1 Court-Martial Procedure § 8-10.00

§ 8-10.00 INTRODUCTION

§ 8-11.00 Disposition in General

Following notice of an offense allegedly committed by a member of a command, the commander must make a preliminary inquiry in order to make an initial disposition decision.[1] When disposing of an offense, commanders are required to select the least severe disposition that will accomplish the objectives of justice and discipline.[2] If circumstances justify taking action, and administrative disposition[3] is inappropriate, a commander must choose between nonjudicial punishment and trial by court-martial. Because the military criminal legal system is in the hands of commanders and their direct civilian superiors, the Department of Justice has no direct control over either the system or any individual case.[4]

Notwithstanding the above references to "commanders," Congress in The National Defense Authorization Act for Fiscal Year 2022 § 531 (Dec. 27, 2021), effective December 27, 2023, amended the UCMJ creating "special trial counsel" the senior of which will be a brigadier general or rear admiral (lower half) in pay grade 0–7 who for a "covered offense," as defined in amended Article 24a(c)(2), has the powers and responsibilities with respect to prosecutorial discretion, including case referral, previously possessed by the convening authority. As amended, the UCMJ largely eliminates commanders' criminal justice role with respect to all major offenses in favor of lawyer prosecutorial decision-making. Accordingly, the current military criminal justice system divides prosecutorial disposition decision authority between special trial counsel for "covered" offenses and commanders for all other offenses.

Nonjudicial punishment is imposed by the commander in lieu of trial by court-martial.[5] it is characterized by a minimum of formalities and is typically prompt and limited in due process guarantees. It is, however, limited in terms of punishment when compared to trial by court-martial.[6]

When trial by court-martial is appropriate, three options are available: summary, special, and general court-martial.[7] the procedural protections afforded the aced increase in proportion to the increasing sentencing choices available to the trial forum.

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[1] *See* section 3-10.00. a decision as to pretrial restraint may also be necessary. *See* chapter 4. For factors relevant to disposition generally, *see generally* major Lawrence J. Morris, *Keystones of the Military Justice System: a Primer for Chiefs of Justice,* ARMY LAW, Oct. 1994, at 15.

[2] R.C.M. 306(b) ("lowest appropriate level"). *See also* § 3-10.00. "The military justice system is highly decentralized. Military commanders … have broad discretion to decide whether a case should be disposed of through administrative, nonjudicial, or court-martial channels." United States v. Lacy, 50 M.J. 286, 287 (C.A.A.F. 1999).

[3] *See* section 3-20.00. Note that civilian prosecution may be a possible alternative as well. *See* section 3-30.00.

[4] United States v. Duncan, 34 M.J. 1232, 1239 (A.C.M.R. 1992) (in the event of possible civilian federal prosecution the attorney general and her or his subordinates have no power to order a stay of a court-martial and have no control over military prosecution).

[5] *See* section 8-20.00.

[6] This could be disputed when compared to a summary court-martial. The punishment of "correctional custody," which is expressly permitted only under article 15 (b)(2)(b), is often viewed as more severe than normal confinement.

Prior to the Military Justice Act of 2016, illustrative case dispositions by the respective armed forces, with applicable acquittal rates, were reported by the armed forces by the "Code Committee," then composed of the judges of the Court of Appeals for the Armed Forces, the Judge Advocates General, and two public members. The Act replaced the Code Committee with a Military Justice Review Panel. The data that follows comes from https://jsc.defense.gov/Annual-Reports reporting the Article 146 data:

FISCAL YEAR 2022 DISPOSITIONS

	Army	Air Force	Navy	Marines	Coast Guard
General Courts	335	161	81	93	7
BCD Specials	111	138	94	89 not designated by type of special	0
Special Courts	0	0	0	0	7
Military Judge Alone specials	34	15	6	24	Not reported
Summary Courts	47	87	9	113	4
Article 15's	20,850	4,183	5,992	6,358	Not reported
Average strength	465,625	329,486	348,521	176,556	Not reported

FISCAL YEAR 2022 ACQUITTALS BASED ON COMPLETED TRIALS

	Army	Air Force	Navy	Marines	Coast Guard
General Courts	50 of 439	37 of 161	14 of 81	21 of 93	1 of 7
BCD Specials	10 of 142	5 of 138	7 of 94	9 of 89	0 of 0
Special Courts	0	0	0	0	1 of 7
Military Judge Alone specials	4 of 34	1 of 15	3 of 6	8 of 24	Not reported
Summary Courts	0 of 47	2 of 87	0 of 9	1 of 113	0 of 4

[7] In ascending order of severity.

In light of the UCMJ amendments that transfer prosecutorial decision-making in major case to special trial counsel, the authors have chosen to not update this data until there has been sufficient experience under the new system.

§ 8-12.00 Notification of the Accused

Once a commander has either received charges or chosen to prefer them:

> The immediate commander of the accused shall cause the accused to be informed of the charges preferred against the accused, and the name of the person who preferred the charges and of any person who ordered the charges to be preferred, if known, as soon as practicable.[8]

§ 8-13.00 The Disposition Decision

§ 8-13.10 Decision by Special Trial Counsel or the Commander

Until December 27, 2023, when critical amendments to the Uniform Code of Military Justice transferring prosecutorial decision-making in sexual assault and other major crime cases to special trial counsel went into effect, the responsibility and power to decide how to dispose of offenses belonged to commanders:[9]

> Only persons authorized to convene courts-martial or to administer nonjudicial punishment under article 15 may dispose of charges.[10]
>
> … Unless the authority to do so has been limited or withheld by superior competent authority, a commander may dispose of charges by dismissing any or all of them, forwarding any or all of them to another commander for disposition, or referring any or all of them to a court-martial which the commander is empowered to convene. Charges should be disposed of in accordance with the policy in R.C.M. 306(b).[11]

Rule for Courts-Martial 303A now provides:

> **Rule 303A. Determination by special trial counsel to exercise authority**
>
> **(a) Initial determination.** A special trial counsel has the exclusive authority to determine if a reported offense is a covered offense.
>
> **(b) Covered offense.** If a special trial counsel determines that a reported offense is a covered offense or receives a preferred charge alleging a covered offense, a special trial counsel shall exercise authority over that covered offense.
>
> **(c) Related offenses.** If a special trial counsel exercises authority pursuant to R.C.M. 303A(b), the special trial counsel may also exercise authority over any reported offense or charge related to a covered offense, whether alleged to have been committed by the suspect of the covered offense or by anyone else subject to the UCMJ.
>
> **(d) Known offenses.** If a special trial counsel exercises authority pursuant to R.C.M. 303A(b), the special trial counsel may also exercise authority over any offense or charge alleged to have been committed by the suspect of the covered offense.
>
> **(e) Notification to command.** When a special trial counsel exercises authority over any reported offense, the special trial counsel shall notify the officer exercising special court-martial convening authority over the suspect.

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8 R.C.M. 308(a). If this is not done, it is the responsibility of senior commanders to whom the charges are forwarded to serve notice on the accused. R.C.M. 308(b). “The sole remedy for violation of this rule is a continuance or recess of sufficient length to permit the accused to adequately prepare a defense … .” R.C.M. 308(c).

9 For an interesting perspective on this allocation of responsibility see Note, Prosecutorial Power and the Legitimacy of the Military Justice System, 123 Harv. L. Rev. 937 (2010).

10 R.C.M. 401(a). That power may be withheld by a superior commander. Id.

11 R.C.M. 401(c). Under Rule 306(b), “Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition listed in subsection (c) of this rule.”

Because officers who have the power to convene court-martial also have the power to administer article 15 nonjudicial punishment, the basic jurisdictional question for disposition of charges is who has the power to administer article 15 punishment. The uniform code vests that power in the "commanding officer,"[12] unless the president or secretary concerned has prescribed differently.[13] Accordingly, recourse to service regulations is necessary. Army regulations[14] provide that a "commander" "means a commissioned or warrant officer who, by virtue of that officer's grade and assignment, exercises primary command authority over a military organization or prescribed territorial area, that under pertinent official directives is recognized as a command."[15] In the Army, commands ordinarily include:[16]

(a) Companies, troops, and batteries

(b) Numbered units and detachments

(c) Missions

(d) Army elements of unified commands, subordinate unified commands (subunified), and joint task forces

(e) Service schools

(f) Area commands

Although major military justice decisions remain a command monopoly, now retired general and former Chief Judge John Cooke has made the telling point that we often divorce those decisions from the operational commanders:

> Second, more often that we like to think, authority to convene courts and refer cases to them is divorced from the operational commander. This occurs with installation command jurisdiction over tenant units, and with area jurisdiction overseas. Also, on occasion, we have assigned jurisdiction to a specific commander, such as in the tailhook cases where the Navy and Marines assigned all the cases to a particular commander in each service. Moreover, in today's world of operations conducted by Ad Hoc organizations consisting of units from multiple parent commands, we frequently leave UCMJ jurisdiction with the original commanders, not the operational commander. This is especially true in joint operations, where court-martial jurisdiction typically runs along service lines and not to the joint commander. There are very good reasons why we do all these things, but we need to recognize that they run counter to the fundamental rationale for giving commanders the power to convene courts and refer cases to them.[17]
>
> To the degree that we remove the power to convene and refer cases from commanders with personal knowledge of their personnel, life-style, and military operations, we increase the desirability of moving to the efficiency and consistency available from lawyer-centric procedures and organizations.

