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Restoring Faith in Military Justice

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The military justice system was designed to maintain good order and discipline, strengthen national security, and achieve justice. After military leaders failed to effectively address the sexual assault crisis within the armed forces, Congress lost faith in this system. In response, Congress enacted sweeping legislative reform, transferring prosecutorial discretion for the most serious offenses from commanders to military lawyers. Unlike civilian prosecutions, most decisions within the military justice system have overwhelmingly favored one consideration: maintaining good order and discipline in the unit. While Congress's reforms change who makes the decisions in many cases, they will have little effect unless military leaders also broaden the underlying criteria upon which their recommendations and decisions are made.

This Article proposes an innovative framework to assist military leaders in implementing a holistic approach to decision-making. Borrowing from the law of armed conflict, we propose a test that empowers decision makers to consider all the federal principles of prosecution and sentencing that Congress has repeatedly indicated should serve as touchstones for reform. When employing this framework, military justice decision makers will better account for the long-term impact on accused service members, society, and victims rather than solely focus on short-term deterrence within the unit. This proposal attempts to bring military prosecutions more in line with the criteria applied by civilian federal prosecutors and restore credibility in the military justice system, thereby enabling it to continue to do what it was designed to do.

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Restoring Faith in Military Justice

ELEANOR T. MORALES & JOHN W. BROOKER [*]

> "*In looking at the past 50 years, change—including transformational change—is a recurring aspect of military justice. Our Corps'[s] ability to successfully adapt and execute such change has been the one constant. Even through change, justice will prevail; the JAG Corps will excel. Continue to perform as trusted professionals as we transform and succeed together.*" [1]

INTRODUCTION

The military justice system is undergoing unprecedented transformation. For the first time in United States history, Congress has stripped military commanders of prosecutorial discretion for serious felony offenses and given it to military attorneys.[2] Military prosecutors are now increasingly responsible for the administration of the military justice system.[3] Moving forward, military attorneys, not commanders, will make nearly all prosecutorial decisions in the most serious felony-level cases.[4]

Prior to this legislation, only commanders exercised prosecutorial discretion in the military justice system.[5] In other words, military

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[1] Stuart W. Risch & Michael J. Bostic, *Military Justice Pursuant to the National Defense Authorization Act for Fiscal Year 2022*, JAGCNET (Jan. 18, 2022, 9:43 AM), https://www.jagcnet.army.mil/Sites/JAGC.nsf/homeContent.xsp?open&documentId=86FADC1D4E17C2A3852587CE0050DA31.

[2] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 531–539G, 135 Stat. 1541, 1692 (2021) [hereinafter NDAA 2022]. The 2022 NDAA included historic military justice reform legislation regarding how the military investigates and prosecutes certain offenses under the Uniform Code of Military Justice (UCMJ). The UCMJ is a collection of federal laws that serves as the code of military criminal law and procedure. 10 U.S.C. §§ 801–946a.

[3] Claudia Grisales, *Senate Panel Greenlights Military Justice Reform Bill After Years-Long Push*, NAT'L PUB. RADIO (July 22, 2021, 10:49 AM), https://www.npr.org/2021/07/22/1019146746/senate-panel-greenlights-military-justice-reform-bill-after-years-long-push.

[4] *Id.*

[5] A staff judge advocate could decline to refer a case to a general court-martial pursuant to Article 34 of the UCMJ, 10 U.S.C. § 834(a), if they thought there was no jurisdiction or probable cause. In

commanders—that is, most often nonlawyers—had ultimate authority to decide what charges to bring, when to charge, and what plea terms to accept. They could even unilaterally reduce judges' sentences.[6] In practice, commanders mostly followed the recommendations of the military attorneys advising them, but sometimes they did not.[7]

The changes contained in the 2022 National Defense Authorization Act (NDAA) are unparalleled. They are fundamentally different because they do not change the tools that those who exercise prosecutorial discretion use.[8] Rather, they change *who* is exercising prosecutorial discretion. This transfer of power demonstrates that Congress no longer believes that the military justice system's failures are caused by inadequate or antiquated laws and procedures but are rather rooted in failures of those administering the system. It represents the first true congressionally induced threat to the system. Congress's lack of faith in those exercising prosecutorial discretion may lead it to call into question every prosecutorial decision.[9]

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general, however, the discretion of what to do was exercised by commanders pursuant to UCMJ Articles 15 and 22–24 (10 U.S.C. §§ 815, 822–824) and military regulations, e.g., U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (28 June 2021) [hereinafter AR 635-200]; U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (8 Feb. 2020) [hereinafter AR 600-8-24].

[6] 10 U.S.C. § 860(c) (2012) ("The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority."), amended by 10 U.S.C. § 860a (Supp. IV 2017) (effective Jan. 1, 2019).

[7] This assertion is based on the authors' professional experiences in multiple roles within the U.S. Army Judge Advocate General's Corps.

[8] For purposes of this Article, "prosecutorial discretion" includes initiating prosecution, declining prosecution, issuing nonjudicial punishment, initiating and making final decisions on administrative separation and other adverse administrative actions, selecting charges, entering into a plea agreement, referring a case to court-martial, and participating in sentencing at a court-martial. This definition is intentionally broad considering the unique features within the military justice system, which includes not only the court-martial process but also the administrative separation process. It is important to note that during the court-martial process, prosecutorial discretion is not executed at the preferral stage, as the preferral, or bringing of charges, can be brought by "[a]ny person subject to the UCMJ." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307 (2019) [hereinafter MCM]. Ultimately, the preferral of charges without the referral of charges has no legal effect. Yet referral, which is the "order of a convening authority that charges and specifications against an accused will be tried by a specified court-martial," has ramifications. *Id.* R.C.M. 601(a). In addition to the court-martial process, service members can be administratively separated when they commit a crime in violation of the UCMJ. While there is no equivalent in the civilian system to military administrative separations, the closest analogy is likely a due process hearing where an employee is facing possible termination of their employment. Yet military administrative separations are unique. During military administrative separation proceedings, a commander exercises discretion. Additionally, when a prosecutor decides not to prosecute a crime in the civilian world, the case is over. In contrast, in the military justice system, a *nolle prosequi* memo does not mean the case is over; rather, the service member could still be administratively separated and be issued a less-than-Honorable discharge that can have a similar impact as a punitive discharge issued at a court-martial sentence. *See infra* Section II.C. As such, the authors intend the term "prosecutorial discretion" to be used broadly to reflect the uniqueness of the military justice system.

[9] *See* John W. Brooker, *Improving Uniform Code of Military Justice Reform*, 222 MIL. L. REV. 1, 55 (2014) (explaining why during times of conflict, Congress may defer to military leaders). The

The recent sexual assault crisis in the military has led to multiple congressional interventions in the military justice system, including the most recent reform.[10] One scholar explained that the reform "was concurrently catalyzed by the civilian reckoning of "Me Too" and a contemporaneous rash of highly publicized military sexual assault cases that evidenced both procedural weaknesses and substantive inefficiencies in the military justice system's handling of these complaints."[11] Leading the legislative efforts, Senator Kirsten Gillibrand of New York said in 2021, "Sexual assault in our military is an epidemic and it's clear that the current system is not working for survivors."[12] Congress changed the punitive articles, pretrial and posttrial procedures, and afforded survivors of sexual assault more resources.[13]

Yet the problem within the military justice system goes beyond the sexual assault crisis. Many scholars and critics have opined that when exercising prosecutorial discretion, the primary, if not sole, variable that should be considered is the potential impact on good order and discipline.[14] This assertion is premised on the need for disciplined military members as essential to fighting and winning the nation's wars.[15]

There are other stated purposes, however, that should not be overlooked. The stated purpose of military law as set forth in the Manual for

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Constitution gives Congress the power to raise, support, and regulate the armed forces. U.S. CONST. pmbl.; *id.* art. I, § 8, cls. 11–14. Pursuant to this authority, in 1950, Congress enacted the UCMJ, which continues to serve as the code of military criminal law and procedure to this day. Brooker, *supra*, at 39.

[10] Kyra Ziesk-Socolov, *Two-Front War: The Struggle for Legitimacy in Military Sexual Assault Adjudications*, 44 HARV. J.L. & GENDER 101, 114–20, 130–43 (2021).

[11] *Id.* at 103. The "Me Too" movement, an advocacy campaign created to give a voice to sexual abuse victims, crested in a viral social media hashtag in 2017. *See* Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html.

[12] Vanessa Romo, *Defense Secretary Will Back a Seismic Shift in Prosecuting Military Sex Assault Cases*, NAT'L PUB. RADIO (June 23, 2021, 9:48 AM), https://www.npr.org/2021/06/22/1009272055/defense-secretary-says-hell-support-removing-sexual-offense-cases-from-commander.

[13] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §§ 552–553, 596, 119 Stat. 3256–64, 3282–83; National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1701, 1703–1705, 1722–1726, 1731–1734, 1742–1747, 1751–1752, 127 Stat. 952–54, 958–60, 970–76, 979–84 (2013); National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5301, 130 Stat. 2919–20 (2016) [hereinafter NDAA 2017] (codified at 10 U.S.C. § 856).

[14] *See* DAVID A. SCHLUETER & LISA M. SCHENCK, A WHITE PAPER ON AMERICAN MILITARY JUSTICE: RETAINING THE COMMANDER'S AUTHORITY TO ENFORCE DISCIPLINE AND JUSTICE 3, 6–10 (2020), https://www.court-martial-ucmj.com/files/2020/07/White-Paper-on-Military-Justice-Reforms-2020-w-App.pdf (arguing that "[i]t is critical that Congress, in considering any amendments to the UCMJ, recall[s] that the primary function and purpose of the military justice system is to enforce good order and discipline in the armed forces"); Dru Brenner-Beck, *Assessing Guidelines and Disparity in Military Sentencing: Vive La Différence!*, 27 FED. SENT'G. REP. 108, 116 (2014); Timothy C. MacDonnell et al., *Who Should Decide: Prosecutorial Discretion and Military Justice*, JUST SEC. (June 29, 2020), https://www.justsecurity.org/71112/who-should-decide-prosecutorial-discretion-and-military-justice/; James T. Hill, *Command Prosecutorial Authority and the Uniform Code of Military Justice—A Redoubt Against Impunity and a National Security Imperative*, 228 MIL. L. REV. 473, 476 (2020).

[15] SCHLUETER & SCHENCK, *supra* note 14, at 23.

Courts-Martial is to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[16]

This Article argues that what is truly motivating Congress is poor decision-making by the military leaders entrusted with the system. These leaders often misjudge the impact an action will have on the maintenance of good order and discipline. Further, they routinely fail to account for the long-term impact of their decisions on accused service members, society, and victims.[17] Decisions based solely on unarticulated estimates of the impact on the maintenance of good order and discipline have resulted in permanent unintended consequences that are detrimental to accused former service members, society, and victims—and therefore to the military justice system.

Focusing on the longer-term objective of preventing the dissolution of the military justice system is better for good order and discipline than any short-term gains based on general deterrence within the unit. Ironically, the military's myopic focus on good order and discipline, if continued, will serve as the death knell to the very system that is best positioned to preserve it.

This irony can be illustrated through an analogy. Consider a parent who pushes their child to focus on one activity, like a sport or musical instrument. This can create physical and psychological injuries that ultimately prevent achievement of the desired goal. While a short-term view of the parent's efforts would appear to all observers to be a logical step in pursuit of the ultimate goal, failing to consider all other variables creates the irony of the short-term action actually undermining achievement of the long-term goal.[18] Similarly, narrowly focusing on the short-term impact of enforcing good order and discipline via deterrence will result in uninformed and therefore poor decisions that will further erode congressional trust. Such a loss of trust will lead to further intervention and possible destruction of the entire system, ultimately undermining what the leaders set out to achieve: maintaining good order and discipline.[19]

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[16] MCM, *supra* note 8, pt. 1, ¶ 3.

[17] For purposes of this Article, the term "accused service member" is used broadly. This term includes not only those accused of a crime in the court-martial process but also those responding to administrative actions who also face allegations of misconduct.

[18] *See, e.g.*, Michael Rosenberg, *Learning to Be Human Again*, SPORTS ILLUSTRATED (Jan. 11, 2019), https://www.si.com/nfl/2019/01/11/todd-marinovich-dad-marv-quarterback-drugs-rehab ("Todd Marinovich was 'the test-tube QB' the first half of his life, a drug addict since. Closing in on 50, the former USC and Raiders quarterback is struggling to come to terms with his raging beast of a father—and the big lie that he only now can share[.]").

[19] For further discussion, see Patrick P. Finnegan, *Today's Military Advocates: The Challenge of Fulfilling Our Nation's Expectations for a Military Justice System that Is Fair and Just*, 195 MIL. L. REV. 190, 196 (2008).

Of course, good order and discipline is always a critical factor to consider, but it is not and should not be the only variable weighed when exercising prosecutorial discretion. Leaders must move beyond solely considering the impact on good order and discipline when administering the military justice system. Those exercising prosecutorial discretion must examine cases holistically and consider the broader impact of their decisions, including post-discharge.

Time is of the essence, as Congress will be neither patient nor forgiving of any missteps in the execution of prosecutorial discretion within the military justice system. Upon implementation of the 2022 NDAA, non-attorney commanders and uniformed judge advocates (i.e., military attorneys) will both exercise prosecutorial discretion.[20] They are on borrowed time to reach both a shared understanding of the variables involved when making decisions and an effective approach to decision-making.

This Article blends concepts of the law of armed conflict (LOAC)[21] with military justice to create a comprehensive and systemic methodology that military justice decision makers,[22] to strengthen national security, should implement when exercising prosecutorial discretion. This proposed solution employs the *jus in bello* (law concerning conduct during war) proportionality test, which can be easily retooled to enable military justice practitioners to better perform the multivariable analysis required when exercising discretion in the military justice system.[23]

Without rewriting the law, the proposed test requires only slight adjustments to current practices to adequately account for an abundance of critical variables, so as to consider the foreseeable harms to accused service members, society, and victims. The proposed methodology will naturally account for the principles that govern civilian federal prosecutions and the principles of sentencing, including general and specific deterrence, rehabilitation, retribution, and incapacitation. Its use will lead to the results Congress seeks and restore faith in military decision makers. Regaining Congress's trust could prevent the permanent divestiture of all prosecutorial discretion from uniformed officers.

This Article addresses and analyzes the challenges facing the military justice system following transformational changes resulting from the 2022 NDAA and proceeds in three parts. Part I describes the new legal landscape under the 2022 NDAA and the underlying reason for Congress's loss of faith

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[20] NDAA 2022, *supra* note 2, §§ 531–532, 135 Stat.at 1692–95 (to be codified at 10 U.S.C. §§ 824a, 1044f); *see also id.* § 539c, 135 Stat. at 1699 (directing the effective date of these changes).

[21] U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL para. 1.3.1.2 (Dec. 2016) [hereinafter LAW OF WAR MANUAL] ("The *law of war* is often called the *law of armed conflict*.").

[22] The term "military justice decision makers" refers to commanders and uniformed judge advocates who exercise prosecutorial discretion within the military justice system.

[23] LAW OF WAR MANUAL, *supra* note 21, para. 5.12.

in the military justice system. Part II proposes an innovative test for military justice decision makers to use in this new operating environment and thereby restore legitimacy in the system. Finally, Part III applies this analysis to two common case scenarios.

I. THE MILITARY JUSTICE LEGITIMACY CRISIS

The military justice system has a legitimacy crisis. Numerous incremental reforms to the system have been implemented over the last three decades; however, they have not improved Congress's confidence in the institution.[24] The passage of the 2022 NDAA further reflects that these incremental changes have not gone far enough to restore Congress's faith. This section first describes the new operating environment of the military justice system. Next, it explains and diagnoses the problem the military justice system is currently facing, before proposing a solution in Part II.

A. *Transfer of Prosecutorial Discretion*

Prior to the 2022 NDAA, only commanders—not prosecuting attorneys—exercised prosecutorial discretion in the military justice system.[25] Non-attorney commanders typically decided whom to prosecute and what charges to bring, and only those commanders could send cases to a court-martial (military trial).[26] Commanders accepted offers to plead guilty at trial, and in some cases they could even overturn a guilty verdict of a military judge or panel (the military parallel to a jury).[27]

Those same commanders also exercised nearly complete discretion in determining who was punished, and how, at lesser disciplinary and adverse administrative actions not involving court-martial.[28] They also decided who was administratively separated from the military based upon misconduct.[29] While service members have due process rights depending on the nature of

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[24] For an overview, see Ziesk-Socolov, *supra* note 10.

[25] *See supra* note 5.

[26] *See* MCM, *supra* note 8, R.C.M. 307, 401, 601. There are three levels of court-martial: summary, special, and general. 10 U.S.C. § 816. The authorized punishments vary significantly among these three levels of court-martial. 10 U.S.C. §§ 818–820.

[27] *See supra* note 6.

[28] 10 U.S.C. § 815; MCM, *supra* note 8, pt. V; *see, e.g.*, U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 2-5 (2 Oct. 2020) [hereinafter AR 600-37] (implementing regulations for adverse administrative actions regarding unfavorable information in personnel files).

[29] *See, e.g.*, U.S. DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS encl. 3, para. 11.c.6 (27 Jan. 2014) (C7, 23 June 2022) [hereinafter DoDI 1332.14]; AR 635-200, *supra* note 5, paras. 1-20, 14-14 (Army regulation governing administrative separations for enlisted personnel); AR 600-8-24, *supra* note 5, para. 4-1(e) (Army regulation governing administrative separations for officers).

the action taken against them,[30] the ultimate decision was almost always in the hands of a commander.[31]

While commanders relied and continue to rely heavily on the judge advocates who advise them, historically there has been little formal guidance and training on how to exercise that discretion.[32] Commanders remained ultimately responsible for how the military justice system operated and its effectiveness.

Through the 2022 NDAA, Congress has implemented an unprecedented structure in which military lawyers, not commanders, hold prosecutorial discretion for the most serious felony offenses.[33] This stands in stark contrast to Congress's prior incremental changes to the system. Those prior congressional changes include amending the punitive articles, pretrial and posttrial procedures, and offering survivors of sexual assault more resources.[34]

Through this new legislation, Congress created new positions for uniformed judge advocates, entitled "special trial counsel," who will exercise prosecutorial discretion for "covered offenses."[35] The 2022 NDAA defines "covered offenses" as the following articles within the Uniform Code of Military Justice (UCMJ): Articles 117a (wrongful broadcast or distribution of intimate visual images), 118 (murder), 119 (manslaughter), 120 (rape and sexual assault), 120b (rape and sexual assault of a child), 120c (other sexual misconduct), 125 (kidnapping), 128b (domestic violence), 130 (stalking), and 132 (retaliation), and the standalone offense of possession of child pornography under Article 134.[36] "Covered offenses" also include the inchoate offenses of conspiracy, solicitation, or attempt under Articles 81, 82, and 80 of the UCMJ, relative to the underlying offenses.[37]

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[30] 10 U.S.C. § 831–832 (courts-martial); MCM, *supra* note 8, pt. V, ¶ 4c(1)(G) (nonjudicial punishment); *see also* AR 635-200, *supra* note 5, paras. 2-2, 2-9 (separation notification and hearing board procedures for enlisted personnel); AR 600-8-24, *supra* note 5, para. 4-11 (Army officers' rights amid recommendation for involuntary separation); AR 600-37, *supra* note 28, para. 6-3 (Army Suitability Evaluation Board process for unfavorable information in personnel files); DoDI 1332.14, *supra* note 29, encl. 3, para. 12.a.1 (due process in separation decisions for enlisted service members convicted of certain sexual offenses).

