.[134] Congress, while amending Article 34, did not change its standard to read "probable cause." Absent evidence of a contrary intent, the use of different statutory language within the same

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> However, as the case proceeds to prosecution, the Government must make a good-faith assessment of its case and withdraw any charge which it cannot substantiate by competent, legal evidence. 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."

ABA, Standards for Criminal Justice (1986), Standard 3.8(a). United States v. Howe, 37 M.J. 1062, 1064 (N.M.C.M.R. 1993) (The 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." (citing Standard 3.8(a), ABA STANDARDS FOR CRIMINAL JUSTICE (1986), and Navy Rule 3.8 in JAGINST 5803.1A of 13 July 1992)). The *Howe* case was subsequently reversed on other grounds but continues to be cited in the *Navy Rules of Professional Responsibility*. U.S. v. Driver, 57 M.J. 760 (N. M. Ct. Crim. App. 2002); JAGINST 5803.1E.

130 *Asfeld*, 30 M.J. at 929; *Howe*, 37 M.J. at 1064.

131 *See Asfeld*, 30 M.J. at 917, 928 (citing United States v. Lane, 474 U.S. 438, 446 n.8 (1986) (misjoinder); United States v. Baker, 14 M.J. 361, 365 (C.M.A.1983) (multiplicity); Harrell, *supra* note 86, at 28–29, 29 n.66.

132 U.S. DEP'T JUSTICE, *supra* note 102, § 9-27.220.B (comment).

133 NDAA for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

134 UCMJ arts. 32(a)(2)(A), 34(a)(2)(2015).

legislative act normally shows a different meaning.[135] Within the overall statutory context, an Article 34 standard that approaches the issue of legal sufficiency of the evidence from the perspective of a criminal trial is a logical interpretation. In short, the statute itself arguably now implements a version of the ABA/USA/National District Attorney's Association model.

This statutory interpretation would align well with the functional definition and help avoid ethical dilemmas based on incorporation of the *ABA Standards* into military and state ethics rules.[136] The SJA's Article 34 advice is clearly part of the prosecution function.[137] A conclusion that a specification is "warranted by the evidence" permits it to be resolved at a general court-martial.[138]

If the admissible evidence does not actually support proof beyond probable cause, the SJA's Article 34 conclusion permits the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction. This is true even if the SJA recommends against referral in the Article 34 advice.[139] Only the "warranted by the evidence" legal conclusion is binding.[140] The rest is merely advice, but hopefully a mitigating factor. Thus, it might be unethical for a licensed SJA to do so. This is in addition to potential issues with the service's own professional responsibility program.

Moreover, the SJA and trial counsel have an ongoing duty to remain informed on significant pretrial evidentiary rulings and take appropriate action if the evidence supporting a specification becomes inadmissible.[141]

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135 Costello, *supra* note 57, at 14.

136 *See, e.g.*, AFI 51-201, *supra* note 124, at Standard 3-3.9(a) ("A trial counsel should not institute or permit the continued pendency of criminal charges in the absence of admissible evidence to support a conviction.").

137 *See, e.g.*, United States v. Hardin, 7 M.J. 399, 403–04 (C.M.A. 1979).

138 Until its definition is ultimately resolved, all Article 34 advice should clearly and separately use the phrase "warranted by the evidence." Also, the *Solorio* Court emphasized the plenary power of Congress under the Constitution to strike the balance between justice and discipline. Solorio v. United States, 483 U.S. 435, 440, 441 (1987). This suggests that strict adherence to the statutory pretrial process is prudent. *Id.*

139 *C.f.* UCMJ arts. 34(a), (b)(2) (only the specific items in article 34(a) are a precondition to referral to a general court-martial).

140 *Id*.

141 AR 27-26, Rule 3.8; COMDTINST 5800.1, Rule 3.8; U.S. COAST GUARD, MILITARY JUSTICE MANUAL § 6.C.2.; JAGINST 5803.1E, comment to Rule 3.8; AFRPC Rule 3.8.; AFI 51-201 Standard 3-3.9(a).

At this point, the primary option is to advise the convening authority that the evidence is now lacking.[142]

The SJA who continues to hold that all of the Article 34 advice is merely advisory, in accordance RCMs 406, 407, and 601, faces an even starker ethical situation. Under these rules, it does not matter what the SJA says about the specifications: "no probable cause," "not warranted by the evidence," or even "baseless." The mere submission clears the way for the convening authority to refer even ethically weak specifications to a general court-martial.[143] Under these hopefully very rare circumstances, is it ethical for the SJA to even submit the empowering Article 34 advice? Should they, and their entire staffs, be recused? This is yet another reason for adopting the statutory-based approach discussed in Part III.