The Military Justice Act of 2016 modified Article 33[18] to declare that:

> The President shall direct the Secretary of Defense to issue, in consultation with the Secretary of the department in which the Coast Guard is operating when it is not operating as a service in the Navy, non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under sections 830 and 834 of this title (articles 30 and 34). Such guidance shall take into account, with appropriate

12 U.C.M.J. art. 15(b).
13 U.C.M.J. art. 15(a).
14 The Navy does not define a "commanding officer" in the Navy JAG Manual, although it does define an "officer in charge" by reference to orders, tables of organization, and the like. JAGINST 5800.7F ¶ 0106 (March 30, 2020). The Coast Guard generally follows the Navy procedure. Coast Guard military justice manual, COMDTINST M5810.1G, art. 2.B.A.3 (January 2019). Air Force rules are promulgated in Air Force Guidance Memorandum, Air Force Instruction, Nonjudicial punishment no. 51-202 (14 May 2020).
15 Interim Army Reg. No. 27-10, Military Justice ¶ 3-7(a) & (b) (1 January 2019) (permits designation of Army commander or officer in charge to impose Article 15 in multiservice units).
16 See Interim Army Reg. No. 27-10, Military Justice ¶ 3-7a(3) & (4) (1 January 2019), which includes "a provisional unit … the commander of which is the one looked to by superior authority as the individual chiefly responsible for maintaining discipline in that organization."
17 Brigadier General (retired) John S. Cooke, Military Justice and the Uniform Code of Military Justice, Army Law, March, 2000 at 1.
18 National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 5204 (December 23, 2016) (amending U.C.M.J. art. 33).

consideration of military requirements, the principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases in accordance with the principle of fair and evenhanded administration of Federal criminal law.

That non-binding guidance is now found in Appendix 2.1 of the Manual for Courts-Martial, 2019.[19]

Effective June 28, 2012, the Secretary of Defense constrained disposition authority for sexual assault cases, requiring that only special or general court-martial convening authorities in the grade of O-6 may make initial disposition decisions with respect to rape, sexual assault, forcible sodomy, attempts to commit such offense, and other alleged offenses "arising from or relating to the same incident(s). …"[20]

Pursuant to the 2014 amendments to the Manual for Courts-Martial, the Discussion to Rule for Courts-Martial 306 (b) eliminated "the character and military service of the accused; and … other likely issues" as factors to be considered in making the disposition decision."[21] This clearly was done to eliminate the practice of giving servicemembers leniency in disposition in recognition of arduous, especially combat, service. Inasmuch as the Discussion to the Rules for Court-Martial are non-binding, this change would appear to have no direct effect. Further, even if apparently binding, elimination of an accused's character and experiences from a disposition decision in our legal system might well be a fundamental due process violation.

In addition, Congress specified that in a sex-related offense the convening authority must solicit the victim's preference as to whether the case should be prosecuted by court-martial or by civilian authorities.[22] The convening authority is not bound by the preference but "should be considered by the convening authority."[23] As previously noted, effective December 27, 2023 Congress amended the Uniform Code of Military Justice to transfer prosecutorial power in sexual assault and other specified cases, including the power to refer cases, to special trial counsel. The Manual for Courts-Martial 2024 and updated service regulations implement the changes, but it is likely that the implementation will change with experience.[23.1]

§ 8-13.20 Basic disposition options

When in receipt of charges, a commander authorized to administer nonjudicial punishment, but not authorized to convene courts-martial, may

(1) dismiss any charges;[24] or

(2) forward them to a superior commander for disposition.[25]

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19 Appendix 2.1 reads in part: In determining whether the interests of justice and good order and discipline are served by trial by court-martial or other disposition in a case, the commander or convening authority should consider, in consultation with a judge advocate, the following:a.The mission-related responsibilities of the command;b.Whether the offense occurred during wartime, combat, or contingency operations;c.The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command;d.The nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense;e.In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;f.The extent of the harm caused to any victim of the offense;g.The availability and willingness of the victim and other witnesses to testify;h.Whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial;i.Input, if any, from law enforcement agencies involved in or having an interest in the specific case;j.The truth-seeking function of trial by court-martial;k.The accused's willingness to cooperate in the investigation or prosecution of others;l.The accused's criminal history or history of misconduct, whether military or civilian, if any;m.The probable sentence or other consequences to the accused of a conviction; andn.The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.

20 Memorandum from the Secretary of Defense, Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (April 20, 2012) (noting that "subordinate unit commanders are encouraged to provide their own recommendations regarding initial disposition").

21 Exec. Order 13669, 79 Fed. Reg. 34999 (June 13, 2014)

22 Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015 § 534 (December 2014).

23 Id. at 534(b)(2).

23.1 National Defense Authorization Act for Fiscal Year 2022 § 531 (Dec. 27, 2021).

24 R.C.M. 402(1). Note that even if dismissing the charges, a commander could use administrative options for disposition.

25 R.C.M. 402(2). Commanders unsure of what to do may properly forward charges to the next command level. United States v. Foley, 37 M.J. 822, 825–26 (A.F.C.M.R. 1993). This procedure can also be used to moot disposition error at a subordinate commander's level. E.g., United States v. Johnston, 39 M.J. 242 (C.M.A. 1994) (taint of command influence could be mooted by forwarding charges from special court-martial convening authority to general court-martial convening authority). See also United States v. Martinez, 42 m.j. 327, 331 (C.A.A.F. 1995) (unlikely that senior officer could be improperly swayed by subordinate).

Just as a commander making an initial disposition decision may choose to take no action concerning an allegation of an offense,[26] a commander may dismiss charges.[27] Dismissing a charge[28] is appropriate 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."[29] A dismissal before trial is not final, however, as it takes place before jeopardy attaches,[30] and any person subject to the code, including a senior commander, may again prefer charges.[31] A superior commander may preclude a company commander or commander of similar unit from dismissing charges by directing that the unit commander forward the charges without taking action.[32] The superior commander may also direct the junior to prefer charges,[33] but the junior commander need not comply with this request if, after investigating the matter, he or she could not truthfully swear to the charges.[34]

A Commander with the power to administer article 15 punishment may offer the accused that option[35] and may dismiss charges incident to the article 15 punishment. Should the commander determine that his or her article 15 powers are inadequate to handle the case,[36] charges must be forwarded to the next senior commander in the chain of command for military criminal law:

> When charges are forwarded to a superior commander for disposition, the forwarding commander shall make a personal recommendation as to disposition.[37] if the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted.[38]

If a commander has the power to "convene"[39] a court-martial and believes that level of trial to be appropriate, he or she may send the charges to that court-martial for trial.[40]

§ 8-13.30 Trial by Court-Martial

§ 8-13.31 In General

When a commander or special trial counsel" determines that trial by court-martial is appropriate, he or she either "refers"[41] the charges to a court-martial that he or she is empowered to convene or in the case of a commander forwards them to the next superior commander. Each commander may take whatever disposition action a subordinate commander could, as well as what other actions his or her senior status permits.

§ 8-13.32 Power to Convene

The power to convene or create courts-martial is delimited by the Uniform Code of Military Justice.

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26 § 3-10.00.
27 Unless that power has been withheld by superior authority. See United States v. Rembert, 47 C.M.R. 755 (A.C.M.R. 1973).
28 "Charges are ordinarily dismissed by lining out and initialing the deleted specifications or otherwise recording that a specification is dismissed." R.C.M. 401(c)(1) discussion.
29 R.C.M. 401(c)(1) discussion. "It is appropriate to dismiss a charge and prefer another charge anew when, for example, the original charge failed to state an offense, or was so defective that a major amendment was required (see R.C.M. 603(d)), or did not adequately reflect the nature or seriousness of the offense." R.C.M. 401(c)(1). The rules expressly note that: If a commander who is not a general court-martial convening authority finds that the charges warrant trial by court-martial but believes that trial would probably be detrimental to the prosecution of a war or harmful to national security, the charges shall be forwarded to the officer exercising general court-martial convening authority. R.C.M. 401(d).
30 See § 7-21.00.
31 R.C.M. 401(c)(1).
32 See United States v. Rembert, 47 C.M.R. 755 (A.C.M.R. 1973).
33 Cf. R.C.M. 306(a) discussion.
34 R.C.M. 307(b)(2).
35 Which may be binding on the accused under certain circumstances. See § 8-26.10.
36 The commander may believe that article 15 punishment is appropriate, but not at the level of punishment he or she holds. In such a case, the charges should be forwarded to senior commander with greater article 15 powers. See § 8-27.10.
37 "When charges are forwarded to a commander who is not a superior of the forwarding commander, no recommendation as to disposition may be made." R.C.M. 401(c)(2)(B).
38 R.C.M. 401(c)(2).
39 I.e., "create."
40 Subject to any other procedural requirements that may be mandated by the uniform code of military justice or the rules for courts-martial (e.g., an article 32 investigation or pretrial advice, both of which are necessary for a general court-martial).
41 I.e., "sends." See § 8-14.10.