[31] *See supra* note 6.

[32] *See* Brooker, *supra* note 9, at 118 (suggesting commanders are not properly educated on the impacts of their discharge characterization).

[33] NDAA 2022, *supra* note 2, § 531, 135 Stat. at 1692–94 (to be codified at 10 U.S.C. § 824a). The 2022 NDAA also included additional changes to the military justice system, including mandating that military judges (instead of the panel) sentence accused service members in all noncapital offenses and directing the creation of nonbinding sentencing guidelines. § 539E, 135 Stat. at 1700–06 (to be codified at 10 U.S.C. § 853).

[34] *See* sources cited *supra* note 13.

[35] NDAA 2022 § 533, 135 Stat. at 1695–96 (to be codified at 10 U.S.C. § 801).

[36] *Id.*

[37] *Id.* The 2022 NDAA also created a standalone punitive sexual harassment offense under Article 134 of the UCMJ. § 539D, 135 Stat. at 1699–1700 (to be codified at 10 U.S.C. 934). However, the 2022 NDAA does not include this new offense as a "covered offense." § 533.

Special trial counsels will have the exclusive authority to determine "if a reported offense is a covered offense" and whether any other offense is "related to the covered offense."[38] They also will have sole authority to withdraw or dismiss charges, refer the charges for trial by special or general court-martial, and enter into plea agreements.[39] The special trial counsels will have the final say with regard to referral decisions, as their decisions are "binding" on the convening authority, who are senior military commanders.[40] Put another way, convening authorities no longer have the power to refer charges for "covered offenses" to special or general courts-martial.

Each military department will establish separate dedicated offices of special trial counsel.[41] Notably, the lead of each office of the special trial counsel, who will have general officer rank, will "report directly to the [department] Secretary concerned, without intervening authority."[42] This highly unique structure will take the entire office of the special trial counsel out of the military department-specific judge advocate chain of command, ensuring that all of the special trial counsels are completely independent from chains of command of any accused service member or victim. Through an examination of the new legal landscape of the military justice system, one can better understand the underlying reason for this unprecedented transformation.

B. *Loss of Faith in the System*

Many believe that the problem Congress is trying to solve with this shift in power is sexual assault underenforcement.[43] This Article posits that there is a much bigger, yet related, problem looming under the surface. There is a crisis of legitimacy in the military justice system.[44]

Congress has been signaling for years that military justice decision makers are failing to account for the long-term impact of their decisions on accused service members, society, and victims.[45] This failure, not sexual

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[38] NDAA 2022 § 531.

[39] *Id*.

[40] *Id*.

[41] *Id.* § 532. The departments of the military are the Army, Navy, and Air Force. 10 U.S.C. § 101(a)(8).

[42] NDAA 2022 § 532.

[43] *See, e.g.*, Hill, *supra* note 14, at 502–05.

[44] For further discussion about the importance of legitimacy in a criminal justice system, see Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937, 941 (2010) (arguing that "[l]egitimacy is an essential feature of an effective system of criminal justice"). *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 3–4 (1988) (calling this the subjective standard of procedural justice, which is the degree to which people perceive the procedures to be fair).

[45] *See* Brooker, *supra* note 9, at 101–06 (predicting this one-variable approach of focusing on maintaining good order and discipline, specifically in the context of the treatment of wounded warriors,

assault underenforcement, is the underlying reason why Congress has lost faith in the system.

Over the last decade, Congress began to rein in commanders' unfettered discretion and issued warnings to military leaders that they needed to start accounting for the long-term impact of their decisions. One example occurred when Congress signaled to the military that it needed to start accounting for the collateral consequences of a less-than-Honorable discharge after the accused service member leaves the military. As part of the 2017 NDAA, Congress included the bipartisan Fairness for Veterans Amendment, mandating that Department of Defense (DoD) correction boards, when reviewing military commanders' discharge decisions, consider the discharged service member's mental health and the impact it may have had on their behavior.[46] The legislation also implicitly acknowledged the lifelong impact of a less-than-Honorable discharge.[47]

Another example also occurred in 2016 when Congress directed the Secretary of Defense to issue nonbinding guidance regarding factors that military justice decision makers should consider.[48] The Secretary issued the Non-Binding Disposition Guidance, which lists considerations for panels adjudging a sentence at court-martial,[49] as well as variables military justice decision makers should consider when deciding whether to announce the punishment of an accused service member.[50] It was the proverbial foreshock to the seismic shift in the military justice system found in the 2022 NDAA. Instead of trusting commanders to understand the multitude of variables that must be considered when exercising prosecutorial discretion, Congress, for

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as the next issue that may grab Congress's attention and lead to congressional intervention if the military does not fundamentally change its approach).

[46] NDAA 2017, *supra* note 13, § 535, 130 Stat. at 2123–24 (codified at 10 U.S.C. §§ 1553(d)(3)); S. Amend. 4138 to S. 2943, 114th Cong. (2016); *see also* Press Release, Gary Peters, Senate, Sen. Peters' Fairness for Veterans Amendment Signed into Law (Dec. 23, 2016), https://www.peters.senate.gov/newsroom/press-releases/sen-peters-fairness-for-veterans-amendment-signed-into-law.

[47] NDAA 2017 § 535*; see also* Memorandum from A.M. Kurta, Acting Under Sec'y of Def. for Pers. & Readiness, Off. of the Under Sec'y of Def., to Sec'ys of the Mil. Dep'ts, Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment (Aug. 25, 2017), *available at* https://dod.defense.gov/Portals/1/Documents/pubs/Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf; Memorandum from Robert L. Wilkie, Under Sec'y of Def. for Pers. & Readiness, Off. of the Under Sec'y of Def., to Sec'ys of the Mil. Dep'ts, Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations, (July 25, 2018), *available at* https://www.secnav.navy.mil/mra/CORB/Documents/Signed%20Memorandum%20(Wilkie)%20with%20attachments.pdf [hereinafter Wilkie Memo].

[48] NDAA 2017 § 5204, 130 Stat. at 2906–07 (codified at 10 U.S.C. § 833).

[49] MCM, *supra* note 8, app. 2.1.

[50] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 3-22 (20 Nov. 2020) [hereinafter AR 27-10] (instructing commanders to consider the nature of the offense; the accused's record and position; the deterrent effect; and the impacts on unit morale, the victim, and the accused's leadership effectiveness).

the first time in history, dictated that the President and Secretary of Defense were responsible for listing the factors commanders should consider.

Not only were those guidelines nonbinding, but they ignored Congress's overriding directive to consider factors other than good order and discipline. The guidance's unfettered focus on good order and discipline as the sole factor to consider when making disposition decisions is its fundamental flaw. This singular focus, which by its very nature reflects the current approach that uniformed officers take to military justice matters, is contrary to statutory law. Article 33 of the UCMJ requires the Secretary of Defense to account for "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."[51] The Non-Binding Disposition Guidance explicitly fails to satisfy this requirement. For example, though civilian courts treat offender rehabilitation as a major concern,[52] the Non-Binding Disposition Guidance largely ignores the principle of rehabilitation of the offender in a "broader context," as is required in federal civilian courts,[53] mentioning it only as the last in a series of variables in two very limited situations.[54] Further, the term "rehabilitation" is textually linked with continued military service, reading "rehabilitation and continued service,"[55] thereby potentially leading to an understandable interpretation that the concept of rehabilitation is limited in scope to potential for continued military service.

When making any decision, military leaders must account for multiple variables that weigh on the situation. Laws and regulations set the "left and right limits" of what is a permissible decision, but the discretion of how each variable should be weighted is wholly vested in the leader with the requisite authority. The military justice system is no different.[56]

The military justice system is almost always clear on who has the requisite authority to make decisions. For example, Articles 22, 23, and 24 of the UCMJ specifically set forth who has the authority to convene various levels of court-martial.[57] Article 15 of the UCMJ states who has the authority to exercise nonjudicial punishment.[58] Service-specific regulations state who has the authority to effectuate adverse administrative actions.[59]

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[51] 10 U.S.C. § 833.

[52] *See* U.S. Dep't of Just., Just. Manual § 9-27.110 (2020) (listing "rehabilitation of offenders" as one of the general purposes of criminal law).

[53] *Id*.

[54] MCM, *supra* note 8, app. 2.1.

[55] *Id*. app. 2.1, ¶¶ 2.5(f), 3.2(m).

[56] *See generally id.*; AR 27-10, *supra* note 50; AR 635-200, *supra* note 5; AR 600-8-24, *supra* note 5.

[57] 10 U.S.C. §§ 822–24.

[58] 10 U.S.C. § 815; MCM, *supra* note 8, pt. II, ch. V.

[59] *See, e.g.*, AR 635-200, *supra* note 5, para. 1-19.

Foundational documents within the military justice system set forth variables that decision makers must consider. In explaining the purpose of the military justice system, the Preamble to the Manual for Courts-Martial states, "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[60]

The stated purpose of the military justice system inherently, yet implicitly, rejects the single-variable analysis endemic within the current military justice system. Unfortunately, military justice decision makers often view all three listed variables as one and the same.[61]

What many military justice decision makers overlook is that the "promote justice" variable is incredibly broad. It includes anything not specifically included in the other two variables of maintaining good order and discipline and promoting efficiency and effectiveness in the military establishment. The long-term consequences of a decision within the military justice system fall within this variable.

While the list of variables in the Non-Binding Disposition Guidance are often helpful and could lead to better decisions in many cases, the 2022 NDAA's removal of some elements of prosecutorial discretion from military commanders proves that such lists are incomplete and inadequate. The 2022 NDAA's further divestiture of prosecutorial discretion from commanders indicates that the Non-Binding Disposition Guidance did nothing to restore trust in that discretion, and if anything, further eroded it.

As a result, the Non-Binding Disposition Guidance, as it reflects the approach to military justice that uniformed officers currently employ, is incomplete. As such, continuing with this approach may lead Congress to permanently divest prosecutorial discretion from uniformed officers or even the DoD entirely, unless those exercising discretion take a broader approach when making decisions.

Nonetheless, a broader approach should not eschew the importance of good order and discipline. In fact, the impact of an action on good order and discipline can, and in most cases should, remain the preeminent factor when making decisions in the military justice system. The focus on the impact of a decision on a unit is logical and understandable. The need for discipline within the military is indisputable, as military units and members must accomplish missions that are inherently dangerous and contrary to

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[60] MCM, *supra* note 8, pt. 1, ¶ 3.

[61] *See, e.g.*, Hill, *supra* note 14, at 476 (equating lawyers' obligation to "promote justice" with commanders' duty to "maintain[] good order and discipline"); MCM, *supra* note 8, R.C.M. 1002(f) (noting that the sentences of courts-martial should aim to "promote justice and to maintain good order and discipline in the armed forces," but not mentioning the promotion of efficiency and effectiveness in the military establishment).

self-preservation. A military justice system that does not consider the impact that an action might have on a unit would not add value.

A focus on the impact of a decision on the good order and discipline of a unit is also legal and proper. The Supreme Court has recognized and validated this distinct factor in multiple ways: as a foundation for jurisdiction,[62] as a basis for criminality,[63] and as a consideration in decision-making.[64] As a result, any new approach to exercising discretion in military cases must account for the critical importance of this variable while also improving the method of analysis to address the other numerous disparate variables that matter to Congress.

"Maintaining good order and discipline" is the goal, not an explanation. Military leaders who wish to preserve a separate military justice system need to develop, nourish, and spread an ethic of providing more detailed justifications for their decisions. They need to move away from a myopic focus on one variable. This narrow focus on one variable in their decision-making is contributing to Congress's loss of faith in the system.

Moving forward, military justice decision makers need to decide how to operate in this new regime. Notably, commanders still retain prosecutorial discretion for most military justice decisions despite the shifts set forth in 2022 NDAA.[65] The "covered offenses" that now fall under the judge advocates' discretion are only a few—albeit the most serious—offenses within the dozens of punitive articles of the UCMJ.[66] Despite this, the 2022 NDAA represents a fundamental shift in the exercise of prosecutorial discretion because this is the first time that decision-making authority is not completely aligned with command authority.

Many senior military officers do not view the military justice system as broken.[67] Some military commanders, senior legal advisors, and scholars believe that disciplinary authority is indispensable to command authority.[68] They argue that the divesting of disciplinary authority from command authority would undermine the stated purpose of military law.[69]

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[62] Solorio v. United States, 483 U.S. 435, 447–51 (1987).

[63] Parker v. Levy, 417 U.S. 733, 752–57 (1974).

[64] *See id.* at 744 ("[T]he Court has approved the enforcement of those military customs and usages by courts-martial from the early days of this Nation.").

[65] NDAA 2022, *supra* note 2, § 824a, 135 Stat. at 1695–96 (to be codified at 10 U.S.C. § 824).

[66] *Id.* § 533, 135 Stat. at 1695–96 (to be codified at 10 U.S.C. § 801); *see also supra* notes 35–36 and accompanying text.

[67] *See, e.g.*, Brooker, *supra* note 9, at 2.

[68] *See* SCHLUETER & SCHENCK, *supra* note 14, at 3 (arguing that "[t]ransferring prosecutorial discretion from commanders to judge advocates will undermine commanders' authority to maintain good order and discipline"); Melinda Wenner Moyer, *"A Poison in the System": The Epidemic of Military Sexual Assault*, N.Y. TIMES, https://www.nytimes.com/2021/08/03/magazine/military-sexual-assault.html (Oct. 11, 2021); Megan L. Greer, Who Is Preferred to Refer? The Proposed Transfer of Prosecutorial Discretion in the Military 6 (Dec. 12, 2020) (unpublished comment), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783502.

[69] *See* SCHLUETER & SCHENCK, *supra* note 14, at 6. It is beyond the scope of this Article to analyze the merits of this argument.

While the arguments to align prosecutorial discretion with command authority are logical and understandable, that proverbial ship has sailed. Congress has spoken. Congress now sees the problem to be the judgment of those exercising discretion, more so than the laws and regulations that they are using to make decisions. If Congress trusted the decisions that commanders were making, the 2022 NDAA changes that divest prosecutorial discretion from commanders would have been wholly unnecessary. Military leaders should not fight the *last* war. The fight to keep all authority vested in commanders is over.

Instead, military leaders must look forward and fight the next war. Those interested in preventing further divestiture of prosecutorial discretion from uniformed officers must figure out how to address the underlying legitimacy and perception issues that are of concern to Congress. Otherwise, the system will be lost to civilians altogether, and, ironically, military leaders may be permanently constrained in their ability to preserve good order and discipline. Employing the proposed test will enable military leaders to fight that next war.

II. THE SOLUTION

This section will first explain the proposed solution, a concept borrowed from the LOAC, to this conundrum. Next, this section will explore why it makes sense to borrow from an area of law with which military leaders are already familiar. It will also explore how the solution helps bring military justice closer to the civilian system in ways Congress desires. Finally, this section will describe the application of the proposed solution and analyze variables military justice decision makers are underweighting.

A. *Modified Proportionality Test*

The proposed test, called the modified proportionality test, is borrowed from the *jus in bello* proportionality test found in the LOAC.[70] It involves a balancing test that permits military justice decision makers to weigh the anticipated collateral consequences to accused service members and society against the anticipated maintenance of good order and discipline.

The *jus in bello* proportionality test is conceptually simple and easy to understand. As stated in the DoD Law of War Manual, "Combatants must refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained."[71]

When applying kinetic military force, commanders employ this balancing test of two inherently incongruous variables—the concrete, direct

[70] *See* LAW OF WAR MANUAL, *supra* note 21, para. 5.12.
[71] *Id.*

military advantage to be gained and collateral damage. Similarly, military justice decision makers must weigh two incompatible variables—the impact to good order and discipline and the collateral consequences to accused service members and society.

To properly account for all relevant variables, including long-term collateral consequences, military justice decision makers should employ this modified proportionality test. The test replaces the LOAC-based variables with similar variables from the military justice system. Instead of the LOAC collateral concerns of the "loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack,"[72] the military justice–based modification's collateral concerns should include, but not be limited to, long-term impact on accused service members and society.

Such a simple modification would force decision makers to consider more than just the impact the decision has on good order and discipline, yet not overvalue the collateral concerns. The sole focus on preservation of good order and discipline is a problem because it does not account for the federal principles of prosecution and sentencing. For example, a singular focus on discipline in the unit may result in rehabilitating or punishing the accused service member only to the extent that it helps them to remain a soldier. For more serious felony cases, where an accused service member may receive a benefits-disqualifying discharge, this sole focus does not account for how to rehabilitate and punish the service member as they transition to becoming a civilian.

The test would account for these principles while also remaining open-ended in nature to encourage decision makers to not fixate on checklists, but rather view the decisions holistically.

B. *Borrowing from a Book on the Shelf*

Borrowing from the LOAC—a book already on the military justice decision maker's shelf—makes sense because it contains purpose-based, policy-level, and logical parallels with military justice. This subsection will explore those parallels while also highlighting the proposed solution's incorporation of civilian federal criminal law principles.

When designing recent improvements intended to bolster the effectiveness of and confidence in the military justice system, Congress has looked almost exclusively to the civilian federal criminal system as a model.[73] The 2006 NDAA enacted a completely new Article 120 of the UCMJ, which was largely "modeled after the [civilian system's] sexual assault offenses."[74] Congress designed additional changes in the 2014

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[72] *Id.*

[73] This Article will hereinafter refer to the civilian federal criminal system as the "civilian system."

[74] Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice Re-Traumatize Sexual Assault Survivors in the Courtroom?*, 11 OHIO STATE J. CRIM. L. 439, 445 (2014).

NDAA to make the military justice system better mimic the civilian system throughout the pretrial and posttrial processes.[75] Even the most recent changes in the 2022 NDAA were made largely with the motivation of "bringing military justice in line with civilian standards."[76]

While the civilian system is an important guidepost to use when making changes to the military justice system, it cannot be the only one. The purpose of the military justice system is simultaneously broader and more specific: instead of maintaining order in society at large by preventing violence and destruction, the military justice system is designed to enable violence and destruction by maintaining order in the distinct society of those who practice the profession of arms. This uniquely different purpose makes the civilian system only one of many sources those designing improvements should consult.

