COMMENT

FROM A FEAR OF PANEL MEMBERS TO A FEAR OF JUDGING: MILITARY SENTENCING AND PROSECUTORIAL POWER*

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I. INTRODUCTION

Military criminal law has evolved tremendously from the "rough form of justice" that the Supreme Court refused to apply to civilian dependents abroad in *Reid v. Covert*.[1] It now has an "essential character" which is "judicial."[2] In certain respects, the military's practical goals drive it away from rough justice. The military is an all-volunteer force; it needs to assure its recruits that their prospective employer will not unfairly send them to prison or let them be victimized by unpunished perpetrators.[3] Servicemembers are entitled to an expansive set of substantive and procedural rights, including a right to counsel and a privilege against self-incrimination.[4] In fact, a military accused has a right to counsel regardless of indigency, unlike in state civilian systems.[5] Military justice is more sophisticated than the federal civilian system in some respects, including by providing victims with legal counsel and opportunities to intervene in proceedings.[6] Indeed, the military justice system has helped to make *civilian* justice less "rough": for example, the Supreme Court cited Article 31 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 831, as inspiration in crafting the *Miranda* protections that now shape a suspect's interactions with law enforcement.[7]

Yet in the military, form only follows function, and military law's function is not only to promote justice and to deter misconduct but also to "maintain[] good order and discipline in the armed forces" as well as "to promote efficiency and effectiveness" in the military.[8] It is for this reason that the military eschews traditional constitutional protections such as unanimity

1. Reid v. Covert, 354 U.S. 1, 35 (1957).

2. Ortiz v. United States, 585 U.S. 427, 437 (2018).

3. *Cf.* Adam Wolrich, *Giving the Referee a Whistle: Increasing Military Justice Legitimacy by Allowing Military Judges to Reject Plea Agreements with Plainly Unreasonable Sentences*, 228 MIL. L. REV. 124, 139–41 (2020) (addressing the practical need for servicemembers to trust the military justice system).

4. *See, e.g.*, United States v. Pinson, 56 M.J. 489, 491–92 (C.A.A.F. 2002) (discussing the right to counsel); 10 U.S.C. § 831 (2024) (privilege against compulsory self-incrimination).

5. *Compare* 10 U.S.C. § 827 (2024) (stating that counsel "shall be detailed") *with* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (requiring states to provide counsel to indigent defendants).

6. *See* 10 U.S.C. §§ 806b, 1044, 1044e (2024); Victim and Witness Assistance, 32 C.F.R. pt. 114 (2020).

7. *See* Miranda v. Arizona, 384 U.S. 436, 489 & n.62 (1966).

8. JOINT SERV. COMM. ON MIL. JUSTICE, 1 MANUAL FOR COURTS-MARTIAL 1 (2024) (preamble) (hereinafter M.C.M.).

requirements in jury convictions and guarantees of jury diversity, among other substantive rights.[9] Indeed, many of the groundbreaking rights described above derive from practical and policy considerations. The privilege against self-incrimination, for example, must be particularly strong to overcome the unique military presumption that one must obey and answer questions from one's commanding officer upon penalty of insubordination.[10] There is an inherent tension between justice, efficiency, and discipline.[11] Ultimately, courts-martial are just one of a commander's disciplinary tools and exist alongside a set of nonjudicial punishments and other corrective measures.[12] As the D.C. Circuit described it, military justice must be "practical, efficient, and flexible" without being "unnecessarily undermined by the often deliberately cumbersome concepts of civilian jurisprudence."[13]

From 2013 to 2023, legislators and policymakers significantly reshaped the military justice system to more closely approximate the civilian one.[14] This Comment interrogates two aspects of those reforms.[15] First, it evaluates the military's adoption of a new

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9. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 743 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society."); Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality op.) ("The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty"). United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955) ("It is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."); United States v. Weiss, 510 U.S. 163, 178–79 (1994) (declining to extend *Mathews v. Eldridge*, 424 U.S. 319 (1976), to the military).

10. *See* United States v. Duga, 10 M.J. 206, 209 (C.M.A. 1981) ("Because of the effect of superior rank or official position upon one subject to military law, the mere asking of a question under certain circumstances is the equivalent of a command.").

11. *See* DEP'T OF DEF., REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 19–20 (2015) (hereinafter MJRG Report).

12. *See id.* at 26.

13. Curry v. Sec'y of the Army, 595 F.2d 873, 877, 880 (D.C. Cir. 1979).

14. *See, e.g.*, MJRG Report, *supra* note 11, at 5–8; National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013); National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016); Clara Spera, *Amending the Uniform Code of Military Justice to Mirror Civilian Courts*, LAWFARE (Jan. 12, 2016, 2:02 PM), https://www.lawfaremedia.org/article/amending-uniform-code-military-justice-mirror-civilian-courts; National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021); James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022); National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, 137 Stat. 136 (2023). *See generally* David A. Schlueter & Lisa Schenck, *Transforming Military Justice: The 2022 and 2023 National Defense Authorization Acts*, 231 MIL. L. REV. 1 (2023) (providing further background).