A summary court-martial may be convened by "The Commanding Officer of a detached company or other detachment of the Army";[42] "the commanding officer of a detached squadron or other detachment of the Air Force";[43] "The commanding officer or officer in charge of any other command when empowered by the Secretary concerned";[44] and "any person who may convene a general or special court-martial."[45] Under Article 20(b) of the Uniform Code, a summary court-martial "conviction" does not constitute a "criminal conviction."

A special court-martial may be convened by:

(1) any person who may convene a general court-martial;

(2) the commanding officer of a district, garrison, fort, camp, station, Air Force base, auxiliary air field, or other place where members of the Army or the Air Force are on duty;

(3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;

(4) the commanding officer of a wing, group, or separate squadron of the Air Force;

(5) the commanding officer of any naval or Coast Guard vessel, shipyard, base, or station; the commanding officer of any Marine brigade, regiment, detached battalion, or corresponding unit; the commanding officer of any Marine barracks, wing, group, separate squadron, station, base, auxiliary air field, or other place where members of the Marine Corps are on duty;

(6) the commanding officer of any separate or detached command or group of detached units of any of the armed forces under a single commander for this purpose; or

(7) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.[46]

A general court-martial may be convened by:

(1) the president of the United States;

(2) the Secretary of Defense;

(3) the commanding officer of a unified or specified combatant command;

(4) the Secretary concerned;

(5) the commanding officer of a territorial department, an Army group, an Army, an Army corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps;

(6) the commander-in-chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the United States;

(7) the commanding officer of an air command, an Air Force, an air division, or a separate wing of the Air Force or Marine Corps;

(8) any other commanding officer designated by the Secretary concerned; or

(9) any other commanding officer in any of the armed forces when empowered by the President.[47]

Whether a given officer lawfully held the position of convening authority is sometimes a disputed matter.[48] Accordingly, prosecutors are well-advised to ensure that the administrative record is clear concerning assumption of command and status as a convening authority.

42 U.C.M.J. art. 24(a)(2).
43 U.C.M.J. art. 24(a)(3).
44 U.C.M.J. art. 24(a)(4).
45 U.C.M.J. art. 24(a)(1).
46 U.C.M.J. art. 23(a).
47 U.C.M.J. art. 22(a).
48 See, e.g., United States v. Debarrows, 41 M.J. 710 (C.G. Crim. App. 1995).

Notwithstanding the above Code provisions, authority to convene courts-martial or to refer cases to them[49] may be *withheld* by order of superior authority. This may be done for many reasons, most notably because of the need for efficient use of legal resources. For example, although Article 24(a) of the Uniform Code permits summary courts-martial to be convened in the Army by "the commanding officer of a detached company or other detachment of the Army," routine Army practice is to withhold this authority and to vest it in the special court-martial-convening authority who can more readily be served by the local office of the Staff Judge Advocate. Accordingly, the Code provisions supply the minimum standards for convening courts-martial. Determining actual practice in any given command requires local inquiry.

In *United States v. Jette*,[50] the Court of Military Appeals held that mere violation of service regulations did not deprive an otherwise appropriate officer of the power to act as convening authority:

> The power to convene a court-martial, appoint or replace members, and approve findings and sentence is a power that congress has traditionally reserved for command … . its concern is not technical, but functional, because military justice plays an important role in the readiness of our servicemembers to wage war … . in such a context, we are not justified in attaching jurisdictional significance to service regulations in the absence of their express characterization as such by Congress.[51]

Concurring, Chief Judge Everett, opined:

> I agree … that the real issue is who actually functioned andwas recognized as commander at the time of the relevant events … . This undoubtedly was what Congress had in mind when it empowered certain "commanding officer[s]" to convene courts-martial.[52]

§ 8-13.33 The Accuser

The Uniform Code of Military Justice defines an "accuser" as "a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused."[53] Except in the case of a summary court-martial in a one-officer command,[54] an accuser may not convene a court-martial[55] or refer a case to one,[56] even though he or she ordinarily would have the authority to do so. An accuser is not prohibited from preferring charges[57] or forwarding charges for disposition.[58]

In 1990, the Navy-Marine Court of Military Review held:

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49 R.C.M. 601(b).

50 25 M.J. 16 (C.M.A. 1987). See also United States v. Wakeman, 25 M.J. 644 (A.C.M.R. 1987) (failure to have an assumption of command appointment in accordance with Army Reg. No. 600-20 is nonjurisdictional.)

51 25 M.J. at 18. Cf. United States v. Watson, 37 M.J. 166 (C.M.A. 1993) (as de facto commander, Commanding General of Camp Pendleton had authority, couldexercise convening authority's power for Marine left in his control after Saudi deployment and could take post-trial action).

52 25 M.J. at 19. after noting that, "if the issue had been raised at trial, I might be more sympathetic …" he added, "however, omissions in documentation and noncompliance with procedures for assuming command, which initially went unnoticed and only came to light later, should not vitiate action taken in good faith by officers who, at the time, were de facto commanders."

53 U.C.M.J. art. 1(9). See, e.g., United States v. Ashby, 68 M.J. 108 (C.A.A.F. 2009) (Official inquiry into aircraft crash during a training mission in the Italian Alps did not make the official an accuser); United States v. Nix, 40 M.J. 6 (C.M.A. 1994) (accused's contacts with wife of special court-martial convening authority gave that officer a potential personal interest in the case); United States v. Jeter, 35 M.J. 442, 446–47 (C.M.A. 1992) (where the accused tried to blackmail the convening authority by suggesting that the convening authority's son was a drug user that the accused could help, the convening authority would be an accuser. Although the convening authority's subordinate was the referring authority as acting commander, an issue would have remained, but because violation of U.C.M.J. art. 22(b) is nonjurisdictional, the accused waived the issue by failing to raise it at trial); United States v. Gordon, 2 C.M.R. 161 (C.M.A. 1952) (commander could not act as convening authority when accused had broken into his house). See also United States v. Corcoran, 17 M.J. 137 (C.M.A. 1981); United States v. Crossley, 10 M.J. 376 (C.M.A. 1981); below note 88. "[M]isguided prosecutorial zeal alone [is] not sufficient to show [that an] convening authority was an accuser." United States v. Voorhees, 50 M.J. 494, 495 (C.A.A.F. 1999), citing United States v. Thomas, 22 M.J. 388, 394 (C.M.A. 1986).

54 U.C.M.J. art. 24(b).

55 U.C.M.J. art. 22(b); 23(b). Pro forma involvement by a convening authority need not make the convening authority an accuser. E.g., United States v. Tittel, 53 M.J. 313 (C.A.A.F. 2000) (disobedience of convening authority's order barring use of Navy exchange did not make the convening authority an accuser in the absence of personal involvement). Compare Tittel with United States v. Dinges, 49 M.J. 232 (C.A.A.F. 1998) (possible personal interest and United States v. Gordon, 2 C.M.R. 161, 167 (C.M.A. 1952) (seminal case of personal interest).

56 R.C.M. 601(c).

57 United States v. Reist, No. 97 01295, (N.M. Crim. App. June 23, 1998) (director of law center and person who preferred charges was not disqualified by being an accuser), aff'd, 50 M.J. 108 (C.A.A.F. 1999) (although counsel was disqualified, his participation was not "plain error" in light of the accused's guilty plea and his lack of demonstrated "personal animus" at trial; if error, harmless); United States v. Beckermann, 35 M.J. 842, 846 (C.G.C.M.R. 1992) (former Article 32 investigating officer).

58 United States v. Nix, 36 M.J. 660, 664 (N.M.C.M.R. 1992), rev'd, 40 M.J. 6 (C.M.A. 1994) (convening authority had personal grudge).