Military justice decision makers are squarely at the intersection of two professions: law and arms. The fact that such an intersection exists should encourage those simultaneously practicing both professions to look within both for efficiencies and improvements. Further, given that the LOAC regulates the practice of discretion within the profession of arms, it is both a logical and practical resource to consider when seeking to improve the practice of military justice.[77]

Logically, the LOAC—and specifically the four basic principles of necessity, distinction, proportionality, and humanity—have incredible weight because of their near-universal acceptance.[78] While the interpretation and implementation of each principle is not uniform, the general nature of the combined principles is. Further, the LOAC parallels the military justice system in that both exist to protect the innocent. Whereas the LOAC is designed to protect innocent civilians, the military justice system is designed to protect people who are victims of crimes as well as those who are innocent of crimes. Conversely, the destructive elements of the systems also warrant their comparison. War denies people life and liberty. The military justice

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[75] *See* David Vergun, *New Law Brings Changes to Uniform Code of Military Justice*, U.S. ARMY (Feb. 21, 2014), https://www.army.mil/article/120622/new_law_brings_changes_to_uniform_code_of_military_justice (explaining that Congress repealed the requirement that alleged sexual assault victims "show up at Article 32 hearings and frequently [are] asked to testify" in part because "civilian victims of sexual assault didn't have to show up or testify").

[76] Rachel VanLandingham, *FY22 NDAA: A Missed Opportunity to Improve Military Justice*, JUST SEC. (Dec. 8, 2021), https://www.justsecurity.org/79481/ndaa-a-missed-opportunity/.

[77] Even though a violation of the LOAC is punishable under the military justice system, and therefore in some contexts serves as merely an element of the military justice system, the practice of the LOAC is fundamentally a practicing of the profession of arms, whereas the practice of military law is fundamentally a practicing of the profession of law. This Article explores a comparison of how these legal codes are practiced, as Congress's criticism of the military justice system has shifted from the substantive laws to how those laws are practiced. *See supra* text accompanying notes 32–33.

[78] *See Geneva Conventions of 1949 and Additional Protocols, and Their Commentaries*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp (last visited Sept. 27, 2022) (providing a database of state parties by each convention).

system, albeit for markedly different reasons, does the same. Finally, and possibly most importantly, the systems are inextricably intertwined because both share the common purpose of strengthening national security. Those practicing the profession of arms "kill for reasons of state,"[79] whereas the stated purpose of the military justice system is to "strengthen the national security of the United States."[80] Adherence to the LOAC is indisputably linked to mission accomplishment—history is replete with examples of how violating either the LOAC or a state's military code compromised the mission or how adhering to them enabled victory.[81]

Analyzing the LOAC for ways in which it could assist military justice also makes practical sense. Whereas only judge advocates are trained on the intricacies of the UCMJ, the LOAC is a fundamental tenet of the United States military taught to and internalized by all service members.[82] If a test or method used within the LOAC is translatable to the military justice system, non-attorney commanders would have an easier time understanding it, compared with being expected to apply multiple and seemingly esoteric legal tests and frameworks.

Nonetheless, many scholars and commentators are now concerned with how the military justice system has unnecessarily harmed those who have come into its path, whether they be those accused of crimes or victims of crime.[83] Given that Congress is now closely watching military justice decision makers, those exercising discretion within the system would be well-advised to look for ways in which they can minimize such damage. Just like potentially disproportionate strikes leading to civilian death hindered mission accomplishment in Afghanistan,[84] many have posited that arguably disproportionate strikes by the military justice system leading to the unwarranted ruining of lives have the potential to do the same damage to the military justice system.[85] Military justice decision makers already understand the concept of collateral damage when practicing the profession of arms. By applying the proportionality test, they are demonstrating that

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[79] LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 8 (2d ed. 2022).

[80] MCM, *supra* note 8, pt. 1, ¶ 3.

[81] BLANK & NOONE, *supra* note 79, at 8–9 (summarizing the link between good order and discipline and mission accomplishment).

[82] U.S. DEP'T OF DEF., DIR. 2311.01, DOD LAW OF WAR PROGRAM para. 1.2 (2 July 2020).

[83] *See* Brooker, *supra* note 9, at 101–08 (exploring various early indicators that the public feels that military justice decision makers applying the UCMJ do not properly value the impact that service-connected disability has on misconduct).

[84] Even if a strike was not a LOAC violation because the expected incidental harm was reasonably judged to not be excessive in relation to the anticipated concrete and direct military advantage, the negative impact of civilian casualties on the mission was indisputable. In 2010, U.S. leadership acknowledged that a "number of recent high-profile incidents in which civilians have been killed have given the Taliban a propaganda tool against the coalition." Barbara Starr, *Military Proposes Medal for Troops Showing Restraint*, CNN (May 12, 2010, 5:25 PM), http://www.cnn.com/2010/US/05/12/military.restraint.medal/index.html.

[85] *See supra* note 83.

they understand how to minimize incidental damage and evaluate it while still accomplishing the mission.

When it comes to targeting, willful ignorance of the impact of an attack or improper knowledge about the power of a weapon system is not a defense to a commander accused of a LOAC violation.[86] Those exercising kinetic power within the profession of arms must account for multiple variables when making decisions that could take life and liberty.

1. *Purpose-Based Parallels*

Military leaders are uniquely experienced in comparing disparate variables in patently messy and unfair analyses. When applying the *jus in bello* principle of proportionality, military members routinely weigh numerous factors when deciding whether it is proper and advisable to take life and liberty.[87] As stated in the DoD Law of War Manual: "The principle of proportionality typically involves the comparison of 'unlike quantities and values.'"[88] Given that the military justice system also can deprive one of life and liberty pursuant to a comparison of "unlike quantities and values" such as good order and discipline, victim impact, and long-term rehabilitation, the *jus in bello* proportionality test serves as a useful framework upon which to craft a similar test for the military justice system.

The *jus in bello* proportionality test and decision-making within the military justice system also have the same mandate of preventing unnecessary suffering via excessive harm.[89] While the taking of life and liberty is contemplated and justified under both the LOAC and the military justice system, there are limits.[90]

The two are also inherently linked because the purpose of both is to "strengthen the national security of the United States."[91] In fact, the military justice system can be logically viewed as an enabling tool for those applying the LOAC. This viewpoint is part of the reason why many in the

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[86] *See* LAW OF WAR MANUAL, *supra* note 21, para. 5.10.5 (2016) (describing the relationship between the "requirement to take feasible precautions in planning and conducting attacks and the prohibition on attacks expected to cause excessive incidental harm"); *id.* para. 5.11.6 (describing the effectiveness of "selecting munitions of appropriate size and type" to reduce incidental harm); *id.* para. 18.9.3.1 (including among "grave breaches" of the Geneva Convention, regardless of willfulness, the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.")

[87] *Id.* para. 5.11 (describing feasible precautions in planning and conducting attacks, including the risk to civilians, timing, and new information).

[88] *Id.* para. 5.10.2.3.

[89] *Id.* para. 1.3.4. *See* MCM, *supra* note 8, R.C.M. 306(b) (requiring cases to be handled at the lowest appropriate level).

[90] LAW OF WAR MANUAL, *supra* note 21, paras. 2.3–2.4; MCM, *supra* note 8, R.C.M 306(b), 1002–04.

[91] MCM, *supra* note 8, pt. 1, ¶ 3.

DoD have been so resistant to the changes set forth in the 2022 NDAA.[92] Regardless of one's viewpoint on the nesting of the military justice system within the profession of arms, the shared purpose makes exploring the LOAC for tests to improve the decision-making ability within the military justice system logical.

2. *Policy-Level Parallels*

There are also policy-level parallels between the application of the *jus in bello* proportionality test within the profession of arms and the application of discretion within the military justice system. These parallels include the mandatory nature of the application of the rules, punishment for failure to violate those rules, and the identity of decision makers.

Drawing on the purpose-based parallels above, because excessive harm is strictly forbidden under both the LOAC and military justice system, one is not permitted to stray from the dictates of the *jus in bello* proportionality test when applying force pursuant to the LOAC, nor is one making decisions within the military justice system permitted from deviating from its guidelines.

To illustrate, when applying the LOAC, one cannot refuse to apply the proportionality test, regardless of how great the anticipated concrete and direct military advantage to be gained might be.[93] As the DoD Law of War Manual states: "*Military necessity* does not justify actions that are prohibited by the law of war."[94] Failure to properly apply the LOAC is punishable under the UCMJ and potentially in other tribunals.[95] Similarly, intentional failure to apply the laws and procedures of the military justice system is not only a criminal offense pursuant to Article 131f of the UCMJ,[96] but it is also fundamentally contrary to all tenets of the American common law system and the Constitution.

The United States military has also promulgated control measures to restrict, when necessary, who makes decisions when applying either the LOAC or the military justice system. For example, the DoD Law of War Manual explains, "commanders have implemented the requirements of the principle of proportionality through military procedures, such as rules of engagement, doctrine, standard operating procedures, and special instructions."[97] These measures are in place to limit unnecessary and improper destructive effects. The military justice system employs logically similar control measures for the same reasons. The Rules for Courts-Martial,

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[92] *See, e.g.*, *Joint Chiefs Warn Against Overhauling Military Justice System*, NAT'L GUARD ASS'N OF THE U.S. (June 22, 2021), https://www.ngaus.org/about-ngaus/newsroom/joint-chiefs-warn-against-overhauling-military-justice-system.

[93] LAW OF WAR MANUAL, *supra* note 21, para. 2.2.2.1 (2016).

[94] *Id.* (emphasis in original).

[95] 10 U.S.C. § 818(a); LAW OF WAR MANUAL, *supra* note 21, ch. XVIII.

[96] 10 U.S.C. § 931f.

[97] LAW OF WAR MANUAL, *supra* note 21, para. 5.10.3.

military administrative regulations, and policy directives all work together, attempting to achieve an optimal result.[98]

To illustrate the parallel, whereas *jus in bello* proportionality-based policies can withhold kinetic strike decision authority to a certain level of commander, the military justice system can do the same in terms of withholding decision authority. Just as withholding kinetic strike authority to higher levels is often advisable because "it is likely that more senior commanders have a more comprehensive understanding of the strategic and operational context,"[99] withholding authority for certain military justice actions to a higher level is often advisable because superior commanders with additional experience, training, and broader viewpoint on what impact the action may have are likely to exercise better judgment.[100] Such is one of the main reasons why all potential Article 120 offenses are, as a matter of policy, withheld to a commander in the pay grade of O-6 or higher.[101]

3. *Logical Parallels*

The *jus in bello* proportionality test and decision-making within the military justice system are also logically similar. There are three specific likenesses that militate towards using the *jus in bello* proportionality test as a framework for decision-making within the military justice system.

First, both the *jus in bello* proportionality test and decision-making within the military justice system are based on the judgment that one variable is paramount. Whereas the "concrete and direct military advantage expected to be gained" is the primary variable in the *jus in bello* proportionality test,[102] the impact of an action on good order and discipline is the most important consideration in the military justice system. In a strict application of the *jus in bello* proportionality test, the "concrete and direct military advantage expected to be gained" is the independent variable—the acceptable amount of tolerable collateral damage increases based on the determination of the importance of the military advantage to be gained.[103] Relatedly, "maintaining good order and discipline" is the independent variable in the military justice system—the number of tolerable collateral consequences of a decision made

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[98] MCM, *supra* note 8, R.C.M. 102; *see, e.g.*, AR 27-10, *supra* note 50; Memorandum from Leon E. Panetta, U.S. Sec'y of Def., Off. of the Sec'y of Def., to Sec'ys of the Mil. Dep'ts et al., Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012), *available at* https://dacipad.whs.mil/images/Public/10-Reading_Room/00_WhatNew/SecDef_Memo_Withholding_Initial_Disposition_Authority_20120420.pdf [hereinafter Withholding Initial Disposition Authority].

[99] LAW OF WAR MANUAL, *supra* note 21, para. 5.10.3.

[100] MCM, *supra* note 8, R.C.M. 401 ("A superior competent authority may withhold the authority of a subordinate to charges in individual cases, types of cases, or generally.").

[101] *See* Withholding Initial Disposition Authority, *supra* note 98. For discussion of Article 120's creation, see *supra* note 74 and accompanying text.

[102] LAW OF WAR MANUAL, *supra* note 21, para. 5.12.

[103] *Id.* para. 5.12.3. While collateral damage can be minimized through various techniques, this analysis looks at the nature of the test by considering one anticipated action.

in the military justice system generally increases when a decision maker within the military justice system believes that the alleged offense has had a greater impact on good order and discipline.[104]

Second, both decision-making models allow the primary variable to be analyzed independently of other considerations prior to application of the remainder of the test or system. For example, when one is applying the *jus in bello* proportionality test, the impact of the contemplated action in furtherance of the "concrete and direct military advantage expected to be gained" can typically be judged without any input from the other variables that must be considered.[105] Similarly, with the military justice system, the impact of the action on the maintenance of good order and discipline, at least in the short term, can be determined without any reference to collateral consequences that are permitted to be considered.[106]

Third, and relatedly, both decision-making models either permit or require the consideration of other variables that are completely or partially independent from the primary variable. The *jus in bello* proportionality test requires the consideration of collateral concerns.[107] Similarly, the military justice system permits the consideration of variables to "promote justice," which include not only the variables in the Non-Binding Disposition Guidance[108] but also the collateral consequences that could impact rehabilitation.[109]

C. *Application of the Test*

To better understand the proposed solution to the congressional military justice legitimacy crisis, this subsection will describe the application of the test while highlighting variables military justice decision makers are underweighting.

Military justice decision makers should use the following weighted balancing test: "Commanders and judge advocates must refrain from a decision in which the collateral consequences to accused service members and society would be excessive in relation to the anticipated impact the decision would have on the maintenance of good order and discipline."[110]

The test cannot cure a fundamentally improper judgment about an action's anticipated impact on maintaining good order and discipline. For example, if a decision maker chooses to not prosecute a provable felony-level offense for improper reasons, this test cannot ameliorate such a judgment.

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[104] MCM, *supra* note 8, app. 2.1, ¶ 2.1.

[105] LAW OF WAR MANUAL, *supra* note 21, para. 5.12.2.

[106] MCM, *supra* note 8, at pt. 1, ¶ 3.

[107] LAW OF WAR MANUAL, *supra* note 21, para. 2.4.

[108] MCM, *supra* note 8, app. 2.1, ¶ 2.1.

[109] *Id.* R.C.M. 1001(b)(5)(C)–(D); U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK paras. 2-5-21 to -22 (2020) [hereinafter MILITARY JUDGES' BENCHBOOK].

[110] This test adapts language from the LAW OF WAR MANUAL, *supra* note 21, para. 5.10.

Understanding how the two incongruous variables are weighted in the LOAC setting is vital to understanding how the balancing test will occur in the military justice context.

1. *Maintaining Good Order and Discipline: 'Direct and Concrete Military Advantage' of the Military Justice System*

The military advantage variable in the *jus in bello* proportionality test is easily modifiable for application in a reformulated military justice-focused test. In LOAC proportionality analyses, the decision maker must understand the "concrete and direct military advantage expected to be gained" by the action.[111] When applying the test within the military justice system, "maintaining good order and discipline," and its corollary of "promot[ing] efficiency and effectiveness in the military establishment,"[112] logically and easily amount to the "concrete and direct military advantage expected to be gained" variable in the *jus in bello* proportionality test. The term "military advantage" inherently encompasses the "good order and discipline" and "efficiency and effectiveness" of the unit, as all are designed to improve the unit's ability or preparedness to destroy an enemy, and "thereby . . . strengthen the national security of the United States."[113]

Under the LOAC, decision makers must use "common sense and good faith" when applying the proportionality test.[114] Similarly, decision makers in the military justice system must use their individual discretion depending on the decision to be made.[115] Both systems implicitly require that decisions be made in good faith.

Common sense and good faith, however, are intangible. The reasons underlying decisions pursuant to both the LOAC and the military justice system must be articulable. For example, the qualifiers that the expected military advantage to be gained must be "concrete and direct" impliedly mandates that the expected advantage can be explained. The DoD Law of War Manual states, "the military advantage may not be merely hypothetical or speculative, although there is no requirement that the military advantage be 'immediate.'"[116] Beyond being articulable, the person applying force must be intellectually honest. The DoD Law of War Manual states that those applying force must have "a good[-]faith expectation that the attack will make a relevant and proportional contribution to the goal of the military attack involved."[117]

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[111] *Id*.

[112] MCM, *supra* note 8, pt. 1, ¶ 3.

[113] *Id*.

[114] LAW OF WAR MANUAL, *supra* note 21, para. 5.10.2.3.

[115] MCM, *supra* note 8, R.C.M. 401; MILITARY JUDGES' BENCHBOOK, *supra* note 109, paras. 2-5-21 to -22.

[116] LAW OF WAR MANUAL, *supra* note 21, para. 5.12.2.

[117] *Id*.

Military justice decision makers would improve their decision-making by following this guidance. When basing a decision largely on the impact it would have on good order and discipline, leaders should explain their decision beyond "gut feeling" logic. The term "maintaining good order and discipline" is the goal, not an explanation. Decisions would be more accurate and justifiable if the decision maker explained specifically how the decision would serve the end of "maintaining good order and discipline."

Military justice decision makers often revert to the principle of general deterrence on the unit when explaining how a decision will impact good order and discipline.[118] The problem, however, is military justice practitioners are rarely, if ever, trained on the concept of general deterrence, to include the relationship between the severity of a decision and the impact of the decision on deterring misconduct more broadly.[119] Military justice decision makers commonly vastly overestimate the deterrent effect their decisions have on future misconduct within a unit.[120]

Decision makers who choose to articulate specifically how a decision will impact the unit will be more likely to research and better understand concepts like general deterrence prior to deciding. This research will likely lead to better reasoned decisions, which will likely be more accurate and defensible.

Articulating their decision-making, moreover, is more likely to account for the impact of the crime on the victim and society. This impact is inextricably intertwined with maintenance of good order and discipline, which is not served in a case that is under-prosecuted.[121] The test proposed in this Article does not account for military justice decision makers misjudging the impact of good order and discipline. It does, however, require decision makers to articulate their logic with respect to this variable, thereby improving the chances that initial misjudgments will be apparent and corrected prior to final disposition. In other words, the interests of prosecuting serious misconduct are invariably dovetailed with maintaining good order and discipline.