VI. Conclusion

The last several years have been stressful times for the military justice system. More is almost certainly on the way.[144] There have been genuine reforms, exploitation of bad and misleading statistics,[145] and plenty of political opportunism.[146] More than a few experienced practitioners think "the force" of military justice—that is, discipline, efficiency, and justice—is out of balance.[147]

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[142] *Id.*

[143] MCM, *supra* note 12, R.C.M. 407(a)(6), 601(d)(1) & (2)(B)(stating that the convening authority may refer a specification to a general court-martial after the mere receipt of SJA's Article 34 advice provided that either the convening authority or a judge advocate finds, based on information from any source, that there are reasonable grounds to believe an offense was committed by the accused).

[144] *See* NDAA for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015); MJRG report, *supra* note 13. Section B of the report contains an article-by-article index of UCMJ recommendations followed by a detailed analysis of each provision, including recommended amendments. Section C contains consolidated draft legislation that includes all proposed amendments to the UCMJ. *Id.*

[145] Schenck, *supra* note 6, at nn.6, 8, section III.

[146] Murdough, *supra* note 8 at section III; Dwight Sullivan, *The Politicization of the Military's Response to Sexual Assaults*, CAAFLOG (Jan. 1, 2013), http://www.caaflog.com/2013/01/01/top-10-military-justice-stories-of-2012-1-the-politicization-of-the-militarys-response-to-sexual-assaults/.

[147] *See Report of the Response Systems to Adult Sexual Assault Crimes Panel*, RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 37 (June 27, 2014), http://140.185.104.231/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf [hereinafter RSP Report]; Murphy, *supra* note 5, at 135.

The SJA is uniquely positioned to retain and stabilize this balance. Contrary to the *MCM* rule text,[148] the independent legal judgment of the SJA is a cornerstone of pretrial statutory due process. The SJA does not merely provide advice. He or she is a highly empowered partner in the decision-making leading to a general court-martial.[149] The SJA also has a unique perspective on courtroom realities and fundamental legal fairness. Language reflecting this perspective is contained in the prosecution standards of the American Bar Association, U.S. Attorney's Manual, National District Attorneys Association, and military case law. It should be used when explaining why a specification is not "warranted by the evidence" and cannot, therefore, be referred to a general court-martial.[150] There is a reason Congress put the SJA in charge of pre-referral legal determinations. No SJA, therefore, should fear hearing that they are "thinking like a lawyer."

Of course, being a more highly-empowered partner, with a virtual veto pen, will not be easy. The military work environment, culture, and incentives are designed to ensure every questionable sexual encounter is reported and investigated. Political leaders expect subsequent prosecutions and convictions.[151] Special interests seek more "gotcha" moments to generate publicity for their causes.[152] The path of least resistance may be referral to a general court-martial. Legal ethics, however, and the need for a genuine justice system, may occasionally impose contrary demands. The modern successors of the lawyers who implemented the UCMJ during a major war are more than up for the challenge.[153]

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[148] MCM, *supra* note 12, R.C.M. 601, 406–07.

[149] There is also a proposal to add the SJA to special court-martial referral decisions. *See* MJRG report, *supra* note 13, at 107, 346 (Dec 22, 2015). In the meantime, the jurisdictional limitation of Article 120 offenses to a general court-martial ensures SJA involvement in this hot-button issue. NDAA of Fiscal Year 2014, Pub. L. No. 113-66, § 1705(b), 127 Stat. 672 (2013) (applicable to all offenses committed on or after June 24, 2014).

[150] *C.f.* RSP Report, *supra* note 147, at 129 (describing over 100 instances in which commanders referred sexual misconduct charges when the local civilian authorities had declined to prosecute).

[151] *See, e.g.*, Sen. Gillibrand Press Release of May 5, 2016, https://www.gillibrand.senate.gov/newsroom/press/release/gillibrand-statement-on-latest-dod-report-on-sexual-assault-in-the-military (last visited May 16, 2016); Tilghman, *supra* note 9.

[152] *See, e.g.*, *Debunked: Fact-Checking the Pentagon's Claims Regarding Military Justice*, PROTECT OUR DEFENDERS, http://www.protectourdefenders.com/debunked/ (last visited May 16, 2016).

[153] President Truman signed the UCMJ into law on May 5, 1950. The Korean War began on June 25, 1950. The UCMJ went into effect on May 31, 1951.