> [V]iolation of the accuser concept is purely a statutory violation to be tested for prejudice … . If the defense objects at the trial level and succeeds, dismissal of charges would be required. but, since the court has found that such a violation does not rise to the level of a jurisdictional defect, reversal will result at the appellate level only in those cases where the accused objected at trial *and* demonstrates that he has been prejudiced by the disqualification."[59]

For a brief period, the Court of Military Appeals held that a referral ordered by an accuser deprived the court-martial of jurisdiction.[60] The Court appears, however, to have repudiated that conclusion.[61]

The government may bring an interlocutory appeal under Article 62 of the Uniform Code to challenge a military judge's disqualification of a convening authority as an accuser due to personal interest.[62]

The Court of Appeals for the Armed Forces has held that at least when the appellant was aware of the grounds for disqualification of the convening authority, failure at trial to make a timely objection or motion raising the disqualification may waive the issue.[63]

§ 8-14.00 Procedural Steps to Bring a Case to Trial

§ 8-14.10 Referral of Charges

"Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial."[64] The act of referral is customarily a written order by the convening authority that takes the form of part v of the charge sheet.[65] The Rules for Courts-Martial specify that:

> [i]f the convening authority finds or is advised by a judge advocate that there is probable cause to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general court-martial except in compliance with paragraph (d)(2) or (d)(3) of this rule. The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.[66]

A pretrial agreement signed or authorized personally by the convening authority can act as a referral.[67]

Effective December 27, 2023, Congress has amended the Uniform Code of Military Justice to transfer prosecutorial power in sexual assault and other specified cases from the Convening Authority to special trial counsel, who will have the power to refer the cases.[67.1]

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59 United States v. Allen, 31 M.J. 572, 585 (N.M.C.M.R. 1990) (emphasis in original), applying United States v. Ridley, 22 M.J. 43 (C.M.A. 1986). Allen discusses whether the Secretary of the Navy was an accuser (31 M.J. at 585–89) and applies a presumption that the Secretary carried out his duties officially and without personal interest.

60 United States v. Hardy, 4 M.J. 20 (C.M.A. 1977).

61 United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983). See also United States v. Shiner, 40 M.J. 155, 156–57 (C.M.A. 1994) (convening authority's disqualification as an accuser is non-jurisdictional and is waived by a failure to object); United States v. Jackson, 3 M.J. 153 (C.M.A. 1977).

62 See, e.g. United States v. Ortiz, 2018 CCA LEXIS 73 (NM Ct. Crim. App. February 15, 2018)(non-binding opinion denying Article 62 appeal on the merits and affirming trial judge's finding that Marine CG had a personal interest in punishing those accused of hazing).

63 United States v. Gudmundson, 57 M.J. 493, 495 (C.A.A.F. 2002) (finding waiver).

64 R.C.M. 601.

65 DD Form 458, MCM, 2019, A5-1. See generally § 6-13.00. The convening authority need not personally sign a referral order. United States v. Plott, 38 M.J. 735, 738 (A.F.C.M.R. 1993) (SJA or other may sign the charge sheet for or by the direction of the convening authority). The court-martial, the convening authority, intends to refer a case to is determinative, at least when that intent is expressed in the referral and the parties are fully aware of it. United States v. Glover, 15 M.J. 419, 422 (C.M.A. 1983) (convening orders permitted both a special and general court-martial).

66 R.C.M. 601(d)(1).

67 United States v. Cooper-Tyson, 37 M.J. 481, 482 (C.M.A. 1993); United States v. Wilkins, 29 M.J. 421, 424 (C.M.A. 1990).

67.1 National Defense Authorization Act for Fiscal Year 2022 § 531 (Dec. 27, 2021). R.C.M. 401A provides in part:(a)Who may dispose of preferred specifications Regardless of who preferred a specification, only a special trial counsel may dispose of a specification alleging a covered offense or another offense over which a special trial counsel has exercised authority and has not deferred. A superior competent authority may withhold the authority of a subordinate special trial counsel to dispose of offenses charged in individual cases, types of cases, or generally.(b)Prompt determination. Special trial counsel shall promptly determine what disposition will be made in the interest of justice and discipline.(c)Disposition of preferred specifications.(1)Referral. For those offenses over which a special trial counsel has exercised authority and

When a substantial number of charges are based on immunized testimony, the convening authority must conclude that the unaffected charges would have been referred to the same level of court martial absent the affected charges.[68]

An accuser may not refer cases to a special or general court-martial.[69]

Although the authority of a convening authority or special trial counsel to refer cases may be limited by higher authority, the decision to refer charges to a court-martial, the level of the forum and any aspects concomitant with that authority, are functions of the office of convening authority and matters entirely within the discretion of the convening authority … . that discretion is subject to review only for an abuse of discretion.[70]

Under § 1708 of the National Defense Authorization Act for Fiscal year 2014, only general courts-martial have jurisdiction over cases involving rape, forcible sodomy, rape and sexual assault of a child, and attempts to commit such offenses.

The convening authority's role as the referral authority remains the most divisive subject in discussions about how to improve military criminal law, pitting those who prefer the knowledge and experience of commanders against the presumed impartiality and legal knowledge of prosecutors in particular.[71] Thus far, Congress has continued the commander as the central decision-maker in military criminal law, although continuing to reduce the commander's overall power.

§ 8-14.20 General Courts-Martial

Absent waiver by the accused,[72] no case may be referred to a general court-martial unless an investigation that complies with Article 32 of the Uniform Code of Military Justice has been completed,[73] and the convening authority has received the Staff Judge Advocate pretrial advice.[74] It appears that a failure of the preliminary hearing officer to consider at the preliminary hearing critical evidence can result in a deficient Article 34 advice, which can doom a referral.[75]

§ 8-14.30 Sex-related offenses

Under traditional law, the decision by a convening authority not to refer a case to court-martial (or to refer to a lesser forum than a general court-martial) could always be superseded by the action of a superior convening authority. As modified in 2014 via the Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Congress created new procedures to ensure the prosecution of sex crimes. The 2014 Authorization Act provided that if both the staff judge advocate and the convening authority concurred in a decision not to refer a defined sex-related offense for trial, the convening authority should follow the chain of command and forward the case file for review to the next superior commander authorized to exercise general court-martial convening authority. If the staff judge

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not deferred, a special trial counsel may refer a charge and any specification thereunder to a special or general court martial. If a preliminary hearing in accordance with Article 32 and R.C.M. 405 is required, a special trial counsel shall request a hearing officer and a hearing officer shall be provided by the convening authority.(2)Dismissal. For those offenses over which a special trial counsel has exercised authority and not deferred, a special trial counsel may dismiss any charge or specification thereunder. A dismissal may be accompanied by a deferral as defined in this rule. Further disposition by a special trial counsel in accordance with this rule or by a convening authority pursuant to RCM 306(c) is not barred.

68 United States v. Youngman, 48 M.J. 123 (C.A.A.F. 1998) (otherwise, reversal is required on appeal; Judge Crawford dissented: "If all of the evidence resulting in referral was based on immunized testimony, but none of the immunized testimony or truly derivative evidence was used at trial, I would hold there was no violation of Kastigar." 48 M.J. at 130 (C.A.A.F. 1998).

69 R.C.M. 601(c); see generally section 8-13.33. The discussion to R.C.M. 601(c) notes: "convening authorities are not disqualified from referring charges by prior participation in the same case except when they have acted as accuser."

70 United States v. Allen, 31 M.J. 572, 591 (N.M.C.M.R. 1990). See also United States v. Cox, 50 M.J. 802 (A.F. Crim. App. 1999) (SJA signing the post trial action for the convening authority does not require voiding action-cites supreme court history on issue).

71 For recent articles, see, e.g., Greg Rustico, Overcoming Overcorrection: Towards Holistic Military Sexual Assault Reform, 102 Va. L. Rev. 2027 (2016); Heidi L. Brady, Justice is No Longer Blind: How the Effort to Eradicate Sexual Assault in the Military Unbalanced the Military Justice System, 2016 U. Ill. L. Rev. Online 193 (2016).

72 R.C.M. 601(d)(2).

73 See also R.C.M. 405. See generally chapter 9.

74 R.C.M. 406. See generally chapter 10.

75 See U.C.M.J. art. 24(a)(2) ("the specification is warranted by the evidence indicated in the report of investigation under section 832 of this title (article 32) (if there is such a report)").

advocate recommends prosecution but the convening authority declines to do so, the convening authority must forward the case file to the Secretary of the military department concerned for review as a superior authorized to exercise general court-martial convening authority. The 2015 amendment created a new and problematic alternative to the traditional route to correct a convening authority's arguably erroneous judgment call. Via Section 541 of the Act, Congress mandated that:

> In any case where a convening authority decides not to refer a charge of a sex-related offense to trial by court-martial, the Secretary of the military department concerned shall review the decision as a superior authority authorized to exercise general court-martial convening authority if the chief prosecutor of the Armed Force concerned, in response to a request by the detailed counsel for the Government, requests review of the decision by the Secretary.