The military justice system's general failure to require justifications for most decisions, such as in the sentencing context, is unique. For instance,

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[118] *See e.g.*, SCHLUETER & SCHENCK, *supra* note 14, at 6 (noting that military justice rules "attempt to balance the need for justice and discipline"); Brenner-Beck, *supra* note 14, at 116 (noting that panels have "panel's expertise in evaluating the defendant's potential for rehabilitation"); MacDonnell et al., *supra* note 14 (noting that commanders are better suited than lawyers to consider a specific unit's available resources and need for deterrence); Hill, *supra* note 14, at 476 (noting that only "commanders are duty-bound to exact their subordinates obedience to law and disciplinary standards").

[119] This assertion is based on the authors' collective professional experiences serving in various roles within the military justice system and as law school clinicians whose daily duties include reviewing decisions made within the military justice system.

[120] *Id.*

[121] The authors cannot conceive of a situation where good order and discipline is more effectively maintained with a failure to prosecute serious offenses with credible admissible evidence to sustain a conviction.

Article III federal judges must articulate the basis of a sentence.[122] Failure to do so may result in a sentence being overturned by an appellate court and necessitate a new sentencing proceeding.[123] Even state-level justice systems tacitly or implicitly require explanations for decisions. Even if a formal written explanation for a decision is not required, state-level prosecutors, most of whom are elected,[124] may face consequences for decisions that the electorate perceives to be unreasoned.[125] In the military justice system, Congress has now expressed disapproval with the decisions being made.[126]

Now is the time for military justice decision makers to develop a widespread ethic of providing more detailed justifications of their decisions. Decision makers need to take concrete steps to ensure they are engaging in meaningful analysis, especially amid the new landscape of the 2022 NDAA and because decision makers have struggled to adopt such an ethic despite years of pushing from Congress.

Military justice decision makers who internalize a duty to articulate the rationale for decisions will also be moved to explain the collateral concerns that they considered. The process of articulating and justifying a decision is, in and of itself, a valuable exercise, as it may change the initial anticipated decision by forcing the decision maker into a fruitful and vital internal struggle with the relevant variables.[127] This type of struggle is commonplace when applying force pursuant to the LOAC.

With the Collateral Damage Estimation Methodology (CDEM), both the United States and the North Atlantic Treaty Organization (NATO) have created a widely accepted and employed tool to help those applying force pursuant to the LOAC better understand the impact the decision will have

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[122] *See* Kimbrough v. United States, 552 U.S. 85, 109–10 (2007); United States v. Provance, 944 F.3d 213, 218 (4th Cir. 2019) ("When rendering a sentence, the district court must make an individualized assessment based on the facts presented and 'must state in open court the particular reasons supporting its chosen sentence.'") (quoting United States v. Carter, 564 F.3d 325, 328 (4th Cir. 2009)).

[123] *Provance*, 944 F.3d at 218.

[124] *See* Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1548 (2020) ("Although the Attorney General and United States Attorneys are appointed in the federal system, the vast majority of states elect their attorney general and hold separate elections for local prosecutors.").

[125] For example, Amy Weirich lost reelection to her position as district attorney in Shelby County, Tennessee, after "stirr[ing] national outrage for bringing criminal charges against a Black woman [Pamela Moses] for trying to register to vote." Sam Levine, Memphis Prosecutor Who Charged Black Woman over Voting Error Loses Re-election Bid, GUARDIAN, (Aug, 5, 2022, 9:15 AM), https://www.theguardian.com/us-news/2022/aug/05/memphis-amy-weirich-loses-reelection-pamela-moses. *But cf*. Hessick & Morse, *supra* note 124, at 1544 (finding that incumbent prosecutors seeking reelection "win an astonishing 95 percent of the time").

[126] *See supra*, text accompanying notes 8–13.

[127] *See, e.g.*, Enide Maegherman et al., *Accountability in Legal Decision-Making*, 29 PSYCHIATRY, PSYCH. & L. 345, 346 (2022) (explaining the utility of justifying legal decisions).

on collateral concerns.[128] While the specifics of this methodology are too broad for discussion here, the methodology generally incorporates scientific studies, assumptions, law, and policy to provide actionable and understandable data about the potential collateral concerns.[129] Relatedly, the methodology incorporates potential mitigation measures in its analysis. For example, it can estimate anticipated casualties from a strike if certain variables are changed, such as if the strike is conducted at night instead of day, or if a different munition or delivery method is used.[130]

As it is with those applying force pursuant to the LOAC, the *jus in bello* proportionality test is also a useful framework for the military justice system because it permits the proper weighting of the variables to be considered. As described above, under the *jus in bello* proportionality test, the "concrete and direct military advantage expected to be gained" is the independent variable.[131] The anticipated collateral damage is not on equal footing, as it must be "excessive" for the action to violate the proportionality principle. Further, reasonable actors can assess that a significant amount of collateral damage can occur prior to it reaching excessive levels, particularly if the anticipated concrete and direct military advantage is large. By using the test to consider decisions, military justice decision makers will improve their decisions by finally striking the proper balance of considering the impact of a decision on good order and discipline while simultaneously considering other critical variables.

2. *Collateral Consequences Variable: 'Collateral Damage' of the Military Justice System*

When employing the modified proportionality test, military justice decision makers must consider collateral consequences to accused service members and society. Yet, just like in the LOAC setting, the consequences may not be avoidable in some cases.

While all military justice actions have collateral consequences to the accused, the list of collateral consequences for service members who receive less-than-Honorable discharges is long and unique.[132] Military justice decision makers, however, tend to overlook or simply do not understand these consequences—particularly the consequences resulting from a

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[128] CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3160.01, NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY, at D-1 (13 Feb. 2009) [hereinafter CJCSI 3160.01] (subsequent versions are not available publicly); JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING, at II-18 (31 Jan. 2013); N. ATL. TREATY ORG., ALLIED JOINT PUB. 3-9, ALLIED JOINT DOCTRINE FOR JOINT TARGETING 1-27 (ed. B, ver. 1 2021).

[129] For example, the Collateral Damage Estimation Methodology can generate an estimated number of civilian deaths or serious injuries resulting from a strike. *See* CJCSI 3160.01, *supra* note 128, at GL-4 (defining casualty estimate).

[130] *See id*. at D-A-17 to -29, D-A-31.

[131] *See supra* text accompanying notes 102–04.

[132] *See* discussion *infra* Subsection II.C.2.

benefits-disqualifying discharge.[133] Thus, it is worthwhile to spend time exploring the most common collateral consequences to provide a holistic understanding of this variable in the modified proportionality test.

Having "veteran" status is critical to obtaining many post-service benefits. As such, there are numerous U.S. Department of Veterans Affairs (VA) benefits for which a former service member with a benefits-disqualifying discharge will not qualify.[134] While military justice decision makers need not be VA benefits–eligibility experts, they should have a general understanding of the legal and practical impact of benefits-disqualifying discharge characterizations on eligibility. Simply put, discharge characterization directly impacts—and often inhibits—a service member's ability to obtain VA benefits.[135] Congress defined a "veteran" as "a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom *under conditions other than dishonorable*."[136] However, the use of "dishonorable" in the

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[133] *See supra* text accompanying note 118–21.

[134] This section is not a comprehensive discussion of all potential VA benefits, but it includes the most common ones to illustrate the importance of adopting this approach.

[135] Every military member who separates from service after serving more than six months on active duty receives a discharge characterization. *See* DoDI 1332.14, *supra* note 29, encl. 4, para. 3; glossary n.1 (2022) (distinguishing between entry-level separation during the first 180 days of military service, which is considered Uncharacterized separation, and separation with characterization of service). Service members leave the military for a myriad of reasons, including expiration of their term of service, retirement, medical disability, administrative separation, or court-martial. *Id.* at 9, 14, 22. Today, enlisted service members, as well as commissioned officers, can receive an Honorable, General, or Other Than Honorable discharge administratively. *See id.* at 30–31, 55. Enlisted members can also receive one of two types of punitive discharges—Bad Conduct or Dishonorable discharge, both of which can only be imposed at a court-martial. MCM, *supra* note 8, R.C.M. 1003(b)(8)(B)–(C). Specifically, a Bad Conduct discharge can be imposed at either (1) a general court-martial or (2) a special court-martial empowered to adjudge a Bad Conduct discharge, *id.* R.C.M. 1003(b)(8)(C). The latter is often referred to as "BCD Special." In contrast, commissioned officers are only subject to dismissal at a court-martial, which is the functional equivalent of a Dishonorable discharge, or by order of the President during a time of war. *See id.* R.C.M. 1003(b)(8)(A); 10 U.S.C. § 1161(a). The characterization of one's military discharge, whether Honorable, General, Other Than Honorable, Bad Conduct, Dishonorable, Dismissal, or Uncharacterized, is captured on a DD Form 214 at the time of separation. *DD Form 214, Discharge Papers and Separation Documents*, NAT'L ARCHIVES: NAT'L PERS. RECS. CENTER, https://www.archives.gov/personnel-records-center/dd-214 (Apr. 26, 2018). This form serves as an enduring record of the service member's military service, functioning as a report card of their service for future employers and providing a basis for accessing (or denying) veteran benefits. *See* U.S. DEP'T OF ARMY, REG. 635-8, SEPARATION PROCESSING AND DOCUMENTS paras. 1-11(p)(2)–(3) (17 Sept. 2019) (stating that "[t]he benefits a Soldier may be eligible to receive as a result of military service will be based primarily on the DD Form 214" and "[c]ivilian employment may be affected by the data on the DD Form 214"); Harmon v. Brucker, 355 U.S. 579, 583 (1958) (quoting contemporaneous Army regulations explaining the purpose of a discharge certificate is "to record the separation of an individual from the military service and to specify the character of service rendered during the period covered by the discharge").

[136] 38 U.S.C.A. § 101(2) (West 2022) (emphasis added); *see also* 38 C.F.R. § 3.1(d) (2021), *amended by* Inclusion of the Space Force as Part of the Armed Forces, 87 Fed. Reg. 26124, 26125 (May 3, 2022) (defining "veteran" as "a person who served in the active military, naval, air, or space service and who was discharged or released under conditions other than dishonorable"). For an in-depth

VA benefits–eligibility context has a different meaning and application than in the military justice system.

"Dishonorable" in the military justice context is commonly used to describe only the worst type of characterization of service one can earn when discharged from the service.[137] In the VA benefits–eligibility context, Congress implemented statutory bars to veteran benefits to delineate between "dishonorable" and "honorable" service.[138] The VA further expanded this distinction through implementing regulatory bars to benefits.[139] In light of these statutory and regulatory bars, recipients of Other Than Honorable (OTH) and punitive discharges are generally unable to obtain VA benefits, including health care.[140] Military justice decision makers should be aware of the VA benefits landscape when making disposition decisions.

In addition to the legal implications of benefits-disqualifying discharges, military justice decision makers should also be aware of the practical impacts of less-than-Honorable discharges on VA benefits. Even federal judges with highly specialized knowledge about VA disability law have

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discussion of the statutory and legislative background of the term "veteran," see Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical and Legal Basis for Excluding Veterans from "Veteran" Services*, 122 PENN STATE L. REV. 69, 105–12 (2017).

[137] *See* MCM, *supra* note 8, R.C.M. 1003(b)(8)(B) ("A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment[.]").

[138] 38 U.S.C. § 5303(a).

[139] 38 C.F.R. § 3.12 (2021).

[140] When a former service member presents a DD Form 214 with an Other Than Honorable or Bad Conduct discharge to the VA in an effort to obtain veteran benefits, the VA conducts a "character of discharge" determination. The VA requires a "character of discharge" determination if a service member received an undesirable discharge, an Other Than Honorable discharge, or a Bad Conduct discharge. *See* U.S. DEP'T OF VETERANS AFFS., M21-1, ADJUDICATION PROCEDURES MANUAL pt. X, subpart iv, ch. 1, § A.1.c. (2021). Practically, from the outset, the VA *presumes* that these types of discharges do not entitle the separated service member to veteran status. *See* OUTVETS ET AL., TURNED AWAY: HOW VA UNLAWFULLY DENIES HEALTH CARE TO VETERANS WITH BAD PAPER DISCHARGES 17–22 (2020) (highlighting how some VA training materials erroneously state Other Than Honorable discharge status as a disqualification for health care benefits). This process requires the VA to conduct "an individualized eligibility determination to decide whether the veteran was discharged under 'dishonorable conditions' or 'other than dishonorable conditions,'" *id.* at 2, in accordance with the congressional veteran definition. John W. Brooker et al., *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1, 25–27 (2012). During a character of discharge determination, the VA will analyze both statutory and regulatory bars depending on the facts and circumstances of each case. If neither the statutory nor regulatory bars apply to a particular case, that period of service is deemed "honorable" for VA purposes. *Id.* A period of service is generally fulfilled when service members serve the amount of time listed in their enlistment contract. Notably, the VA does not view one's completion of a period of service when one reenlists. *See id.* at 70–98 (providing an in-depth analysis of how to calculate a prior period of honorable service and whether that prior period serves as an independent basis for VA benefits). In contrast, if one of the statutory or regulatory bars applies, that period of service will be deemed "dishonorable" for VA purposes. *Id. at* 25–27. See *id.* at 110–200 for a more in-depth analysis of the VA's character of discharge determination process and decisions.

called the benefits-eligibility rules "murky" because of confusing and antiquated provisions;[141] not surprisingly, separated service members, commanders, and judge advocates are similarly puzzled.[142] Employees at the VA are likewise confused when navigating and deciding whether a service member is eligible for VA benefits.[143]

As a result, the VA often makes erroneous benefit-eligibility decisions. A Harvard study published in 2020 entitled *Turned Away* concluded that the VA routinely wrongly denied potentially eligible veterans critical benefits, a pattern it called "national, persistent, and systemic."[144] The VA's wrongful denial of lifesaving benefits has a widespread impact on this underserved and vulnerable population.[145]

In most cases, the most impactful collateral consequence is the loss of VA health care benefits. Losing eligibility for VA health care benefits, including mental health treatment, can be devastating for both the former service member and for society.[146] Recipients of punitive discharges are statutorily ineligible for health care at the VA for service-connected disabilities.[147] Recipients of OTH discharges may also be barred from accessing VA health care for service-connected disabilities if a statutory bar to benefits applies.[148] Yet, if a service member with an OTH discharge is not statutorily barred but falls within one of the regulatory bars to benefits identified in 38 C.F.R. § 3.12(d), they will be legally entitled to VA health care "limited to the treatment of *any disability incurred or aggravated during active service.*"[149] Nonetheless, these former service members are unlikely to receive VA health care for their service-connected conditions, as the VA will, almost inevitably, wrongly deny these former service members

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[141] Trilles v. West, 13 Vet. App. 314, 330 (2000) (Kramer, J., & Steinberg, J., concurring).

[142] *See* Brooker et al., *supra* note 140, at 208–11 (describing errors and confusion regarding benefits eligibility among military attorneys and judges). Veteran service organizations (VSOs) are available to aid service members in their efforts to obtain benefits. *Id.* at 217, app. M.

[143] *See* OUTVETS ET AL., *supra* note 140, at 13–22 (describing the frequency with which former service members are wrongfully turned away when seeking care at VA medical facilities, as well as the inadequate training provided to staff).

[144] *Id.* at 15.

[145] *See generally id.*

[146] *Id.* at 1 (noting that former service members with less-than-Honorable discharges "have higher rates of mental health conditions, suicide, homelessness, and unemployment").

[147] 38 U.S.C. § 5303(e); *see* 38 C.F.R. § 3.12(c)(2) (2021) (barring veterans who are discharged "[b]y reason of the sentence of a general court-martial"); Act of Oct. 8, 1977, Pub. L. No. 95-126, 91 Stat. 1106, 1107–08 (stipulating that VA health providers "shall not provide such health care . . . for any disability incurred or aggravated during a period of service from which such person was discharged by reason of a bad conduct discharge"); 38 C.F.R. § 3.360(b) (2021) (barring veterans with a Bad Conduct discharge, regardless the level of court-martial, from receiving health care). This bar to health care extends to that period of service only, and care could be predicated upon a prior period of honorable service. *See* Brooker et al., *supra* note 140, at 72–83.

[148] 38 U.S.C. § 5303(a). *See generally* Brooker et al., *supra* note 140 (providing an in-depth analysis of specific case facts regarding eligibility for VA benefits).

[149] Brooker et al., *supra* note 140, at 50 (emphasis in original).

from receiving the care they deserve.[150] In contrast, an Honorable or General discharge characterization will preserve health care for service-connected disabilities so long as no statutory bars to benefits apply.[151]

Affording VA health care to service members afflicted with combat-induced mental health conditions is often lifesaving because VA health care is "[t]he only reservoir of combat PTSD [post-traumatic stress disorder] expertise."[152] Moreover, there is often a connection between the discharged service members' misconduct that led to their discharge and their military-caused mental health condition. Clinical psychiatrist Jonathan Shay testified before Congress that the denial of VA mental health treatment to recipients of benefits-disqualifying discharges is "as unjust and irrational as if they had been drummed out for failure to stand at attention after their feet had been blown off. Most of these men committed offenses *because* of their combat PTSD."[153]

Further exacerbating the denial of disability health care, former service members may have conditions related to their military service that had not yet been discovered or diagnosed at discharge. Thus, a military member's service-connected disabilities may not yet be known at the time discharge is characterized. Almost every conflict has a set of medical conditions that are presumptively connected to service in that theater of operations.[154] These specified conditions, categorized by the conflict in which the military member fought, are presumed to be service-connected for purposes of determining eligibility for VA disability–related benefits, including health care.[155] For example, Type 2 diabetes, ischemic heart disease, Hodgkin's disease, and respiratory cancers are deemed automatically service-connected for Vietnam veterans.[156] This means that those who served in Vietnam will almost invariably receive VA health care and benefits if ever diagnosed with

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[150] *See* OUTVETS ET AL., *supra* note 140, at 13.

[151] *See* 38 U.S.C. § 5303 (detailing limitations to receiving veterans' benefits based on discharge status). Military justice decision makers must note that former service members with more than one prior period of service may be eligible for VA benefits based on that prior service period if it was under conditions other than dishonorable. *See* Brooker et al., *supra* note 140, at 70–98 (describing how a prior period of service may serve as an independent basis for granting benefits at the VA).

[152] *Health Care, Economic Opportunities and Social Services for Veterans and Their Dependents—A Community Perspective: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Veterans' Affs.*, 103d Cong. 105 (1993) (statement of Warren Quinlan, Director of Operations, New England Shelter for Homeless Veterans).

[153] *Viewpoints on Veterans Affairs and Related Issues: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Veterans' Affs.*, 103d Cong. 117 (1994) (statement of Jonathan Shay, M.D., Ph.D.) (emphasis in original).