If an armed force lacks a "chief prosecutor," Congress added:

> That "the term 'chief prosecutor' means the chief prosecutor or equivalent position of an Armed Force, or, if an armed Force does not have a chief prosecutor or equivalent position, such other trial counsel as shall be designated by the Judge Advocate General of that Armed Force, or in the case of the Marine Corps, the Staff Judge Advocate to the Commandant of the Marine Corps."

This Congressional action (and a somewhat similar one without the chief prosecutor requirement provided for in Section 1744(c) of the 2014 Authorization suffers from two substantial deficiencies. If a military department Secretary acts as a general court-martial convening authority and refers a case to trial,[76] any non-court higher review would presumably have to be by the Secretary of Defense—or President. Further, although this might function adequately in the Navy particularly, the ordinary legal services structure of the Army, for example, creates pragmatic difficulties. Under the provision, a request by the "detailed counsel of the Government" is necessary. At present, in the Army, that officer works for the Staff Judge Advocate who in turn ordinarily works for and is rated by the convening authority the process is designed to by-pass in a dramatic fashion. This issue appears to have been mooted by further changes made by Congress in 2021 when it amended the Uniform Code of Military Justice, effective December 27, 2023, to create special trial counsel to be supervised by a lead special trial counsel in the grade of 0–7 (brigadier general or admiral of the lower half).[76.1] Upon the effective date, Congress transferred the Convening Authority's prosecutorial powers in sexual assault and other specified offenses to the special trial counsel.

§ 8-15.00 Withdrawal of Charges and Thereafter

Rule for Courts-Martial 604(a) provides that either the convening authority or a superior competent authority may for any reason withdraw the charges and specifications from a court-martial at any time before findings are announced.[77] While the Rule speaks in terms of the convening authority making the withdrawal, the Court of Military Appeals, interpreting the predecessor version of the Rule, indicated that inasmuch as the convening authority works through agents, he or she need not "specifically approve" a withdrawal; "the convening authority, if he chooses, may provide general guidelines for such action by his agents."[78] Although "withdrawal and referral of charges are separate acts, … it is reasonable to presume that re-referral of a charge by a proper convening authority implies a decision to withdraw that charge from a prior referral … . RCM 604 does not require that the convening authority memorialize this decision in any particular form."[79] Some withdrawals may function sufficiently enough like a dismissal to stop the speedy trial "clock."[80]

If all charges and specifications are not withdrawn, the military judge should instruct the court members that the withdrawn charges or specifications may not be considered for any reason.

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76 Assuming that doing so would not potentially make the Secretary "an accuser" or involve command influence concerns, or that if so the statute obviates the problem.

76.1 National Defense Authorization Act for Fiscal Year 2022 § 531 (Dec. 27, 2021).

77 While R.C.M. 604(a) puts an outside temporal limit on the withdrawal, the rule implicitly assumes that charges may be withdrawn prior to the trial or during the trial. See United States v. Koke, 32 M.J. 876 (N.M.C.M.R. 1991) (detailed discussion of withdrawal), aff'd on other grounds, 34 M.J. 313 (C.M.A. 1992).

78 Satterfield v. Drew, 17 M.J. 269, 272 (C.M.A. 1984). Judge Cox, concurring in the result, differed.

79 United States v. Williams, 55 M.J. 302, 304–305 (C.A.A.F. 2001) (senior commander rereferred general court-martial charges after initial convening (and referring) authority, a brigadier general retired to be temporarily replaced by a lieutenant colonel).

80 See United States v. Tippit, 65 M.J. 69 (C.A.A.F. 2007) (withdrawal before referral).

Reasons for prearraignment withdrawal might include[81] receipt of additional charges, absence of the accused, reconsideration by the convening authority of the seriousness of the offenses, questions concerning the mental capacity of the accused, and routine duty rotation of personnel constituting the court-martial. Under these circumstances, the withdrawn charges could be re-referred.[82]

Rule 604(b) provides:

> Charges that have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason. Charges withdrawn after the introduction of evidence on the general issue of guilt may be referred to another court-martial only if the withdrawal was necessitated by urgent and unforeseen military necessity.

If the charges and specifications are withdrawn after evidence has been introduced, the collateral estoppel and double jeopardy rules might prohibit their rereferral.[83]*See also* United States v. Easton, 71 M.J. 168 (C.A.A.F. 2012) (inadequate necessity). the fact that a superior convening authority has withdrawn the charge and rereferred it does not deprive the court of jurisdiction.[84]

The Discussion to the rule states: “Improper reasons for withdrawal include an intent to interfere with the free exercise by the accused of constitutional or codal rights, or with the impartiality of a court-martial.” Prior cases have found improper withdrawal when the convening authority withdrew charges to obtain more severe sentences,[85] to retaliate against the accused for having requested witnesses,[86] and to obtain a more agreeable trial judge.[87] More recently, the Court of Appeals for the Armed Forces has held that a convening authority may withdraw charges for the convenience of a rape complainant.[88]

Charges may also be withdrawn with the consent of the accused.[89]

Like its predecessor,[90] Rule 604(b) indicates that the reasons for the withdrawal and later referral should be included in the record of trial.[91]

§ 8-16.00 Command Control and Command Influence

Inasmuch as courts-martial began purely as instrumentalities of command,[92] it is hardly surprising that commanders and the chain of command are central to pretrial procedure, and that the most critical prosecutorial decisions are in command hands. The continuing interjection of due process standards and expectations borrowed from civilian life gives rise to an unavoidable conflict between the military’s traditional desire to influence personnel via criminal justice procedures and the accused’s interest in impartial, individualized treatment.[93] Although military law fully recognizes “command control,” it prohibits and condemns unlawful command influence.[94]

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81 R.C.M. 604(b) Discussion. See also United States v. Griese, 1999 CCA LEXIS 245 (N.M. Crim. App. July 7, 1999) (unpublished) (opining that withdrawal of all charges could be an appropriate result upon discovery of new charges not previously known due to government mix-up).
82 R.C.M. 604(b) Discussion.
83 See chapter 7. The second sentence of the rule section was written to bring it within the ambit of Wade v. Hunter, 336 U.S. 684 (1949). Under Wade, adequate military necessity will justify withdrawal and rereferral. Wade involved the impact of combat operations on a World War II General Court-Martial.
84 United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983). See also United States v. Kohut, 44 M.J. 245 (C.A.A.F. 1996) (does not preclude withdrawal of jurisdiction as control measure).
85 United States v. Walsh, 47 C.M.R. 926, 928 (C.M.A. 1973).
86 Petty v. Convening Auth., 43 C.M.R. 278 (C.M.A. 1971). But see United States v. Koke, 34 M.J. 313, 315 (C.M.A. 1992) (permissible to withdraw charges to try all known charges at once).
87 Vanover v. Clark, 27 M.J. 345 (C.M.A. 1988).
88 United States v. Underwood, 50 M.J. 271 (C.A.A.F. 1999) (also finding no prejudice to accused).
89 Cf. United States v. Freeman, 23 M.J. 531 (A.C.M.R. 1986).
90 MCM, 1969, ¶ 33j(1).
91 United States v. Haagenson, 52 M.J. 34, 37 (C.A.A.F. 1999). See also United States v. Hardy, 4 M.J. 20 (C.M.A. 1977), requiring that the reasons for withdrawal and referral be placed on the record, even if withdrawal takes place before the taking of evidence. 4 M.J. at 25. The present rule is based in part on Hardy. In United States v. Koke, 34 M.J. 313, 315 (C.M.A. 1992), the court held that it sufficed for trial counsel to set forth reasons upon referral. Judge Crawford indicated in Koke that the court should look at the “pedigree” of the rule at an appropriate time. 34 M.J. at 314 n.3.
92 See § 1-40.00 et seq. See also West, A History of Command Influence on the Military Judicial System, 18 U.C.L.A. l. Rev. 1, 7–12 (1970).
93 See generally Major Deana M.C. Willis, The Road to Hell Is Paved with Good Intentions: Finding and Fixing Unlawful Command Influence, Army Law, Aug. 1992, at 3. This conflict has given rise to numerous proposals to remove the military legal system from command channels. See, e.g., Schiesser & Benson, A Proposal to Make Courts-Martial Courts: the Removal of Commanders from Military Justice, VII Texas Tech. L. Rev. 559 (1976); Bayh, The Military Justice Act of 1971: The Need for Legislative Reform, 10 Am. Crim. L. Rev. 9 (1971); H.R. 3999, 95th Cong., 2d Sess. (1977) (introduced by Mr. Bennett, this bill, like many of its predecessors, including the “Bayh Bill” (S. 987, 93 Cong., 1st sess.

Given the explicit prosecutorial and quasi-judicial powers vested in commanders, it is apparent that commanders have enormous potential to improperly influence the court-martial process. What is unclear is what is "improper."