[154] VETERANS BENEFITS ADMIN., U.S. DEP'T OF VETERANS AFFS., PRESUMPTIVE DISABILITY BENEFITS 1 (2021), *available at* https://www.benefits.va.gov/BENEFITS/factsheets/serviceconnected/presumption.pdf.

[155] *Id.*

[156] *Id.* at 2.

one of these conditions, even if the diagnosis comes decades after separation from military service.[157]

Unfortunately, most presumptive conditions are not discovered and established until well after the war has ended and the service members who fought in that war have been discharged.[158] For example, presumptive conditions related to the Vietnam War were added in 2021.[159] While some presumptive medical conditions linked to service in the Middle East and Afghanistan have already been determined,[160] it is almost guaranteed that many more will be added to the list in the decades to come as the etiologies behind medical conditions common to those who deployed are better understood.

However, decision makers in the military justice system do not yet know what these presumptive conditions will be when making their justice-related decisions. They do know that it is inevitable that many veterans will develop serious service-connected conditions decades following service. For example, while the VA was researching the impact of burn pits,[161] Congress passed the Honoring our PACT Act, adding two dozen cancers and illnesses to the list of conditions that the VA will presume were incurred during military service for those who served in one of the designated Middle Eastern locations on or after August 2, 1990.[162] Future service-connected conditions are "known unknowns."[163] Thus, it is critical for military justice decision makers to understand that an OTH or punitive discharge could deny a service member VA health care not only for known current conditions,

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[157] *Agent Orange Exposure and VA Disability Compensation*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/disability/eligibility/hazardous-materials-exposure/agent-orange/ (Aug. 19, 2022).

[158] *FACT SHEET: Biden Administration Announces Actions to Address the Health Effects of Military Exposures*, WHITE HOUSE (Nov. 11, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/11/fact-sheet-biden-administration-announces-actions-to-address-the-health-effects-of-military-exposures.

[159] *Agent Orange Exposure and VA Disability Compensation*, *supra* note 157, (listing three new presumptive conditions associated with Agent Orange exposure during the Vietnam War: bladder cancer, hypothyroidism, and Parkinsonism); *VA Adds Three New Agent Orange Presumptions*, U.S. DEP'T OF VETERANS AFFS., https://www.publichealth.va.gov/exposures/publications/agent-orange/agent-orange-2021/presumptions.asp (Sept. 10, 2021) ("As a result of the FY21 National Defense Authorization Act, VA added three new conditions that are related to exposure to Agent Orange and other herbicides: bladder cancer, hypothyroidism, and Parkinsonism (also known as Parkinson-like conditions).").

[160] VETERANS BENEFITS ADMIN., *supra* note 154, at 4–5.

[161] *Airborne Hazards and Burn Pit Exposures*, U.S. DEP'T OF VETERANS AFFS., https://www.publichealth.va.gov/exposures/burnpits/ (Sept. 30, 2022). Respiratory diseases were presumptively service-connected in 2021. Press Release, U.S. Dep't of Veterans Affs., VA to Start Processing Disability Claims for Certain Conditions Related to Particulate Matter (Aug. 2, 2021), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5699.

[162] Honoring our PACT Act of 2022, Pub. L. No. 117-168, § 406, 136 Stat. 1759, 1783–85 (to be codified at 38 U.S.C. § 1120).

[163] *See* Donald Rumsfeld, U.S. Sec'y of Def., NATO Press Conference (June 7, 2002) (transcript available at https://www.nato.int/docu/speech/2002/s020606g.htm) (famously describing the concept of "known unknowns").

but also for devastating conditions caused by wartime service that manifest in the future.

Further, wartime service is not always required to suffer devastating health consequences decades later directly because of military service. Severely contaminated water at Camp Lejeune, North Carolina,[164] and possibly at many other military installations,[165] has sickened and killed a horrifying number of military members and their families.[166] Military justice decision makers at the time did not know about the contaminated water. They know now, however, that such unfortunate situations are all too common, even though the specific nature of the situation may not be known at the time of a decision made within the military justice system.

Congress cares about former service members who receive benefits-disqualifying discharges and how it impacts their ability to access health care at the VA. In 2017, the VA implemented a regulation that provides emergency mental health services for up to ninety days including inpatient, outpatient, or residential treatment regardless of discharge characterization.[167] In 2018, Congress passed 38 U.S.C. § 1720I, which extended mental and behavioral health care to recipients of OTH discharges who served at least 100 cumulative days on active duty and deployed "in a theater of combat operations, in support of a contingency operation, or in an area at a time during which hostilities are occurring," as well as who survived military sexual trauma.[168] However, this extension of care does not reach recipients of punitive discharges.[169] This narrowly tailored legislation is even less impactful as intended, as the VA routinely misinterprets its own regulations and improperly denies care to those who are eligible.[170]

A commonly overlooked collateral consequence is the connection between benefits-disqualifying discharges and homelessness.[171] Those who

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[164] *Camp Lejeune Water Contamination Health Issues*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/disability/eligibility/hazardous-materials-exposure/camp-lejeune-water-contamination (Mar. 7, 2022).

[165] Catherine Herridge & Andrew Bast, *Service Members and Families Affected by Toxic Water at Marine Base Still Seeking Justice Decades Later*, CBS NEWS (Jan. 10, 2022, 10:24 AM), https://www.cbsnews.com/news/toxic-water-marine-base-service-members-families-justice (explaining that "Environmental Working Group, an environmental research organization, reports 385 military sites 'have contaminated drinking water or ground water'").

[166] Congress also addressed exposure to contaminated water at Camp Lejeune in the Honoring our PACT Act, giving those with "veteran" status who spent at least 30 days on site from 1953 to 1987 a federal cause of action to seek compensation. Honoring our PACT Act of 2022, Pub. L. No. 117-168, § 804, 136 Stat. 1759, 1802–04.

[167] U.S. DEP'T OF VETERANS AFFS., EMERGENT MENTAL HEALTH CARE FOR FORMER SERVICE MEMBERS 1 (June 2017), *available at* https://www.va.gov/HOMELESS/ssvf/docs/Fact_Sheet_Emergent_Mental_Health_Care_for_Former_Service_Members.pdf.

[168] 38 U.S.C. § 1720I(b)(4).

[169] *Id.*

[170] *See supra* notes 143–44 and accompanying text.

[171] Jack Tsai & Robert A. Rosenheck, *Risk Factors for Homelessness Among US Veterans*, 37 EPIDEMIOLOGIC REVS. 177, 188, 191 (2015).

serve in the military often serve in locations far away from their homes of record or residency.[172] Termination of their military employment often requires them to relocate after discharge.[173] The VA offers housing resources to qualifying veterans.[174] Yet, recipients of benefits-disqualifying discharges are generally ineligible for these resources and face increased risk of homelessness.[175] Tragically, those with "bad paper" discharges—those with an Other Than Honorable discharge or worse[176]—are "estimated to be at seven times the risk of homelessness as other veterans."[177] Moreover, veterans with bad paper "'find it harder, if not impossible to obtain rental housing, credit, licenses, mortgages, home improvement loans, life and medical insurance' and [find their discharge status] generally transforms them into 'bad risks' by any public or financial organization's calculus."[178] This vicious cycle results in former service members with benefits-disqualifying discharges enduring higher rates of homelessness, making access to VA benefits even more critical.[179]

A correlation exists between benefits-disqualifying discharges, mental health, and homelessness.[180] As a result, many former service members with less-than-Honorable or punitive discharge characterizations find themselves caught in a vicious cycle. The misconduct that led to their less-than-Honorable discharge was caused by or related to a military-induced mental health issue.[181] Thus, unsurprisingly, service members with benefits-disqualifying discharges are more likely to suffer from a mental health condition.[182] Yet, those suffering from these mental health conditions are often ineligible for health care and other lifesaving benefits at the VA.[183] In fact, "[t]hree out of

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[172] *See* Emily Moy, *State of Residence vs. Home of Record: What Does It All Mean?*, U.S. ARMY (Jan. 7, 2016), https://www.army.mil/article/160640/state_of_residence_vs_home_of_record_what_does_it_all_mean.

[173] *See Deciding Where to Live When You Leave the Military*, MIL. ONESOURCE (June 9, 2022, 9:17 AM), https://www.militaryonesource.mil/military-life-cycle/separation-transition/military-separation-retirement/deciding-where-to-live-when-you-leave-the-military.

[174] *See, e.g.*, VETERANS LEGAL CLINIC, LEGAL SERVS. CTR. OF HARVARD L. SCH., UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER 22 (2016) (explaining that a major program that provides housing support is the U.S. Department of Housing and Urban Development-VA Supportive Housing (HUD-VASH) program. This HUD and VA program "combines the value of a Section 8 housing voucher with the wrap-around support of VA social work and health-care services.").

[175] *Id.*

[176] *Id.* at 27.

[177] VETERANS LEGAL CLINIC, *supra* note 174, at 22. In 2014, two out of three homeless former military members in Houston had benefits-disqualifying discharges. *Id.*

[178] Brooker et al., *supra* note 140, at 12 n.13.

[179] OUTVETS ET AL., *supra* note 140, at 1; *see also* Cynthia M.A. Geppert, *Bad Paper, Good Decisions: Providing Mental Health Care to All Veterans Regardless of Discharge Status*, 34 FED. PRAC. 4, 5 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6370434/pdf/fp-34-05-04.pdf ("Nonroutinely discharged veterans are more likely to be homeless.").

[180] VETERANS LEGAL CLINIC, *supra* note 174, at 21–22.

[181] OUTVETS ET AL., *supra* note 140, at 1–2.

[182] *Id.* at 2.

[183] *Id.*

four veterans with bad paper discharges who served in combat and who have [p]ost-traumatic stress disorder are denied eligibility by the Board of Veterans' Appeals."[184] As a result, mental health conditions caused by their military service often go untreated.[185]

Loss of future employability is an additional overlooked collateral consequence. Not only has the separated service member lost their military career, but their benefits-disqualifying discharge will also likely impact their future employment.[186] Benefits-disqualifying discharges, particularly those characterized as OTH or worse, have a negative stigma that "greatly limits the opportunities for both public and private civilian employment."[187] Employers frequently request a former service member applicant's discharge paperwork (DD Form 214) as part of the job application process and likely draw inaccurate conclusions or make assumptions,[188] as the case examples in Part III illustrate. Stigma among employers naturally persists in light of over eighty-five percent of discharges being Honorable.[189] As a result, separated military members with less-than-Honorable discharges have higher rates of unemployment.[190]

The collateral consequences further extend to the loss of access to education benefits. Recipients of less-than-Honorable discharges lose the robust educational opportunities the VA offers. Perhaps the most well-known is the Post-9/11 GI Bill, which offers educational assistance for "the actual net cost for in-State tuition and fees" for postsecondary education.[191] Qualifying veterans may even be eligible for a monthly housing stipend while in school.[192] The Montgomery GI Bill is the predecessor of the Post-9/11 GI

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[184] VETERANS LEGAL CLINIC, *supra* note 174, at 2.

[185] OUTVETS ET AL., *supra* note 140, at 2.

[186] *Id.* at 1.

[187] Daniel Scapardine, Comment, *Leaving "Other Than Honorable" Soldiers Behind: How the Departments of Defense and Veterans Affairs Inadvertently Created a Health and Social Crisis*, 76 MD. L. REV. 1133, 1135–36 (2017).

[188] *See* Alyssa Peterson & Arjun Mody, *How Employers Illegally Discriminate Against Veterans with Less-than-Honorable Discharges*, HARV. C.R.-C.L. L. REV. (May 29, 2018), https://harvardcrcl.org/how-employers-illegally-discriminate-against-veterans-with-less-than-honorable-discharges ("[A] number of employers have gone so far as to adopt blanket bans on hiring veterans with bad paper."). *See also* Hugh McClean, Essay, *Discharged and Discarded: The Collateral Consequences of a Less-than-Honorable Military Discharge*, 121 COLUM. L. REV. 2203, 2240–41 (2021).

[189] HUMAN RIGHTS WATCH, BOOTED: LACK OF RECOURSE FOR WRONGFULLY DISCHARGED US MILITARY RAPE SURVIVORS 4 (2016), https://www.hrw.org/sites/default/files/report_pdf/us0516_militaryweb_1.pdf.

[190] OUTVETS ET AL., *supra* note 140, at 1.

[191] 38 U.S.C. § 3313(c)(1)(A)(i); *see also Post-9/11 GI Bill (Chapter 33)*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/education/about-gi-bill-benefits/post-9-11/ (July 22, 2022).

[192] 38 U.S.C. § 3313(c)(1)(B). This housing stipend is calculated using the rate of a service member at the E-5 pay grade for the zip code in which the educational institution is located. *Id.*

Bill.[193] Under either law, however, only service members with Honorable discharges receive these generous benefits.[194]

The moral injury that many former service members endure may be the harshest and the least understood collateral consequence. The VA, other federal and state government entities, and society in general do not recognize service members with benefits-disqualifying discharges as "veterans."[195] This complete exclusion from the military community can feel like the ultimate betrayal.[196] While the military promotes cohesion above all else,[197] the psychological impact of being excluded from the military family cannot be overstated. One recipient of a benefits-disqualifying discharge described the feeling as "almost like being a criminal."[198] Service members with benefits-disqualifying discharges are ostracized from the military community; they are not even entitled to burial-related benefits, including burial in a national cemetery[199] or a burial flag.[200]

Former service members with benefits-disqualifying discharges also have higher rates of suicide, making access to this benefit even more important.[201] The VA reported that, on average, seventeen veterans commit

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[193] 38 U.S.C. § 3011(a)(3)(B); *see also Montgomery GI Bill Active Duty (MGIB-AD)*; U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/education/about-gi-bill-benefits/montgomery-active-duty/ (Apr. 20, 2022).

[194] 38 C.F.R. § 21.9520(a)(2) (2021). Another VA educational benefit afforded to qualifying veterans is the Veteran Readiness and Employment (VR&E) program. *See Veteran Readiness and Employment (Chapter 31)*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/careers-employment/vocational-rehabilitation/ (Nov. 12, 2021). This program was formerly called Vocational Rehabilitation and Employment. *Id.* VR&E is a postsecondary education program that "helps eligible veterans prepare for, obtain, and maintain suitable employment or achieve independence in daily living." U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-676, VETERANS AFFAIRS: BETTER UNDERSTANDING NEEDED TO ENHANCE SERVICES TO VETERANS READJUSTING TO CIVILIAN LIFE 19 (2014). The program offers many beneficial services including job training, education, and independent living services. *Id*. However, this benefit is, once again, limited to those who have "veteran" status and ultimately precludes many with benefits-disqualifying discharges. Brooker et al., *supra* note 140, at 46.

[195] *See supra* note 135 and accompanying text.

[196] Some commentators have described this as "moral injury." Richard W. Seim, *Different Paths Can Lead to Moral Injury Following Military Trauma*, VANTAGE POINT (Mar. 12, 2019), https://blogs.va.gov/VAntage/57448/different-paths-can-lead-to-moral-injury-following-military-trauma/; Jonathan Shay, *Moral Injury*, 31 PSYCHOANALYTIC PSYCH. 182, 183 (2014) (defining moral injury as a "betrayal of what's right[] by someone who holds legitimate authority (e.g., in the military—a leader)[] in a high stakes situation").

[197] This is illustrated in the Soldier's Creed that enlisted Army soldiers often memorize upon entry into the service. *Soldier's Creed*, U.S. ARMY, https://www.army.mil/values/soldiers.html (last visited Sept. 30, 2022).

[198] Kate Murphy, *After 50 Years, Vietnam War Veteran Earns Purple Heart with Help of UNC Law Students*, NEWS & OBSERVER (Nov. 5, 2021, 4:47 PM), https://www.newsobserver.com/news/local/article255507936.html.

[199] 38 U.S.C. § 2402.

[200] 38 U.S.C. § 2301; *see* Brooker et al., *supra* note 140, at 51.

[201] OUTVETS ET AL., *supra* note 140, at 1.

suicide every day in 2019.[202] Former service members with benefits-disqualifying discharges are "three times more likely to experience suicidal ideation" than other former military members.[203] However, access to VA health care can essentially eliminate the difference in frequency of suicidal ideation between the two groups.[204]

There are other factors not addressed by the proposed test that continue to impact the exercise of discretion in the military justice system. For example, the U.S. government has repeatedly acknowledged evidence of improper racial bias in the system.[205] Recent data indicates that such bias continues to exist.[206] Military leaders, scholars, and other stakeholders in the

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[202] OFF. OF MENTAL HEALTH AND SUICIDE PREVENTION, U.S. DEP'T OF VETERANS AFFS., 2021 NATIONAL VETERAN SUICIDE PREVENTION ANNUAL REPORT 5 (2021), https://mentalhealth.va.gov/docs/data-sheets/2021/2021-National-Veteran-Suicide-Prevention-Annual-Report-FINAL-9-8-21.pdf.

[203] OUTVETS ET AL., *supra* note 140, at 10. *See also* Mark A. Reger, Derek J. Smolenski, Nancy A. Skopp, Melinda J. Metzger-Abamukang, Han K. Kang, Tim A. Bullman, Sondra Perdue & Gregory A. Gahm, *Risk of Suicide Among US Military Service Members Following Operation Enduring Freedom or Operation Iraqi Freedom Deployment and Separation from the US Military*, 72 JAMA PSYCHIATRY 561, 564, 567 (2015) (finding that receiving a less-than-Honorable discharge was a risk factor for suicide).

[204] OUTVETS ET AL., *supra* note 140, at 10.

[205] In 1972, the Secretary of Defense convened a task force to evaluate the administration of military justice across all branches of service. 1 U.S. DEP'T OF DEF., REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 1 (1972). This task force found that across all military branches, Black service members received in Fiscal Year 1971 "a lower proportion of honorable discharges and a higher proportion of general and undesirable [now called Other Than Honorable] discharges than whites with similar education levels and aptitude." *Id.* at 33. The task force concluded that the military justice system disadvantaged Black service members in the issuance of military discharges. *Id.* at 108–11. Similarly, the United States General Accounting Office (GAO, now the Government Accountability Office) nearly a decade later in 1980 also reported disparate treatment and the unequal issuance of less-than-Honorable discharges. U.S. GEN. ACCT. OFF., FPCD-80-13, MILITARY DISCHARGE POLICIES AND PRACTICES RESULT IN WIDE DISPARITIES: CONGRESSIONAL REVIEW IS NEEDED ii (1980). Specifically, the GAO concluded that less-than-Honorable discharges disproportionately affected minority service members. *Id. at* 49–52. The GAO concluded: "Simply stated, different people get different discharges under similar circumstances, and the type of discharge an individual gets may have little to do with his behavior and performance on active duty." *Id.* at ii.