Because the Rules for Courts-Martial vest each commander with "discretion to dispose of offenses by members of that command,"[95] and require that allegations "should be disposed of … at the lowest appropriate level of disposition … ."[96] it is improper for a commander to "[u]surp the function of subordinate commanders."[97] The rule was enunciated in *United States v. Hawthorne*,[98] when the Court of Military Appeals condemned a general court-martial convening authority's policy that regular Army soldiers with two prior convictions be sent to trial by general court-martial, as explained by the Army Court of Military Review:

> The fine line between lawful command guidance and unlawful command control is determined by whether the subordinate commander, though he may give consideration to the policies and wishes of his superior, fully understands and believes that he has a realistic choice to accept or reject them. If all viable

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(1973)), would have created courts-martial commands). Professor Lederer has reluctantly concluded that the military's sexual assault and harassment problem is so large and command interest in being seen to discourage it so overwhelming that commanders likely will violate command influence restrictions in their otherwise commendable leadership activities in the area. See generally Colonel James F. Garrett, Colonel Mark "Max" Maxwell, Lieutenant Colonel A. Calarco & Major Franklin D. Rosenblatt, Lawful Command Emphasis: Talk Offense, Not Offender; Talk process, Not Results, Army Law, August, 2014 at 4 (and cases cited therein), Accordingly, in 2014 he unsuccessfully recommended to the Secretary of Defense's Military Justice Review Group that the current military criminal legal system be divided into an enhanced non-judicial punishment disposition system, which would remain under command control, and a criminal justice system under lawyer control. For a somewhat similar approach see Major Elizabeth Murphy, The Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process, 220 Mil. L. Rev. 129 (2014). The late General Hodson, a former Army Judge Advocate General and one of the Corps most respected officers, disagreed with the total separation of courts-martial from command channels, but stated that he agreed with the concept that "the prosecuting, judging, and defense functions should be separated, and I favor removal of the commander from the system except for post-trial clemency purposes." Hodson, Courts-Martial and the Commander, 10 San Diego L. Rev. at 51 (1972). Hodson argued, however, for the preservation of the commander's prosecutorial function: Military commanders now have the authority not to prosecute men assigned to their unit, even for serious offenses, absent objection by a higher commander, and to decide what court will try a case when prosecution is deemed necessary … . The Bayh and Bennett legislation would have given the authority to decide whether a charge should be tried by court-martial to the chief of the prosecution division of a court-martial command, a military lawyer who is independent of command and is responsible only to the Judge Advocate General … . It can be argued that an independent prosecutor would be more likely to be more even handed than a commander in his treatment of alleged offenders, e.g., the prosecutor would not give preferential treatment to officers or senior non-commissioned officers or "cover up" incidents which might reflect adversely on the Army as an institution. These apparent advantages are easily outweighed by the disadvantages. the basic flaw, it seems to me, is that we cannot hold the commander responsible for carrying out his mission, which requires a well disciplined unit, if we give to an independent command, albeit staffed by lawyers, the authority to maintain the kind of law and order within the unit which will encourage good discipline, high morale, and unit esprit. Hodson, Military Justice: Abolish or Change?, 24 L. Rev. Digest 49, 56–57 (1974). The idea of removing prosecution control from the command structure for at least sexual assault cases garnered a great deal of interest in the Senate in 2013, failing—at least at the time this edition was written—to gain sufficient support for Congressional enactment. E.g., Editorial Board, Military brass wins on sexual assault bill, Wash. Post., June 15, 2013, http://failover.washingtonpost.com/opinions/congress-kills-reforms-to-prevent-sexual-assault-in-the-military/2013/06/15/302457a0-d46e-11e2-a73e-826d299ff459_story.html, accessed June 30, 2013. Although it is desirable to remove selection of court members from command in order to remove the occasional perception that convening authorities have "stacked the deck," there seems to be no substantial reason to remove the power of referral and its related pretrial procedures from command control. If commanders are considered prosecutors and their powers are compared to the power of discretionary prosecution held by civilian prosecutors, disagreements among commanders on case disposition are really disagreements among prosecutors. Cf. United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986). Civilian law clearly accepts that subordinate prosecutors are subject to the supervision of more senior prosecutors in the same office or "chain of command." It may be that division, wing, Army, or fleet commanders ought not to be able to dictate the prosecutorial decisions of subordinates. This, however, could easily be dealt with by service regulation. the decision of a senior prosecutor to overrule the disposition decision of a junior, no matter how disturbing to the accused, is not "unfair." Only if the senior officer is viewed as affecting the independent discretion of a judicial officer is such conduct instantly unacceptable. Resolution of this aspect of the command control versus command influence dilemma may then best be accomplished by a change in the perceived role of commanders and recognition of their function as prosecutors.

94 In its usual usage, "command influence" refers to a commander's unlawful attempt to influence the proceedings of a court-martial via counsel, judge, or, most usually, members. see U.C.M.J. art. 37; R.C.M. 104. see generally chapter 15. The term may also be used, however, to refer to improper command-tampering with the pretrial process. see De Giulio, Command Control: Lawful Versus Unlawful Application, 10 San Diego L. Rev. 72 (1972). Air Force instruction 51-201, Law, Administration of Military Justice ¶ 1.2 (6 June 2013) provides, "SJAS should periodically discuss with commanders the importance of avoiding even the appearance of unlawful command influence." See also Lieutenant Colonel Erik C. Coyne, USAF, Influence With Confidence: Enabling Lawful Command Influence By Understanding Unlawful Command Influence: A Guide for Commanders, 68 A.F. L. REV. 1 (2012); Lieutenant Colonel Robert Burrell, Recent Developments in Appellate Review of Unlawful Command Influence, Army Law, May, 2000 at 1.

95 R.C.M. 306(a).

96 R.C.M. 306(b).

97 Dep't Army Pam. 27-173, Trial Procedure ¶ 2-2g. (2) (31 December 1992). Cf. United States v. Miller, 31 M.J. 798, 802–03 (A.F.C.M.R. 1990), aff'd, 33 M.J. 235 (C.M.A. 1991). See also United States v. Gerlich, 45 M.J. 309 (C.A.A.F. 1996) (set asiding article 15 was improper because there was no new evidence presented to justify result); United States v. Wallace, 39 M.J. 284 (C.M.A. 1994) (commander properly set aside article 15 based on new evidence); United States v. Hamilton, 36 M.J. 723, 729 (A.C.M.R. 1992) (decision of commander to try the accused after article 15 punishment was not caused by SJA; the convening authority made his own decision), aff'd, 41 M.J. 32 (C.M.A. 1994). See The Commanders Legal Handbook Ch. 3 (2013) (including a list of 10 commandments to avoid unlawful command influence).

98 22 C.M.R. 83 (C.M.A. 1956).

> alternatives are foreclosed as a practical matter, the superior commander has unlawfully fettered the discretion legitimately placed with the subordinate commander.[99]

Faced with the 2012–2013 scandal of massive numbers of sexual assault offenses in the armed forces, the President strongly condemned them and urged that persons engaging in sexual assault should be "stripped of their positions, court-martialed, fired, dishonorably discharged. Period." As a result, one Navy judge ruled that President Obama's statements amounted to command influence in two pending cases and held that the accused in them could not be punitively discharged.[100] The conflict between command responsibility to maintain discipline and law and the critical need to avoid command influence could hardly be made clearer. And in *United States v. Boyce*,[101] the Court of Appeals for the Armed Forces dealt with an extraordinary case of command influence. Air Force Lieutenant General Franklin, whose prior decision in a rape case involving a lieutenant colonel led to a political firestorm and subsequent UCMJ revisions, referred a rape case to trial after being told by the Chief of Staff that the Secretary of the Air Force had "lost confidence" in him and that the general should either retire or be fired, presumably because of his prior action in disapproving the conviction of the lieutenant colonel for rape. He submitted his intent to retire three hours later. The court held that there had been evidence of both actual command influence and the appearance of command influence, and that the government had not met its burden of overcoming that evidence. The court ordered a rehearing. Pointedly, the court also opined:

> In reaching our holding in this case, we fully acknowledge that we do not have the authority to redress the chilling effect that the conduct of the Secretary of the Air Force and/or the Chief of Staff of the Air Force generally may have had on other convening authorities and in other criminal cases that are not before us. We recognize that such systemic problems must be left to Congress and the executive to address. Nonetheless, in individual cases that are properly presented to this Court—such as Appellant's—we will remain ever mindful of Chief Judge Everett's admonition that unlawful command influence is the "mortal enemy of military justice," and we will meet our responsibility to serve as a "bulwark" against it by taking all appropriate steps within our power to counteract its malignant effects. [footnote and citation omitted]
>
> Notably, the Court reached its decision in the absence of specific prejudice to the accused and having concluded that insofar as the appearance of unlawful command influence was concerned, "the Government has not met its burden of proving beyond a reasonable doubt that the conduct of the Secretary of the Air Force and/or the Chief of Staff of the Air Force did not place an intolerable strain upon the public's perception of the military justice system."[102]