[206] In May 2019, the GAO published a report concluding that race still plays a role in the administration of military justice and discharge determinations. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-344, MILITARY JUSTICE: DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL AND GENDER DISPARITIES (2019); *see also Racial Disparity in the Military Justice System—How to Fix the Culture: Hearing Before the Subcomm. on Mil. Pers. of the H. Armed Servs. Comm.*, 116th Cong. 7–8 (2020) (statement of Brenda S. Farrell, Director, Defense Capabilities and Management Team, U.S. Government Accountability Office) (presenting the GAO report to Congress); CONN. VETERANS LEGAL CTR., DISCRETIONARY INJUSTICE: HOW RACIAL DISPARITIES IN THE MILITARY'S ADMINISTRATIVE SEPARATION SYSTEM HARM BLACK VETERANS 21–22 (2022) (finding that Black service members across all branches, who made up 17.9% of those separated during the time studied, received only 16.5% of Honorable discharges, but 30% of General and over 25% of Other Than Honorable discharges). These current and historical studies introduce grave disparities in the issuance of discharges which is worthy of continued study and analysis. Indeed, the 2021 NDAA instructed the Department of Defense to describe to the GAO how it planned to implement the recommendations of the 2019 GAO report. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 547, 134 Stat. 1541, 3616–17. The

military justice system must continue to study and analyze this issue to correct this problem. This Article is designed to complement such research, as decision makers who embrace the complexities underlying their decisions are more likely to make more informed and therefore better decisions.

As discussed throughout this section, many of the long-term collateral consequences to accused service members also adversely impact society. Service members with bad-paper discharges—those with an Other Than Honorable discharge or worse—are more likely to have mental health conditions and suffer from an increased likelihood of suicide, but they are not eligible for treatment.[207] As a senior fellow at the Center for a New American Society, Phil Carter, explained:

> The nation's long had a social contract with its troops that says we will send you to war, and when you come home we will care for you. . . . There's been this gap; this population that's gone to war and earned the benefits of that social contract, but for whatever reason had these benefits taken away.[208]

Many of those who fall within that gap are homeless and endure untreated post-traumatic stress disorder. According to Carter, "the longer they're left without help, the higher the cost to society."[209]

Service members with benefits-disqualifying discharges are "overrepresented" in the civilian criminal justice system. Those discharged with bad paper make up less than five percent of the total military population, but they account for just over twenty-three percent of military members in prison and over thirty-three percent of military members in

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subsequent GAO report found that the military services had implemented most of the recommendations on reporting demographic data related to nonjudicial punishment, but that "DOD ha[d] not identified when disparities should be further reviewed [n]or studied the causes of disparities in the military justice system." U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-105000, MILITARY JUSTICE: DOD AND COAST GUARD IMPROVED COLLECTION AND REPORTING OF DEMOGRAPHIC AND NONJUDICIAL PUNISHMENT DATA, BUT NEED TO STUDY CAUSES OF DISPARITIES 4 (2021).

There is also a correlation between less-than-Honorable discharges and other forms of discrimination. For example, discrimination based on sexual orientation was the official policy of the military until "Don't Ask, Don't Tell," 10 U.S.C. § 654, was repealed in 2011. *See* Megan Slack, *From the Archives: The End of Don't Ask, Don't Tell*, WHITE HOUSE (Sept. 12, 2012), *available at* https://obamawhitehouse.archives.gov/blog/2012/09/20/archives-end-dont-ask-dont-tell. Of those who were separated from military service for "homosexuality," a 1992 GAO study found that "some groups were consistently discharged at a rate higher than their representation in the total active force or individual service." U.S. GEN. ACCT. OFF., NSIAD-92-98, DEFENSE FORCE MANAGEMENT: DOD'S POLICY ON HOMOSEXUALITY 4 (1992). The study also provides one example of the disproportionate impact on female service members, who were more likely to be involuntarily separated than male counterparts on LGBTQ grounds. *Id.*

[207] VETERANS LEGAL CLINIC, *supra* note 174, at 2.

[208] Marisa Peñaloza & Quil Lawrence, *Other-than-Honorable Discharge Burdens Like a Scarlet Letter*, NAT'L PUB. RADIO (Dec. 9, 2013, 6:00 AM), https://www.npr.org/2013/12/09/249342610/other-than-honorable-discharge-burdens-like-a-scarlet-letter.

[209] *Id.*

jail.[210] While states and federal governments have established veterans treatment courts, designed to divert veterans who commit crimes away from traditional criminal justice paths, one-third of veterans treatment courts are unavailable to those with benefits-disqualifying discharges.[211]

When basing a decision solely on the impact the decision would have on good order and discipline, military decision makers fail to account for other important variables. Yet, by employing the modified proportionality test, military justice decision makers will naturally internalize a duty to consider the long-term impact of their decisions and render more informed and well-reasoned decisions.

3. *Striking the Balance*

The modified proportionality test brings military justice prosecutions in line with the criteria applied by every other federal prosecutor. While striking the proper balance in the weighting of the variables, military justice decision makers will inherently consider the principles of prosecution and sentencing found in the civilian system.

The principles of federal prosecution found in the Justice Manual[212] were "designed to assist in structuring the decision-making process of attorneys for the government" when making "policy judgment[s] that the fundamental interests of society require the application of federal criminal law to a particular set of circumstances."[213] These principles of federal prosecution acknowledge that exercising prosecutorial discretion is "recognizing both that serious violations of federal law must be prosecuted" while also accounting for the "profound consequences for the accused, crime victims, and their families whether or not a conviction ultimately results."[214]

Similarly, the test empowers military justice decision makers to understand and weigh seemingly incongruent variables when exercising prosecutorial discretion. This proposed test also mirrors the Justice Manual's principles in that both are "designed to assist in structuring the decision-making process" for decision makers "with a view to providing guidance rather than . . . mandating results."[215] Akin to the intent of the federal principles of prosecution, the modified proportionality test affords

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[210] VETERANS LEGAL CLINIC, *supra* note 174, at 21.

[211] *Id.* at 21–22.

[212] The Justice Manual replaced the U.S. Attorneys' Manual, setting forth the principles of federal prosecution. The 1980 Principles of Federal Prosecution formed the basis for the principles set forth in the Justice Manual. As explained in the preface to the Principles of Federal Prosecution in the 2017 U.S. Attorney's Manual, "These principles were originally promulgated by Attorney General Benjamin R. Civiletti on July 28, 1980. While they have since been updated to reflect changes in the law and current policy of the Department of Justice, the underlying message to federal prosecutors remains unchanged." U.S. Dep't of Just., U.S. Att'ys' Manual § 9-27.001 (2017), *available at* https://www.justice.gov/archives/usam/archives/usam-9-27000-principles-federal-prosecution.

[213] U.S. Dep't of Just., Just. Manual § 9-27.001 (2020).

[214] *Id.*

[215] *Id.*

the military decision maker with "flexibility" assuring "regularity without regimentation" and preventing "unwarranted disparity."[216]

The federal principles of prosecution set forth in the Justice Manual, furthermore, nest within the modified proportionality test. Similar to the federal principles, which "should be read in the broader context of the basic responsibilities of federal attorneys: making certain that the general purposes of the criminal law . . . are adequately met, while making certain also that the rights of individuals are scrupulously protected,"[217] the proposed test likewise can be applied in the broader context of basic responsibilities of military justice decision makers. The modified proportionality test accounts not only for the general purposes in criminal law articulated in the Justice Manual, but it also considers the additional unique variable within the military justice system—maintenance of good order and discipline.[218]

The entire framework of the federal principles of prosecution can be incorporated into the test for military justice decision makers. Employing a test that inherently incorporates the civilian principles of prosecution may be exactly what Congress is seeking and ultimately restores faith in the military justice system.

The modified proportionality test also accounts for the federal principles of sentencing. Generally, sentencing decisions in the civilian system are founded upon the sentencing principles articulated in 18 U.S.C. § 3553(a).[219] This statute requires the federal district court sentencing judge to consider:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[220]

The sentence should be "sufficient, but not greater than necessary, to comply" with the aforementioned factors.[221] The statute affords the federal sentencing judge with discretion and the flexibility to allocate more weight to a particular factor or set of factors in light of the individual facts and

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[216] *Id.*

[217] *Id.* § 9-27.110.

[218] *See supra* text accompanying note 104.

[219] The Justice Manual also accounts for the sentencing principles in criminal law: "assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from offenders, and rehabilitation of offenders." Just. Manual § 9-27.110.

[220] 18 U.S.C. § 3553(a)(1)–(2).

[221] 18 U.S.C. § 3553(a).

circumstances of each case.[222] Section 3553(a) inherently accounts for the long-term impact on the individual defendant as well as those on society rather than focusing solely on one variable, the deterrence of criminal conduct.[223] The federal sentencing judge weighs all the factors from § 3553(a) while also accounting for the discretionary guideline sentence set forth in the U.S. Sentencing Guidelines Manual when rendering a criminal sentence.[224]

Similarly, military decision makers would also consider all the sentencing principles when applying the modified proportionality test. The military justice system recognizes five sentencing principles: rehabilitation of the wrongdoer, specific deterrence of the wrongdoer, general deterrence of others, retribution, and preservation of good order and discipline.[225] In 2016, Congress reaffirmed the importance of these sentencing principles when legislators amended Article 56 of the UCMJ.[226] The federal criminal sentencing principles are similar to those identified in the military justice context and offer an important guidepost.[227] By employing this test, the military justice decision maker will naturally account for the sentencing principles, bringing it more in line with the federal criminal system and making it more palatable to Congress.

The test enables military decision makers to implicitly incorporate all the sentencing principles into their decision-making. By analogy, this is akin to vegetable-infused applesauce for young children. Children need to eat their vegetables, but they frequently do not like the taste, do not understand why it is important, and naturally refuse to eat them. Cleverly, parents find creative ways to get their children to eat vegetables without the kids

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[222] *See* United States v. Booker, 543 U.S. 220, 264–65 (2005) (noting that Congress created the statute with a goal of "maintaining sufficient flexibility to permit individualized sentences when warranted").

[223] *See* 18 U.S.C. § 3553(a)(2) (listing deterrence as one of four factors informing the need for a sentence).

[224] *See* Booker, 543 U.S. at 245 (holding that the United States Sentencing Guidelines are advisory, not mandatory). *See generally* U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2021).

[225] MILITARY JUDGES' BENCHBOOK, *supra* note 109, para. 2-5-21 (noting that the five recognized principles of sentencing are "[r]ehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of [their] crime(s) and [their] sentence . . .").

[226] NDAA 2017, *supra* note 13, § 5301, 130 Stat. at 2919–20 (codified at 10 U.S.C. § 856). Congress frequently looks to the civilian system as a model for the military justice system. *See supra* text accompanying notes 73–74.

[227] *Compare* 10 U.S.C. § 853(c)(1)(B) (instructing courts-martial to consider "the impact of the offense on . . . the mission, discipline, or efficiency of the command of the accused and any victim of the offense"), *with* 18 U.S.C. § 3553(a)(4) (instructing courts to consider federal sentencing guidelines). The most noteworthy distinction between the military justice system and the federal criminal system is the military's added sentencing principle of good order and discipline. *See generally* Brenner-Beck, *supra* note 14, at 108 (analyzing how the good order and discipline concept sets apart military practice from the federal criminal system). Despite this noteworthy distinction, criminal sentences are based upon similar justifications for punishment in both the federal civilian and military systems. Ortiz v. United States, 138 S. Ct. 2165, 2175 (2018) (confirming that military courts are "'court[s] of law and justice'—'bound, like any court, by the fundamental principles of law'").

realizing it. One way is through vegetable-infused applesauce. Many kids love the taste of the applesauce and often happily ingest it without realizing that they are also consuming vegetables. Similarly, this test enables non-attorneys, who likely have not been trained in the sentencing principles and may not appreciate their importance, to consider all the sentencing variables without realizing it.[228]

Considering all the sentencing principles in their decision-making is particularly important considering military justice decision makers have an immense amount of discretion. Not only can commanders and military attorneys use this test in their decision-making, but military judges and administrative separation board members can also benefit from using this test. For example, in the court-martial process, military judges are typically bound only by the applicable maximum sentence of conviction, as military offenses rarely have a mandatory minimum term of years.[229] While Congress and the President have dictated maximum sentences, "they are set sufficiently high that they rarely operate as a realistic ceiling."[230] Unlike in the federal criminal setting, the military justice system does not yet have sentencing guidelines.[231] Thus, military justice decision makers have broad discretion.

The modified proportionality test enables military justice decision makers to exercise that discretion in an informed and well-reasoned manner while naturally accounting for all the sentencing principles within the military justice system. An explanation of how the sentencing principles within the military justice context interact with the variables of the modified proportionality test will further illustrate how the weighted balancing test works.

i. Rehabilitation

Rehabilitation is an important sentencing principle that is often overlooked and frequently misunderstood. This principle should not be viewed solely as one's potential for continued service. Rather, rehabilitation is much broader and includes one's capability for

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[228] The irony of comparing commanders to children in an article designed to assist military justice decision makers to maintain prosecutorial discretion is not lost on the authors, but the analogy is illustrative.

[229] *See* MCM, *supra* note 8, app. 12 (listing maximum punishments at courts-martial for various charges). Even spying during wartime, which once held a mandatory of punishment of death, 10 U.S.C. § 906 (2012), now carries a punishment of "death or such other punishment as a court-martial or a military commission may direct." 10 U.S.C. § 903 (2018). Convictions of certain crimes can carry a mandatory punitive discharge. For example, punishment for service members found guilty of rape or sexual assault "shall include dismissal or dishonorable discharge," with exceptions for plea deals and cooperating with investigations. 10 U.S.C. § 856(b).

[230] Bradford D. Bigler, *Rebalancing Military Sentencing: An Argument to Restore Utilitarian Principles Within the Courtroom*, 225 MIL. L. REV. 1, 3–4 (2017).

[231] *Compare* 10 U.S.C. § 853(c), *with* 18 U.S.C. § 3553(a). However, the 2022 NDAA directed that nonbinding military justice sentencing guidelines be created. NDAA 2022, *supra* note 2, § 539E, 135 Stat. at 1701–06 (to be codified at 10 U.S.C. § 853A).

rehabilitation in society in general.[232] "Rehabilitation seeks to accomplish future crime prevention through reformation" of the wrongdoer.[233] Some scholars have critiqued the current military justice system as failing to have a rehabilitative ethic. Scholar and retired Army judge advocate Evan Seamone argues that the military criminal system undermines rehabilitation efforts of the wrongdoer.[234]

Incorporating rehabilitation into the military justice decision-making process is important because Congress, the final arbiter of the system, cares.[235] The DoD has likewise recognized its importance. In 2018, while acting as the Under Secretary of Defense for Personnel and Readiness, Robert L. Wilkie issued guidance reaffirming a commitment to the rehabilitative ethic to DoD boards when reviewing whether to grant discharge upgrades: "It is consistent with military custom and practice to honor sacrifices and achievements, to punish only to the extent necessary, to rehabilitate to the greatest extent possible, and to favor second chances in situations in which individuals have paid for their misdeeds."[236] This guidance explicitly states that the military boards should consider "[w]hether the punishment, including any collateral consequences, was too harsh."[237] As the Manual for Courts-Martial requires in criminal sentencing and the DoD instructs military discharge boards, military justice decision makers should similarly account for the impact of collateral consequences on the offender's rehabilitation.[238]

Denying benefits to recipients of benefits-disqualifying discharges undermines their rehabilitation. Precluding a discharged service member suffering from a service-connected mental health condition from receiving VA health care "defies the moral obligation to advance the interests of both

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[232] MCM, *supra* note 8, R.C.M. 1001(b)(5) ("'Rehabilitative potential' refers to the accused's potential to be restored . . . to a useful and constructive place in society.").

[233] Bigler, *supra* note 230, at 18.

[234] Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1, 3 (2011).

[235] In 2018, Congress expanded eligibility for mental and behavioral health care at the VA for former service members with Other Than Honorable discharges. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 258(a), 132 Stat. 348, 826–28 (2018) (codified at 38 U.S.C. § 1720I). Congress passed this legislation in response to the increasing number of veteran suicides. Peggy McCarthy, *Veterans with "Bad Paper" Discharges Now Eligible for Mental Health Services*, HARTFORD COURANT (Mar. 27, 2018), https://www.courant.com/news/connecticut/hc-mental-health-vets-20180327-story.html. Although this expansion is limited to veterans who served more than 100 days and were deployed to a combat operation, or who were victims of sexual assault or harassment in the military, 38 U.S.C. § 1720I(b)(4), it is a reflection that Congress cares about those who have received benefits-disqualifying discharges.

[236] Wilkie Memo, *supra* note 47, attach. ¶ 6(a).

[237] *Id.* attach. ¶ 7(b).

[238] Uniformed officers should bear in mind that there is no expunction process afforded to recipients of less-than-Honorable discharges. States do not have the authority to change military records or upgrade discharge characterizations. The only recourse for service members is to request a correction of their records to DoD boards. *See* 10 U.S.C. §§ 1552, 1553.

the veteran and the society he will rejoin."[239] When commanders punish misconduct caused or exacerbated by a mental health condition incurred or aggravated by military service, the punishment fails to account for the stated sentencing philosophy of rehabilitation of the offender.[240] Instead, it actively militates against the service member's rehabilitation efforts.

Imposing a lifetime bar to VA health care on a wounded warrior not only fails to rehabilitate the individual but can also exacerbate their mental health condition as it continues to go untreated.[241] The bar "create[s] a class of individuals whose untreated conditions endanger public safety and the veterans as they grow worse over time."[242] The VA system was created "'[t]o care for him who shall have borne the battle, and for his widow, and his orphan' by serving and honoring the men and women who are America's Veterans."[243] Yet many of those who have borne the battle are excluded from those life-saving services for conduct that can be explained or mitigated by their service-inflicted mental health conditions. While not all service members suffering from a mental health condition who commit misconduct should remain in the military, it is critical that decision makers account for the lifelong impact of benefits-disqualifying discharges permanently undermining the service member's rehabilitation and second chance as a civilian.

The modified proportionality test enables military decision makers to properly account for rehabilitation of the offender by requiring the decision maker to consider the collateral consequences of the decision.

ii. Just Punishment

In addition to rehabilitation, punishing the wrongdoer is another sentencing principle in the military justice system.[244] Punishment of the offender may also be called retribution.[245] This sentencing principle also

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[239] Seamone, *supra* note 234, at 3. *See also* VETERANS LEGAL CLINIC, *supra* note 174, at 8 (explaining that "[t]he stakes could not be higher. Exclusion from the VA means the denial of housing for those who are homeless, the denial of healthcare for those who are disabled, and the denial of support to those whose disabilities prevent them from working.") (footnote omitted).