Again, the fundamental conflict between the military's desire and need to ensure discipline and the fundamental requirement for impartial justice is evident. Command influence or, as it is increasingly termed, UCI (unlawful command influence) is an ever-present concern in military law and a frequent topic for professional writing.[103] In 2020 Congress amended Article 37 to read: "No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused." U.C.M.J. art. 37(c). Subsequently, Judge Ryan wrote:

> I write separately to express my continued opinion that that ends the inquiry with respect to unlawful command influence (UCI). In my view, an appellant must show actual prejudice under Article 59(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 859(a) (2012), to prevail on a claim of UCI. United States v. Boyce, 76 M.J. 242, 254 (C.A.A.F. 2017) (Ryan, J., dissenting). Congress agrees, and after this Court's opinion in Boyce, which found "apparent" UCI while acknowledging there was no prejudice to the accused, *id.* at 250, it amended Article 37, UCMJ, 10 U.S.C § 837, to make even more clear that an appellant must prove actual prejudice to prevail on a claim of UCI. National Defense Authorization Act for

99 United States v. Rivera, 45 C.M.R. 582, 584 (A.C.M.R. 1972) (Hodson, C.J.). See also United States v. Hinton, 2 M.J. 564 (A.C.M.R. 1976); United States v. Sims, 22 C.M.R. 591 (A.B.R. 1956).

100 Andrew Tilghman, Navy judge rules Obama tainted sex assault cases, Army Times, July 1, 2013, at 6. Subsequently, defense counsel raised the issue in other cases.

101 76 M.J. 242 (C.A.A.F. 2017).

102 Id. at 252.

103 See, e.g., Colonel John Loran Kiel, Jr., "So You're Telling Me There's a Chance": Why Congress Should Seize the Opportunity to Reform Article 37 (UCI) of the UCMJ, 227 Mil. L. Rev. 1 (2019); Lieutenant Colonel John L. Kiel, Jr. They Came In Like a Wrecking Ball: Recent Trends at CAAF In Dealing With Apparent UCI, The Army Law, January, 2018 at 18; Mr. Fredric L. Borch III, Command Influence "Back in the Day," The Army Law, January, 2018 at 1.

> Fiscal Year 2020, Pub. L. No. 16-92, § 532(a)(2), 133 Stat. 1198, 1359–60 (2019). After the 2019 revisions, Article 37, UCMJ, now states: "No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section *unless the violation materially prejudices the substantial rights of the accused*." Article 37(c), UCMJ, 10 U.S.C. § 837(c) (2018 & Supp. I 2019–2020) (emphasis added).[103.1]

Absent a personal interest that would make him or her an "accuser,"[104] the convening authority may, however, personally refer charges to a higher level of court-martial than initially recommended or even withdraw charges from a lesser court-martial in order to refer them to a greater one.[105] Similarly, a convening authority may specify given offenses or types of offenses and require subordinate commanders to forward cases involving them for his or her personal disposition.[106]

Of course, this requirement that each commander act individually raises the question of how one should cure any error that might result from a commander's discussion of the case with a more senior commander when that discussion might be interpreted as containing inappropriate pressure. In some cases, clear and express guidance from the more senior commander as to the junior commander's powers and responsibilities might be adequate. In others, the only likely solution would be for the more senior commander to personally prefer or refer charges. In *United States v. Johnston*,[107] however, the Court of Military Appeals sustained a procedure by which an assistant Staff Judge Advocate preferred charges, at the SJA's suggestion, after the accused's commander's freedom of action was arguably compromised by a senior commander's guidance.

On the other hand, the Court has also held that a senior commander is unlikely to be improperly affected by the actions of a subordinate commander.[108]

If one treats each commander, particularly each convening authority, as a quasi-judicial officer, it appears at least questionable to permit more senior officers to dictate case disposition without at least a detailed statement of reasons amounting to good cause. The Court of Military Appeals explained the military result in the withdrawal and rereferral cases thusly:

> If we interpret Article 37 as prohibiting an officer exercising general court-martial jurisdiction from intervening when he concludes that charges should be withdrawn from a summary or special court-martial, the resulting situation would be inconsistent with the military command structure, whereunder a superior commander can direct the actions of a subordinate. Indeed, such an interpretation would enable a subordinate commander—the special or summary court-martial convening authority—to deprive his superior of powers expressly granted by Article 22. Moreover, under this construction of Article 37, for all practical purposes, Article 44 would begin to operate against an officer exercising general court-martial jurisdiction whenever a convening authority at a lower echelon initially referred charges for trial. under the law of war, commanders may be held responsible for failure to control their troops and to maintain discipline. *Cf. In re Yamashita*, 327 U.S. 1 … (1946). Therefore, we should hesitate to infer from the general language of Article 37 the existence of such limitations on the commander's power to assure that crimes are referred to tribunals that can mete out adequate punishment.[109]

Notwithstanding this, the court, dealing with a different form of command influence, stated:

> A commander who causes charges to be preferred or referred for trial is closely enough related to the prosecution of the case that the use of command influence by him and his staff equates to "prosecutorial

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103.1 United States v. Horne, 2022 CAAF LEXIS 356 (C.A.A.F. May 13, 2022) (Ryan, J., concurring).

104 Compare United States v. Thomas, 22 M.J. 388 (C.M.A. 1986) and United States v. Wharton, 33 C.M.R. 729 (A.F.B.R.), petition denied, 33 C.M.R. 436 (1963) with United States v. Gordon, 2 C.M.R. 161 (C.M.A. 1952). See also sections 8-13.33 & 13-12.00. United States v. Byers, 34 M.J. 923 (A.C.M.R. 1992) (per curiam) (fact that convening authority was an "accuser" deprived the court-martial of jurisdiction), rev'd and remanded, 37 M.J. 73 (C.M.A. 1992).

105 United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983), implicitly overruling United States v. Hardy, 4 M.J. 20 (C.M.A. 1977); United States v. Wharton, 33 C.M.R. 729 (A.F.B.R.), petition denied, 33 C.M.R. 436 (1963).

106 United States v. Rembert, 47 C.M.R. 755 (A.C.M.R. 1973). In Rembert, the general court-martial convening authority required subordinates to forward cases involving any of 16 offenses when the subordinate authorities had determined that special court-martial or lesser action would be appropriate. Query: does this type of policy create enough of a "signal" to subordinates to violate the "Hawthorne rule?"

107 39 M.J. 242 (C.M.A. 1994). But see United States v. Hamilton, 41 M.J. 32 (C.M.A. 1994).

108 United States v. Martinez, 42 M.J. 327, 331 (C.A.A.F. 1995). Although such a situation does not have the risk of subsequent reprisal by senior authority, it may not adequately take into account the usual effort made by commanders to visibly support personnel responsible to them.

109 United States v. Blaylock, 15 M.J. 190, 194 (C.M.A. 1983).

> misconduct." Indeed, recognizing the realities of the structured military society, improper conduct by a commander may be even more injurious than such activity by a prosecutor.[110]

Equating the command structure with the prosecution does permit, however, a different analysis in some cases. The Navy-Marine Court of Military Review asked, for example, why, if the convening authority is to be treated as a prosecutor, higher command cannot issue "rudder orders."[111] Viewing command channels as a hierarchical prosecutorial office does suggest that disposition decisions ought to be subject to command oversight.[112] Although this is not an unreasonable conclusion, it requires abandonment of the quasi-judicial role of the convening authority and, likely, at least that officer's role in court member selection.