[240] Seamone, *supra* note 234, at 3. Rules for Court Martial 1002(f) states in part that when imposing a sentence, the court-martial should take into consideration a number of factors including "the need for the sentence to . . . rehabilitate the accused." MCM, *supra* note 8, R.C.M. 1002(f)(3).

[241] *See* Joel L. Young, *Untreated Mental Illness*, PSYCH. TODAY (Dec. 30, 2015), https://www.psychologytoday.com/us/blog/when-your-adult-child-breaks-your-heart/201512/untreated-mental-illness ("The most obvious effect of untreated mental illness is a steady—and often rapid—decline in mental health. Mental illness will not go away on its own, and the longer it persists, the harder it is to treat.").

[242] Seamone, *supra* note 234, at 3.

[243] *Mission, Vision, Core Values & Goals*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/about_va/mission.asp (Mar. 26, 2021) (quoting President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865)).

[244] MILITARY JUDGES' BENCHBOOK, *supra* note 109, para. 2-5-21.

[245] Bigler, *supra* note 230, at 16.

accounts for the seriousness of the offense.[246] In determining the seriousness of the offense, military justice decision makers should consider the holistic impact on the victim, including the economic, physical, and psychological impacts of the offense.[247] Like civilian federal prosecutors, they must also consider the broader impact of the offense on the military and civilian community.[248]

Serious egregious conduct calls for serious punishment.[249] Correspondingly, the victim's right to accountability for the crime and justice is a significant consideration in prosecutorial decision-making.[250] The test accounts for the long-term impact of the offense on the victim as part of the good order and discipline variable. In the test, military justice decision makers consider the victim's needs and interests as the preeminent independent variable, as they are inextricably intertwined with the maintenance of good order and discipline.

Military justice decision makers, particularly for less serious crimes, should not simply narrowly consider whether the accused service member is, in fact, punished. Rather, military justice decision makers should also account for the long-term consequences to the individual wrongdoer and to society when making decisions. The modified proportionality test ensures consideration of the immediate impact of the punishment as well as the long-term consequences to both the accused service member and society.

In many cases, the cost to society does not disappear but rather is shifted elsewhere. Specifically, there is a large cost to society when less-than-Honorable discharges bar the former service member from health care and benefits at the VA.[251] This shifts the burden from the immense, often issue-focused resources at the VA, to local communities, informal family networks, and nonprofit organizations.[252] This burden-shifting has been described as "self-defeating."[253] In particular, discharged service members suffering from untreated PTSD are "already prone to violent outbursts and loss of impulse control[,] rais[ing] concerns fundamental to our self-interest as a nation."[254] Shifting the burden away from the VA to

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[246] MILITARY JUDGES' BENCHBOOK, *supra* note 109, para. 2-5-21.

[247] U.S. Dep't of Just., Just. Manual § 9-27.230 (2020).

[248] *See id.* (instructing that law enforcement resources should be directed toward "the national priorities" as well as "problems of particular local or regional significance.")

[249] *See, e.g.*, Kyle Rempfer, *Army Chief Warrant Officer Sentenced to Life in Prison over Sexual Assault of a Minor*, ARMY TIMES (July 9, 2020), https://www.armytimes.com/news/your-army/2020/07/09/army-chief-warrant-officer-sentenced-to-life-in-prison-over-sexual-assault-of-a-minor (reporting that former Army Chief Warrant Officer Daniel Kemp was sentenced to life in prison for repeatedly sexually abusing his adopted children).

[250] U.S. Dep't of Just., Just. Manual § 9-27.230 (2020).

[251] Maxine Waters & Jonathan Shay, Opinion, *Heal the "Bad Paper" Veterans*, N.Y. TIMES (July 30, 1994), https://www.nytimes.com/1994/07/30/opinion/heal-the-bad-paper-veterans.html.

[252] *Id.*

[253] *Id.*

[254] Brooker et al., *supra* note 140, at 15.

larger society is not invisible—"when we are willing to look they re-emerge from obscurity in the homeless shelters, prisons and jails, and morgues of every city and state in the nation."[255]

The test also accounts for the effect on the offender service member's family. The collateral consequences of a benefits-disqualifying discharge may be trebled when they reach a separated service member's family, particularly if military service caused a disability. These consequences are often the same for minor offenses as for much more serious felony convictions. For example, Survivors' and Dependents' Educational Assistance (DEA) benefits are available to dependents of a permanently and totally disabled service-connected veteran.[256] This program offers education and training to qualified dependents of disabled veterans.[257] In addition to being precluded from receiving educational benefits, family members of service members with benefits-disqualifying discharges lose access to free or affordable health care, and may also be precluded from receiving monetary benefits.[258]

Notably, the most serious offenses are not impacted by the modified proportionality test. Military justice decision makers should still go through the analysis in every case, as there may be small ways to serve justice by taking care of the offender's family, particularly in situations in which a family member is a victim of the offender's crime.[259]

Employing the modified proportionality test will enable military justice decision makers to view the process and their decisions holistically, including accounting for all aspects of the sentencing principle of punishing the wrongdoer.

iii. Protection of Society

The third sentencing principle in the military justice system is protecting society from the offender. Society must be protected from the possibility of the service member committing future crimes. Military justice decision makers must account for the broader risks that the accused service member

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[255] *Id.* at 16 (footnotes omitted).

[256] 38 U.S.C. § 3501(a)(1).

[257] 38 U.S.C. §§ 3500–3501. Furthermore, individual states offer even more generous educational opportunities to veterans' family members. For instance, in Texas, the Hazlewood Act provides qualified veterans, spouses and dependent children with an allotted tuition exemption at public institutions of higher education in Texas. TEX. EDUC. CODE tit. 3, § 54.341 (2013). However, benefits under the Hazlewood Act are only available for those who receive an Honorable or General discharge and their dependents. *Hazlewood and Education Services*, TEX. VETERANS COMM., https://www.tvc.texas.gov/education/hazlewood/ (last visited Oct. 2, 2022).

[258] The VA offers survivors of veterans who die while on active duty or because of service-connected disabilities monthly insurance benefits and tax-free dependency and indemnity compensation (DIC). 38 U.S.C. §§ 1312–1313.

[259] 10 U.S.C. § 1059; 32 C.F.R. § 111.1–111.6 (2021); U.S. DEP'T OF DEF., INSTR. 1342.24, TRANSITIONAL COMPENSATION (TC) FOR ABUSED DEPENDENTS (23 Sept. 2019).

poses beyond the immediate impact on the unit. The modified proportionality test empowers decision makers to analyze their cases more broadly.

The modified proportionality test also accounts for the fact that service members are punished for crimes that are not criminalized in the civilian world. The military justice system punishes people whose crimes were specific to the military but pose no risk to society otherwise. Service members who receive benefits-disqualifying discharges can endure civilian-life consequences for military-specific crimes. For example, a service member can be administratively separated with an OTH discharge—even in peacetime—for absence without leave, disrespect, disobedience, insubordinate conduct, and failure to obey an order.[260] This test forces decision makers, often for the first time, to consider the lifelong impact of their decisions for someone simply not coming to work on an ordinary day in garrison.[261]

Nothing in this test requires a specific decision. Although the above example discusses a case where military decision makers fail to use the test, resulting in an overly harsh decision, there is nothing in the test that prevents severe consequences in cases that warrant them. In the military justice system, the consequences need not be limited to a lengthy term of imprisonment but also could result in the removal of benefits if the crime so warrants it.

iv. Specific Deterrence

Specific deterrence of the offender "seeks to preclude future crime by incapacitating the criminal for the future commission of crime."[262] Surprisingly, however, service members are frequently unaware of the likelihood or impact of a benefits-disqualifying discharge.[263] While service members facing a less-than-Honorable discharge may be warned prior to their separation that they *may* lose some or all their VA benefits, many have no idea they are actually *likely* to lose benefits, nor are they certain they will ever need those benefits.[264] Accordingly, the deterrent effect upon the individual service member is nearly "negligible."[265]

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[260] 10 U.S.C. §§ 886 (AWOL), 889 (disrespect toward a superior commissioned officer), 890 (willfully disobeying a superior commissioned officer), 891 (insubordinate conduct), 892 (failure to obey an order). Under the 2022 NDAA, commanders still have prosecutorial discretion for these crimes. *See supra* notes 65–66 and accompanying text.

[261] This example is not contemplating more aggravated AWOL circumstances.

[262] Bigler, *supra* note 230, at 18.

[263] Jeremy R. Bedford, *Other Than Honorable Discharges: Unfair and Unjust Life Sentences of Decreased Earning Capacity*, 6 U. PA. J.L. & PUB. AFFS. 687, 703–05 (2021).

[264] *Id.* at 704–05; VETERANS LEGAL CLINIC, *supra* note 174, at 11 (finding that the VA denied eighty-five percent of veterans with bad-paper discharges who applied for benefits).

[265] Bedford, *supra* note 263, at 704 ("While no comprehensive study exists analyzing the deterrent effect of potential loss of disability compensation, numerous criminological studies show that certainty of punishment has a larger deterrent effect than the severity of punishment.")

The modified proportionality test overcomes the pervasive lack of understanding among military justice decision makers of the least understood and most often overlooked collateral consequences. The test naturally incorporates the collateral consequences of a benefits-disqualifying discharge in the decision-making process. Furthermore, the test enables decision makers to account for the longevity and permanency of their decisions on the offender. Defense counsel employing the test will also be better able to inform their clients about the long-term impact of the possible dispositions.

The test accounts for the application of this principle in the context of military-specific crimes. When a service member receives a benefits-disqualifying discharge for military-specific crimes, the specific deterrence variable does not apply. When the military separates a service member for military-only crimes, they are not deterred from committing those crimes again because the conduct is not a crime in the civilian sector. The test considers that specific deterrence as a sentencing principle is not achieved in this context, and therefore it does not overestimate the deterrent effect when weighing the variables.

Military justice decision makers must use their individual discretion depending on the decision to be made. If a service member commits a violent offense, for example, the test will allow for punishment with a focus on specific deterrence. In those circumstances, the collateral consequences, such as the loss of VA benefits, may not be excessive. The application of the test does not prevent the exercise of prosecutorial discretion necessary to deter the wrongdoer.

v. General Deterrence

General deterrence is not focused on the wrongdoer, but rather "hopes to dissuade others from the commission of future crime through the punishment imposed in the current case."[266] This sentencing principle is related to, but distinct from, impact on good order and discipline. Not directly focused on reducing crime, good order and discipline "seeks to produce a disciplined unit, with crime reduction being one of the many positive externalities."[267] The Justice Manual emphasizes the importance of this sentencing principle: "Deterrence of criminal conduct, whether it be criminal activity generally or a specific type of criminal conduct, is one of the primary goals of the criminal law."[268]

The modified proportionality test allows for general deterrence to be weighted more heavily in the appropriate case. The test enables military justice decision makers to look beyond deterring service members in the unit. It requires that military justice decision makers adopt a broader vision

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[266] Bigler, *supra* note 230, at 18.

[267] *Id.*

[268] U.S. Dep't of Just., Just. Manual § 9-27.230 (2020).

of whom they wish to deter. For example, in a child rape case, the military justice decision maker should not only be focused on deterring service members in that unit, but they should also be mindful of deterring society at large from this horrific behavior.

Yet, in other cases, the test prevents military justice decision makers from overestimating the impact of general deterrence. Decision makers in the civilian system frequently miscalculate the impact of a punishment's ability to deter others.[269] Relatedly, the Non-Binding Disposition Guidance's nearly sole focus on maintenance of good order and discipline reflects the military justice system's overemphasis of this variable.[270] Good order and discipline is the independent and preeminent variable. However, it is not the only variable in the equation.

While striking the proper balance in the weighting of the variables, military justice decision makers would also inherently consider all the sentencing principles when applying this test. As the Justice Manual instructs federal civilian prosecutors, the proposed test also provides the military justice decision makers with a convenient tool for exercising prosecutorial discretion while "promot[ing] consistency" across the branches of the military without "rigid uniformity."[271]

III. CASE ILLUSTRATIONS

Using the modified proportionality test, this part illustrates how the test works in two applied examples.[272] The examples will demonstrate that military justice decision makers can employ the test in both types of cases described in the 2022 NDAA—non "covered offenses" where commanders will still exercise prosecutorial discretion, as well as "covered offenses" where uniformed judge advocates will exercise prosecutorial discretion.[273] The test variables are presented in a sequential order, but their analysis will often occur simultaneously or, perhaps, in a different order. Please note that the following examples include discussion of violence, death, and sexual assault.

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[269] *See generally* Johannes Andenaes, *General Prevention Revisited: Research and Policy Implications*, 66 J. CRIM. L. & CRIMINOLOGY 338 (1975) (discussing research on general deterrence and pointing to several studies showing that the impact on general deterrence is overestimated); *see also* Tom Tyler, Yale L. Sch., Presentation at the SELA Meeting: Legitimacy and the Maintenance of Public Order 5 (June 7–10, 2012), https://law.yale.edu/sites/default/files/documents/pdf/sela/Tyler_Mexico_talk_final.pdf (noting that studies generally conclude that "deterrence is found to have, at best, a small influence on people's behavior," while "[m]ore general reviews of deterrence research conclude that the relationship between risk judgments and crime was 'modest to negligible'").

[270] *See generally* MCM, *supra* note 8, app. 2.1.

[271] U.S. Dep't of Just., Just. Manual § 9-27.140 (2020).

[272] The cases presented in this section are fictional and designed solely to explain the application of the modified proportionality test.

[273] NDAA 2022, *supra* note 2, § 533, 135 Stat. at 1695–96 (to be codified at 10 U.S.C. § 801).

A. *Minor Misconduct*

Lance Corporal (LCpl) Mandy Lopez enlisted in the Marine Corps at age seventeen. She chose to be an aircraft rescue and firefighting specialist; after her initial training went well, she was stationed in Okinawa, Japan. A few months later, a Japanese submarine patrol plane crashed on its approach into the Marine Corps air station. The aircraft flipped and burst into flames. LCpl Lopez and other Marines from her crew were the first on the scene. After extinguishing enough flames, the crew approached the wreckage to look for survivors. LCpl Lopez found one survivor barely hanging on to life. LCpl Lopez immediately recognized the man as her friend Kenji. She carried Kenji away from the wreckage. Kenji later died in LCpl Lopez's arms. Despite the carnage, LCpl Lopez's unit did not offer anyone counseling. LCpl Lopez and her friends never talked about what happened.

About five months following the plane crash, LCpl Lopez and her unit were in South Korea on a joint training exercise when a Marine Corps helicopter crashed after hitting power lines. LCpl Lopez and her crew were the first to arrive. She was ordered to place body parts into trash bags because the crash site was in a swampy area. When she was relieved many hours later, she went back to her tent and could not process anything. She felt numb.

After this second crash, LCpl Lopez began to drink alcohol for the first time in her life. After many months, however, the alcohol did not change how she felt. After two years in Okinawa, she transferred back to a duty station in Cherry Point, North Carolina, near where she grew up. She wanted to be near her family. When she saw her family members again, they immediately noticed a change. LCpl Lopez would get angry easily and did not seem to have many friends. She was totally different than the teenager who left just a little more than two years before.

While LCpl Lopez was stationed at Cherry Point, an old high school friend introduced her one Sunday to marijuana. She tried it without even thinking about it. The next day, when LCpl Lopez reported for duty, she was randomly selected for a urinalysis. Before the results of the urinalysis were back, LCpl Lopez admitted to her chain of command that she had used marijuana. She was perfunctorily enrolled in mandatory drug and alcohol counseling and shown no emotional support. She felt like she had let everyone down and even contemplated suicide.

Later that same week, LCpl Lopez was late to formation. She slept through physical training at 0630 but was present for work call at 0900. The command could not believe that LCpl Lopez was late. The unit added a failure to repair charge to the nonjudicial punishment it issued later that week. Among other punishments, her commander reduced LCpl Lopez to the rank of Private, the lowest enlisted rank.

During her drug and alcohol counseling, now-Private (Pvt) Lopez's counselor recommended that she go to the mental health clinic on post.

Pvt Lopez trusted her counselor, so she went. After several appointments, a psychologist diagnosed her with PTSD and major depressive disorder.

After she served the punishment, Pvt Lopez's First Sergeant called her into an office and showed her paperwork that said that she was being considered for separation from the Marine Corps for illegal drug use. The First Sergeant said that she could "make it easy" by waiving her rights to an administrative separation board and to an attorney. Crushed and feeling helpless, Pvt Lopez waived her rights.

The entire chain of command recommended an OTH discharge characterization. In his recommendation for an OTH discharge characterization, the company commander stated, "Drug use is not tolerable." The battalion commander stated, "Must send a strong message that this is not OK." The brigade commander reasoned, "Support chain of command's recommendations." The staff judge advocate did not justify her recommendation for an OTH discharge in writing, and the Commanding General did not provide any rationale for approving the chain of command's unanimous recommendations.

Life after military service was difficult for now-Ms. Lopez. She started living at home again despite having saved some money from her time in service. She thought about suicide many times. At her mother's behest, she applied to be a firefighter at multiple fire departments, only to be immediately denied upon showing the hiring manager her DD Form 214, which reflected her OTH discharge for "Pattern of Misconduct." One day while sitting at home, a Marine friend called Ms. Lopez to check on her and give her some advice. The friend, who had been diagnosed with PTSD, had started seeing a therapist at the closest Vet Center, a VA-funded resource that provides counseling to many former service members. The friend convinced Ms. Lopez to call the Vet Center, but because Ms. Lopez had neither deployed in support of a contingency operation nor was a victim of Military Sexual Trauma, the Vet Center would not see her.

After the Vet Center denied her, Ms. Lopez effectively gave up on life, and her mother noticed. Her mother, worried that her daughter would kill herself, convinced Ms. Lopez to go to the emergency room. She saw a psychiatrist, who, after a short interview, agreed with the previous PTSD and major depressive disorder diagnoses and opined that they began with the trauma associated with the aircraft crashes in Asia. Things started to get a bit better after Ms. Lopez started taking antidepression medication and found a civilian therapist. She found a job working for a family friend on a landscaping crew.

Ms. Lopez never earned much more than minimum wage over the next ten years, as no large company would hire her with her discharge type and characterization. She lost eligibility for health insurance on her parents' plan as of her twenty-sixth birthday, and she could no longer afford her sporadic therapy appointments. Upon losing health insurance, Ms. Lopez went to the

local VA Health Clinic, as she had received a letter from VA several years back telling her that she might be eligible for health care coverage. Unfortunately, when the clerk looked at her DD Form 214, he turned her away and told her to come back if she got a discharge upgrade.

Ms. Lopez, now thirty, works as a long-haul truck driver. While she likes the solitude and seeing the country, she feels lost. Every time she looks for another job, nobody will hire her with her DD Form 214 stating that she committed misconduct and that her discharge was not under honorable conditions. Without treatment, she continues to feel depressed and contemplates suicide again.

While there is little question that then-LCpl Lopez should have faced consequences for marijuana use, her command's sole focus on the anticipated impact that the disposition decision would have on good order and discipline created easily predictable permanent consequences. The command was fully aware of LCpl Lopez's diagnoses, and it understood that self-medication is a classic symptom of undiagnosed and untreated PTSD,[274] but it simply did not care.

If LCpl Lopez's command had applied the modified proportionality test, it may have arrived at a different decision on how to handle LCpl Lopez's misconduct. At a bare minimum, it would have made a more informed decision. In this applied example, the command did not hesitate to perform the typical analysis of the independent variable—the "anticipated impact the decision would have on the maintenance of good order and discipline." Nonetheless, the command failed to specifically articulate how it believed an administrative separation with an OTH discharge characterization would maintain good order and discipline, providing nothing beyond perfunctory statements of intolerance and general deterrence in the unit. To compare this with a targeting decision, the command did not articulate the concrete and direct advantage anticipated.

Decision makers who adopt a practice to provide more granularity in their recommendation, however, are forced to think about the issue more deeply, and might even seek advice on general deterrence from a judge advocate. They must articulate the anticipated impact on good order and discipline, including how long the impact would last. Even if the ultimate decision about the impact that the action would have on maintaining good order and discipline does not change, the decision is less likely to be based on emotion, bias, and flawed heuristics, as the justification would be reviewable, discussable, and debatable. This logic would also place the

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[274] *See* Murdoch Leeies et al., *The Use of Alcohol and Drugs to Self-Medicate Symptoms of Posttraumatic Stress Disorder*, 27 DEPRESSION & ANXIETY 731, 731 (2010) (finding that "[s]elf-medication is a common behavior among people with PTSD in the [general population], yet has potentially hazardous consequences").

decision maker more in line with decision makers in the civilian system who often must justify their prosecutorial or sentencing decisions.[275]

The starkest omission in this case, however, was the lack of attention to the easily anticipatable collateral consequences. The first collateral consequences that the command should have assessed were those to Ms. Lopez. Even a cursory look at readily available resources would have informed both the command and staff judge advocate that their actions would serve as a form of a harsh life sentence for Ms. Lopez.

If Ms. Lopez's leaders had applied the test and considered the collateral consequences of their decision, they would have learned that she would likely be permanently barred from receiving VA health care benefits for the PTSD and major depressive disorder that her military service caused and are well-documented in her service treatment records. While Ms. Lopez is legally entitled to VA health care for service-connected conditions like these, the VA's malfeasance in caring for former service members like Ms. Lopez is well-documented and essentially universal.[276] Further, Ms. Lopez is not eligible for counseling at VA-funded Vet Centers.[277] Given that former service members with mental health diagnoses have a "significantly elevated suicide risk,"[278] the unarticulated, and therefore more likely to be uninformed and unchecked, decisions based solely on an estimated impact on good order and discipline can be foreseeably deadly.

Beyond health care benefits, the decision makers never considered that their decision permanently barred Ms. Lopez from receiving education benefits, disability compensation, and almost all other VA benefits. In addition to revoking her eligibility for GI Bill benefits, the OTH discharge characterization bars her from participating in VA-sponsored Veteran Readiness and Education programs designed to help her transition from the military to the civilian workforce.

The decision makers did not consider the likely lifetime "scarlet letter" nature of the discharge type and characterization they based solely on a gut feeling about the impact on good order and discipline. Absent a change to her discharge characterization, which is unlikely,[279] she will forever be saddled with the language "Pattern of Misconduct" and "Other Than Honorable," any time she applies for a job or to go to college.[280] As with the

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[275] *See supra* notes 123–26 and accompanying text.

[276] OUTVETS ET AL., *supra* note 140, at 17–22.

[277] *See* 38 C.F.R. § 17.2000 (2021) (explaining eligibility for readjustment counseling for service members and their families).

[278] Rajeev Ramchand, *Suicide Among Veterans*, RAND CORP. (2021), https://www.rand.org/pubs/perspectives/PEA1363-1.html.

[279] *See* Steve Beynon, *"Thousands" of Veterans with Bad Paper Discharges Might Not Know They Can Upgrade*, STARS & STRIPES (Oct. 7, 2020), https://www.stripes.com/veterans/thousands-of-veterans-with-bad-paper-discharges-might-not-know-they-can-upgrade-1.647817 (noting that obtaining a discharge upgrade is "not easy" and "can involve legal hurdles and a lengthy bureaucratic process").

[280] *See supra* note 186–89 and accompanying text.

other collateral consequences, the impact may be permanent, even though the impact the decision had on good order and discipline was fleeting.

The related impact on society will also be profound. Society will never benefit from Ms. Lopez reaching her full potential and contributing fully to society, as her discharge status significantly compromises her employability. Following the Vietnam War, the Joint-Service Study Group concluded that employers prefer honorably discharged veterans to nonveterans, but prefer nonveterans to veterans with less-than-Honorable discharges.[281] Further, the Joint-Service Study Group found that "there is a distinct hierarchy of employer preference which parallels the severity of the discharges."[282]

Discharge-based discrimination continues to this day.[283] For behavior that is no longer consistently prosecuted in most of the United States, Ms. Lopez's commanders assessed, even if unknowingly, that this young woman who volunteered to serve in the Marine Corps should have a tangible and irreversible negative impact on her employability, and should likely never hold a job with any government organization or a leadership role in a large corporation. While working as a long-haul truck driver is an honorable and critically important job, Ms. Lopez wishes she had other options. She does not, however, and likely never will.

The impact to society was simply ignored. For instance, the complete failure of decision makers to consider the impact of their decisions on mental health access is a significant contributor to the veteran suicide epidemic. Without VA mental health treatment, former service members like Ms. Lopez have a thirty percent higher suicide rate than those whose access has not been barred.[284] "While the suicide rate for those in VA care is falling, the rate for those veterans outside VA care is increasing."[285] As a result, commanders must be aware of their power in addressing the veteran suicide epidemic when they make decisions that could bar a service member's access to health care.

Relatedly, state and local governments and nonprofit organizations must bear the cost of and responsibility for treating and caring for former service members like Ms. Lopez, even though their disabilities are directly related to military service. Without even realizing it, the decision makers in

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[281] U.S. GEN. ACCT. OFF., FPCD-80-13, MILITARY DISCHARGE POLICIES AND PRACTICES RESULT IN WIDE DISPARITIES: CONGRESSIONAL REVIEW IS NEEDED 53 (1980).

[282] *Id.*

[283] *See, e.g.*, Peterson & Mody, *supra* note 188; Marcy L. Karin, *"Other Than Honorable" Discrimination*, 67 CASE W. RSRV. L. REV. 135, 156–79 (2016) (examining the impact of OTH discharges in the context of reemployment protection).

[284] VETERANS LEGAL CLINIC, *supra* note 174, at 21.

[285] *Id.*; *see also* OFF. OF MENTAL HEALTH & SUICIDE PREVENTION, U.S. DEP'T OF VETERANS AFFS., 2020 NATIONAL VETERAN SUICIDE PREVENTION ANNUAL REPORT 18, https://www.mentalhealth.va.gov/docs/data-sheets/2020/2020-National-Veteran-Suicide-Prevention-Annual-Report-11-2020-508.pdf (finding that the suicide rate of veterans with recent VA health care use decreased by 2.4 percent between 2017 and 2018, while the suicide rate of those without such use increased by 2.5 percent).

Ms. Lopez's case have effectively absolved the federal government of all responsibility for Ms. Lopez's well-being, even though her military service indisputably caused the problem. Members of Congress have repeatedly expressed increased interest in providing ongoing care to former service members suffering with mental health diagnoses.[286]

Former service members with untreated mental health conditions like Ms. Lopez are also more likely to commit crimes.[287] Finally, many former service members with discharge types and characterizations like Ms. Lopez are homeless because of the devastating impact of the collateral consequences. Despite massive VA efforts to prevent veteran homelessness,[288] such efforts are largely unavailable for former service members like Ms. Lopez because of the type and characterization of their discharge.

Decisions that have such a large societal impact, such as on veteran suicide, incarceration, and homelessness, must be made holistically. While the impact of a decision on good order and discipline is critically important, the concrete and direct impact of the decision is largely fleeting, whereas the collateral consequences are permanent. It appears that decision makers may not realize the immense impact their decisions have not just on their unit, but as importantly, the individuals involved in the process and the entire nation. Employing the modified proportionality test is a method to help prevent the irresponsible use of power that Congress increasingly laments.

Had the decision makers in this case performed the modified proportionality test, they would have spotted these issues and explored options to maintain good order and discipline without disproportionate collateral consequences. To use a targeting analogy, they could have chosen a different weaponeering solution to reduce the risk of collateral damage while still achieving the intended effect.

For example, while adjudging an Honorable or General discharge characterization is always an option to preserve benefits, it often is not the only option. If Ms. Lopez had been separated solely for her drug use and not also because of lateness, her misconduct-based discharge with an OTH characterization would not have legally disqualified her from VA benefits. In this case, the VA disqualified Ms. Lopez because it determined that her misconduct was "willful and persistent."[289] Because the unit did not apply the modified proportionality test, it failed to consider that a simple modification of the basis of separation could serve the intended effect of general deterrence while also not legally precluding Ms. Lopez from VA

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[286] For example, in 2016, Congress passed the Fairness for Veterans Amendment to provide more favorable discharge characterization reviews to many suffering from service-related mental health conditions. NDAA 2017, *supra* note 13, § 535, 130 Stat. at 2123–24 (codified at 10 U.S.C. §§ 1553(d)(3)); *see supra* note 46.

[287] VETERANS LEGAL CLINIC, *supra* note 174, at 2, 21.

[288] For a summary of ongoing efforts, see *VA Homeless Programs*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/homeless/ (Sept. 2, 2022).

[289] 38 C.F.R. § 3.12(d)(4) (2021).

benefits, including health care. Further, the command and defense counsel could have mitigated the risk that the VA would misjudge Ms. Lopez's benefits eligibility by linking her with a veterans service organization (VSO) or law clinic before her separation, while also explicitly indicating in the administrative separation record that the discharge was not based on persistent misconduct.[290] The resources to perform this analysis and make such indications to the VA have been available for almost a decade.[291]

The modified proportionality test is simply an attempt to get those who make decisions within the military justice system to consider what has been known for decades. During the Vietnam War, a 1972 DoD task force concluded, "The combination of penalties imposed by other than honorable discharges consign many veterans to a hopeless cycle of: Joblessness, perpetual underemployment, drug addiction, chronic disease and despair, a life of poverty, crime and imprisonment."[292]

Fifty years later, decision makers in the military justice system are still ignoring these collateral consequences. While such ignorance was tolerated for decades, the 2022 NDAA has changed the operating environment.

B. *Serious Misconduct*

The modified proportionality test is designed to work not just for minor misconduct but also in cases involving more serious crimes. Consider a fictional sexual assault case that resembles common ones in the military justice system.[293]

After graduating from high school and enlisting in the Army for four years of active duty, then-Private Soren Miller graduated from his initial entry training as an infantryman. Two years after enlisting, now-Sergeant Miller deployed with his unit to Afghanistan. During his year-long deployment, he fought in numerous engagements, earning a Combat Infantryman Badge. Despite his steady performance and strong leadership skills, Sergeant Miller saw horrific things. Upon redeployment to his home duty station, Sergeant Miller experienced flashbacks and nightmares and became hypervigilant. He started drinking alcohol excessively and attempted suicide. Sergeant Miller

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[290] For specific guidance, see Brooker et al., *supra* note 140, at 186–90, 192–94. The command could also take steps to increase the likelihood that Ms. Lopez could get the VA health care to which she is entitled even with an Other Than Honorable discharge characterization, but such action itself proves the value of the modified proportionality test, as the test would make them aware that such mitigating steps are possible and potentially necessary.

[291] *Id.* at 192–94.

[292] *Administrative Discharge Procedures and Discharge Review: Hearings on H.R. 52, H.R. 262, H.R. 548, H.R. 549, H.R. 647, H.R. 867, H.R. 1186, H.R. 2455, H.R. 2964, H.R. 5254, H.R. 5305, H.R. 5306, H.R. 5307, H.R. 5592, & H.R. 7584 by the Subcomm. on Mil. Pers. of the H. Armed Servs. Comm.*, 94th Cong. 453 (1975) (statement of Rep. Louis Stokes).

[293] *See supra* notes 10–11.

visited the on-post mental health clinic several times, culminating in an Army psychiatrist diagnosing him with PTSD.[294]

A few months later, Sergeant Miller was assigned to supervise another soldier, Private Naomi Smith. Private Smith was one of very few women in their nearly all-male infantry unit. Sergeant Miller made several sexual advances, including asking her out and commenting on her appearance. Private Smith rejected his advances, which made Sergeant Miller angry.

One evening during a party at the junior enlisted barracks, Sergeant Miller saw Private Smith. He offered Private Smith a cup of alcohol, which she accepted. About an hour later, Sergeant Miller asked Private Smith if they could go to a more private place to talk. Private Smith looked uneasy but agreed, and they both walked upstairs to her room. After a few minutes of talking alone in her room, Sergeant Miller attempted to kiss Private Smith, but she pushed him away. Sergeant Miller grew enraged, pushed her onto her bed, and sexually assaulted her.[295]

The next day, Private Smith confided in a friend about what had happened. The friend encouraged her to tell her first sergeant what happened. A few days later, Private Smith told her first sergeant that Sergeant Miller sexually assaulted her. Her first sergeant immediately reported the assault to the company commander. The command team ensured Private Smith was assigned a special victims' counsel (SVC).[296] The command team also reported the assault to the U.S. Army Criminal Investigation Division (CID).[297] After talking to her SVC, Private Smith decided to cooperate with law enforcement and file an unrestricted report.[298]

The first place military justice decision makers could employ the modified proportionality test is in deciding which level of disposition is appropriate. Pursuant to the 2022 NDAA, the decision maker in this hypothetical is the special trial counsel.[299]

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[294] For purposes of this hypothetical, assume that the medical provider did not issue Sergeant Miller a profile as he was still able to perform his regularly required duties. A "profile" consists of documentation of a service member's physical limitations and serves as the medical provider's recommendation to the service member's commander.

[295] For purposes of this example, the term "sexual assault" is used in a colloquially broad context to include the most serious of the offenses under UCMJ Article 120. *See* 10 U.S.C. § 920 (defining rape, sexual assault, aggravated sexual conduct, and abusive sexual contact).

[296] A special victims' counsel (SVC) is a uniformed judge advocate who represents the interests of the victim. The SVC's primary duty is to represent the best interests of the victim client. *Army Special Victims' Counsel*, JAGCNET, https://www.jagcnet.army.mil/Sites/SVCounsel.nsf (last visited Oct. 2, 2022).

[297] CID is the primary federal law enforcement agency for the Army. *CID Mission*, DEP'T OF THE ARMY: CRIM. INVESTIGATION DIV., https://www.cid.army.mil/mission.html (Sept. 9, 2022).

[298] In the military, sexual assault and rape victims have the option of filing an unrestricted report or restricted report. While an unrestricted report will trigger the initiation of an official criminal investigation, a restricted report will not. 32 C.F.R. § 103.6(a) (2021).

[299] If the case took place prior to the implementation of the 2022 NDAA, this decision would be withheld to the first O-6 commander in the accused service member's chain of command. *See* Withholding Initial Disposition Authority, *supra* note 98.

Employing the test, the independent variable to consider is the preservation of good order and discipline, and one must articulate the rationale. Here, the accused service member sexually assaulted a subordinate soldier. There are very few things that can undermine good order and discipline more than a superior soldier subjecting a subordinate to sexual violence. This horrific crime was a complete violation of trust. It erodes the very unit cohesion necessary to produce a disciplined force. The military justice system would also lose credibility if it failed to hold Sergeant Miller accountable, thereby further undermining good order and discipline. Relatedly, the impact of a harsh punishment could have a positive impact on good order and discipline.

The level of disposition must also account for the seriousness of the offense, which includes the impact on the victim and military community. Private Smith is deserving of justice and accountability for the crime to which she was subjected. There is also a need to choose a disposition method that would protect other members of the unit from Sergeant Miller if he is found guilty. Ensuring that he does not commit this crime again is paramount. Simply discharging him from the military would not address the real risk he poses to society. Incapacitating him—only a court-marital can impose imprisonment—may be necessary. Others beyond those in his unit must also be dissuaded from committing the crime.

After articulating this rationale to their superior, the special trial counsel decides that the best thing to do to maintain good order and discipline is to refer the case to the most serious level of court-martial, general court-martial.

But the special trial counsel's analysis does not stop there. Before they make a final decision, they analyze the dependent variable, the collateral consequences to the accused service member, society, and the victim in light of the federal prosecution and sentencing principles.

The collateral consequences to Sergeant Miller are significant. He was in several firefights in Afghanistan, attempted suicide, and was diagnosed with PTSD. If he is issued a punitive discharge at a court-martial, he will receive a lifetime bar from not only receiving disability compensation for any service-connected injuries post-discharge, but he will also be barred from health care at the VA for his service-connected PTSD. His ability to be rehabilitated will likely be undermined without treatment for his combat-caused mental health condition. Yet, Sergeant Miller did not commit a nonviolent or military-specific crime such as disrespect or absence without leave; he committed a violent felony-level offense.

Applying the balancing test, the special trial counsel will likely determine that the maintenance of good order and discipline is not excessive considering the collateral consequences to Sergeant Miller. Thus, the special trial counsel will likely decide to refer the case to general court-martial. This case example illustrates that the modified proportionality test does not favor a particular outcome and can be applied even in serious felony–level cases.

CONCLUSION

The Army Judge Advocate General has called military justice decision makers to "transform and succeed together."[300] Part of this "transformational change"[301] is the need to fundamentally rethink the approach to military justice actions.

Too often, military justice decision makers consider only one variable in what should be a complex, multivariable equation. While maintaining good order and discipline is a worthy goal of the military justice system, it is essential to truly embrace other variables to achieve holistic justice.[302]

Employing the modified proportionality test will enable military justice decision makers to consider how their decisions affect accused service members, victims, and society long-term, resulting in more informed decisions. It will, in turn, bring their decision-making in line with the criteria applied by every other federal prosecutor while maintaining the preeminent importance of preserving good order and discipline. That will assist in restoring legitimacy in the military justice system and prevent the permanent divestiture of prosecutorial discretion from commanders. The proposed test empowers military justice decision makers to embrace the "transformational change" they are called to adopt.

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[300] Risch & Bostic, *supra* note 1.

[301] *Id.*

[302] *Id.* ("Our Army's military justice practice is critical to the good order and discipline of the force and committed to protecting the rights of Soldiers.").