In 1995, in *United States v. Weasler*,[113] a case that dissenting Chief Judge Sullivan proclaimed "a landmark decision in this court's 44-year history,"[114] The Court of Appeals for the Armed Forces drew "a distinction between the accusatorial process and the adjudicative stage, …"[115] and permitted an affirmative waiver of a prima facie case of unlawful command influence as part of a pretrial agreement. *Weasler* has not as yet had a significant effect on the law of command influence but retains that potential.[116]

Applying prior case law to circumstances in which the accused charged the Secretary of the Navy with command influence, the Navy-Marine Court of Military Appeals declared:

> The Court of Military Appeals has recognized two types of unlawful command influence, actual and apparent. the test for actual lawful command influence is, figuratively speaking, "whether the convening authority has been brought into the deliberation room." … In fact, "actual unlawful command influence can arise from an inaccurate perception of the commander's desires by a participant in the system" … but only as long as that perception is a reasonable one … . The test for apparent unlawful command influence, on the other hand, is whether a reasonable member of the public, if aware of all the facts, would have a loss of confidence in the military justice system and believe it to be unfair.[117] … A presumption, although a rebuttable one, of prejudice exists where there is an appearance of unlawful command influence. …[118]
>
> The accused bears the burden of raising the issue of unlawful command influence … by establishing the existence of at least the appearance of unlawful command influence … . We conclude … that the accused's burden includes (1) "asserting the facts of his allegation with sufficient particularity and substantiation so that if true, any reasonable person can only conclude that unlawful influence existed"; (2) declaring that the proceedings were unfair; and (3) showing that the unlawful command influence was the proximate cause of that unfairness … . But … the accused is still not required to show specific prejudice.[119]

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110 United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986). The court added: Consequently, in cases where unlawful command influence has been exercised, no reviewing court may properly affirm findings and sentence unless it is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence. Id. at 394 (C.M.A. 1986) (but dealing with command actions that could potentially affect the trial itself). See also United States v. Black, 40 M.J. 615, 618–20 (N.M.C.M.R. 1994) (actions of convening authority and trial counsel which may have affected potential defense testimony not shown not to have occurred by clear and positive evidence; any impact not shown to be harmless beyond a reasonable doubt).

111 United States v. Lawson, 33 M.J. 946, 951 (N.M.C.M.R. 1991), aff'd, 36 M.J. 415 (C.M.A. 1993). In this highly publicized case, a Marine road guide was abandoned in the desert and died as a result. The Marine Corps Commandant was highly involved. The court held that the commandant's views were made public only after the Article 32 report was made and that there was no intent to affect the case. Although two members of the court had some knowledge of the Commandant's remarks, they weren't challenged by the defense. One must wonder whether the court's decision beyond a reasonable doubt that command influence didn't affect the trial is sufficient as a matter of public policy.

112 Citing United States v. Bramel, 29 M.J. 958, 967 (A.C.M.R.), aff'd, 32 M.J. 3 (C.M.A. 1990), the court in United States v. Drayton, 39 M.J. 871 (A.C.M.R. 1994) (dictum), in effect adopted this position by opining that U.C.M.J. art. 37(a) applies only to the adjudicative process and not to the accusatorial process, specifically the recommendation as to disposition, aff'd, 45 M.J. 180 (C.A.A.F. 1996) (several witnesses testified at trial that NCO statement had no impact on their testimony). Critically, the court in Drayton states that Bramel "in effect repudiates the broad sweep of the unlawful command control language found in United States v. Hawthorne," 22 C.M.R. 83 (C.M.A. 1956). With elimination of Article 37(a), defects in accusatorial process could be challenged, according to the court via the de facto accuser doctrine or specific R.C.M. provisions. 39 M.J. at 874 (A.C.M.R. 1994). The Court of Appeals for the Armed Forces adopted the distinction between the "accusatorial process" and the "adjudicative stage" in United States v. Weasler, 43 M.J. 15, 17 (C.A.A.F. 1995) (permitting accused to waive command influence objections as part of a pretrial agreement). See also United States v. Gerlich, 45 M.J. 309 (C.A.A.F. 1996) (commander had all the facts when he made his initial decision thus the inference that his decision was affected by the general); United States v. Brown, 45 M.J. 389, 399 (1996) ("failure to raise the issue of command influence as to the accusatorial process, as in this case at trial, waives the issue.").

113 43 M.J. 15 (C.A.A.F. 1995).

114 Id. at 20 (C.A.A.F. 1995).

115 "that is, the difference between preferral, forwarding, referral, and the adjudicative process, including interference with witnesses, judges, members, and counsel." 43 M.J. at 17–18 (C.A.A.F. 1995).

116 United States v. Reynolds, 40 M.J. 198 (C.M.A. 1994) (permitted waiver of potential command influence). E.g., United States v. Brown, 45 M.J. 389, 399 (1996) ("failure to raise the issue of command influence as to the accusatorial process, as in this case at trial, waives the issue.").

117 United States v. Allen, 31 M.J. 572, 589–90 (N.M.C.M.R. 1990) (citations omitted).

118 31 M.J. 572, 589–90 (N.M.C.M.R. 1990) (citing United States v. Crawley, 6 M.J. 811 (A.F.C.M.R. 1978)).

If the evidence supports a factual basis for the allegation, the government must rebut the existence of unlawful command influence by clear and convincing evidence.[120]

As a result of its deep concern with the issue, the Court of Military Appeals has held that the failure of an accused to raise command influence at trial does not result in waiver of the issue on appeal.[121] Even when command influence has occurred, adequate corrective action can nullify its potential effects to such a degree as to moot the error.[122] Indeed, in extreme cases dismissal of charges may be an appropriate remedy.[123]

Command influence ordinarily requires at least perceived official action on behalf of the command rather than individual actions. However, actions of sufficiently senior officers may trigger concern of a command influence nature, despite the lack of command status.[124] Procedurally, command influence claims must be fully developed on the record.[125] Factual deficiencies are apt to be fatal to the defense.

Personnel must take great care to ensure that their actions cannot be interpreted as command influence. In June, 2008, for example, charges were dismissed against a Marine battalion commander charged with dereliction of duty for failing to investigate the Haditha killings. The convening authority's staff judge advocate had attended the convening authority's command strategy sessions dealing with the case.[126] Even when unsuccessful, continuing appeals asserting command influence in a wide variety of factual circumstances are indicative of the amorphous nature of the doctrine.[126.1]

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119 31 M.J. at 591 (N.M.C.M.R. 1990) citing, among other cases, United States v. Levite, 25 M.J. 334, 341 (C.M.A. 198). The court added that when the government attempts to meet its burden, once the issue is raised "statements made by subordinates that they were not influenced are 'inherently suspect.' " Allen, 31 M.J. at 591.

120 31 M.J. at 591 (N.M.C.M.R. 1990).

121 See, e.g., United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983). United States v. Griffin, 41 M.J. 607, 610 (A. Crim. App. 1995).

122 E.g., United States v. Griffin, 41 M.J. 607, 609 (A. Crim. App. 1995) (when commanding general's memo indicated that the service was no place for drug users, government agreement to pretrial agreement terms that removed any drug reference or drug-related specification, with judicial inquiries of counsel, any taint was dissipated, and the judge wasn't obligated to proceed beyond obtaining the defense counsel's concession that no unlawful impact existed). But see notes 97-100.

123 See United States v. Gore, 60 M.J. 178 (C.A.A.F. 2004). In Gore, the military judge dismissed the charges after determining that a defense witness had been prevented from giving favorable testimony by the commander of the witness. The government appealed the dismissal under article 62 of the U.C.M.J. Ultimately, the Court of Appeals for the Armed Forces sustained the military judge's action. In doing so, the court held that in reviewing the remedy chosen by the military judge for the command influence, it would apply an abuse of discretion standard. 60 M.J. at 187. See generally, Lieutenant Colonel Patricia A. Ham, Revitalizing the Last Sentinel: The Year in Command Influence, Army Law, May 2005, at 1, 12–17.

124 United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994) (dictum) (witness interference was of no effect and was harmless beyond a reasonable doubt). See also United States v. Denier, 47 M.J. 253, 260 (C.A.A.F. 1997) (lieutenant colonel acting as court members did not carry the "mantle of command authority" as in Stombaugh); United States v. Argo, 46 M.J. 454, 458 (1997) (SJA acts with mantle of authority). On the other hand, the actions of a subordinate commander which had no effect on the convening authority or the court-martial process, however ill advised, is likely not to constitute command influence. E.g., United States v. Newbold, 45 M.J. 109 (C.A.A.F. 1996). The new Article 37(a)(3) may alter Stombaugh as it provides that: "No person subject to this chapter may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority or preliminary hearing officer with respect to such acts taken pursuant to this chapter as prescribed by the President." National Defense Authorization Act for Fiscal Year 2020, S. 1790, 116th Cong. § 532 (2019).

125 United States v. Bartley, 47 M.J. 182 (C.A.A.F. 1997); United States v. Hill, 46 M.J. 567 (A.F. Crim. App. 1997); United States v. Brown, 45 M.J. 389 (C.A.A.F. 1996).

126 Rick Rogers, Corps to Appeal Ruling in Haditha Killings; Charges vs. Officer Dismissed by Judge San Diego Union Tribune, June 20, 2008 at B-1.

126.1 See, e.g. United States v. Proctor, 2021 CAAF LEXIS 509 (June 2, 2021) (by a 3-2 vote, commander's anecdote was not command influence); United States v. Alton 2021 CCA LEXIS 269 (Army Ct. Crim. App. June 2, 2021) (unpublished) (West Point Superintendent's speech wasn't command influence); United States v. Horne, 2021 CCA LEXIS 261 (A.F. Ct. Crim. App. May 27, 2021) (unpublished) (actions of special victims' counsel were not command influence).