15. Notably, this Comment does not touch on two important developments in the military justice system. It does not discuss extraterritorial trials of non-Americans in military commissions, and it does not discuss the recent reform to the military justice system to create a branch of independent prosecutors for certain offenses, including sex

judge-alone sentencing scheme with mandatory sentencing parameter ranges. Second, it assesses the military's new system of binding plea agreements. The first reform adds to a military judge's power, at the expense of a prosecuting authority's; the second takes away from it, to the boon of a prosecutor seeking to force a plea deal. Together, they complicate the question of what exactly the military justice system values—and what policymakers want it to value. Does it love judging or fear judging?[16] Should we expect it to look again to any parts of the civilian justice system for any future reforms—perhaps advisory sentencing parameters, or establishing the equivalent of a probation office to help arbitrate the sentencing process? Not likely. This Comment concludes that we may have reached the point at which the military has exchanged its fear of dispensing rough justice for a fear of judicial discretion and independence. Even as these recent reforms do further civilianize the structure of military justice, they carve out avenues and back-doors for commanders and prosecutors to evade the "deliberately cumbersome" consequences of adhering to a true civilian justice model.[17]

II. NEW JUDGE-ALONE SENTENCING WITH NEW MANDATORY PARAMETERS

A. The shift to judge-alone sentencing is also a check on prosecutorial power.

In 2016 and 2021, Congress passed major reforms to the military sentencing system.[18] Panel members, the military equivalent of a jury, used to fashion sentences for those convicted at courts-martial in addition to determining guilt; only in certain judge-alone courts-martial or guilty pleas would that responsibility fall to the judge.[19] These were "unitary" sentences, determined from the totality of the convictions and charges.[20] In 2016, Congress established segmented offense-based sentencing

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offenses. Both topics merit dialogue with the developments laid out here but are beyond the scope of this Comment.

16. *See generally* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

17. *Curry*, 595 F.2d at 880.

18. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114–328, §§ 5001–5542, 130 Stat. 2000, 2894–2968 (2016); National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117–81, § 539E, 135 Stat. 1541, 1700–06 (2021).

19. *See* MJRG Report, *supra* note 11, at 463–70.

20. *See id.* at 506.

and implemented a set of sentencing principles to mirror federal practice, adapting 18 U.S.C. § 3553 to the military context.[21] Then, in 2021, Congress shifted all military sentencing authority away from panel members to military judges, and it also directed the creation of the Military Sentencing Parameters and Criteria Board for the purpose of establishing sentencing parameters.[22] Unlike the federal civilian system, where the U.S. Sentencing Guidelines are now merely advisory,[23] these sentencing parameters are mandatory, although they allow an upward or downward departure "upon finding specific facts" warranting it, so long as the judge includes "a written statement of the factual basis for the sentence," subject to review by the military appellate courts.[24] President Biden promulgated the Board's sentencing parameter regime on July 28, 2023.[25]

There were plenty of reasons to be skeptical of military panel members undertaking sentencing. Jury sentencing has become relatively rare in the United States.[26] Jurors can be more easily confused or prejudiced than lawyers; they might have divergent senses of justice, and they are more likely to introduce noise and variability into a system that seeks to treat similarly situated defendants similarly.[27] It was also becoming increasingly rare to have "repeat" panel members bring valuable past experience to newly constituted panels.[28]

Most significantly for this Comment, however, the commander, also known as the convening authority, supplies the panel members.[29] The convening authority is not allowed to stack

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21. *See* 10 U.S.C. § 856 (2024); Andrew S. Effron & Jonathan J. Wroblewski, *Congress Reforms Military Sentencing, Creating an Opportunity for a Productive Sentencing Reform Dialogue Between the Military and Civilian Criminal Justice Systems*, 35 FED. SENT'G REP., no. 1, 2022, at 73, 76–77.

22. *See* National Defense Authorization Act for Fiscal Year 2022 § 539E. Panel members' fundamental role in determining guilt was unaffected. *See id.*

23. *See* United States v. Booker, 543 U.S. 220, 245 (2005).

24. 10 U.S.C. § 856(c)(2)(B). *See also* 18 U.S.C. § 3553(b)(1), (c)(2) (laying out a comparable pre-*Booker* statutory framework for departures in the federal civilian system).

25. Exec. Order No. 14103, 88 Fed. Reg. 50,535 (2023).

26. *See, e.g.*, Melissa Carrington, Note, *Applying* Apprendi *to Jury Sentencing: Why State Felony Jury Sentencing Threatens the Right to a Jury Trial*, 2011 U. ILL. L. REV. 1359, 1360 & n.2 (2011) (collecting state statutes).

27. *See* Stephen C. Reyes, *Military Sentencing Parameters and Criteria Offenses: A First Step to Reducing "Noise" In Court-Martial Sentencing*, 70 NAVAL L. REV. 1, 7–8 (2024).

28. Telephone Interview with Dwight H. Sullivan, Senior Assoc. Deputy Gen. Couns., Dep't of Def. (Oct. 29, 2024).

29. *See* 10 U.S.C. § 825(e)(2) (specifying that the convening authority will select panel members who "in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament"). Panel members are

the deck—there is a voir dire process and a right to an impartial panel free from bias and from "unlawful command influence"—but the commander retains "significant discretion."[30] In theory, by helping to shape who becomes a panel member, the commander was also able to influence the fashioning of a sentence upon conviction. Indeed, while guilt versus innocence is a binary choice, the deliberative process of determining a sentence allows much more room for a creative commander to exert influence—perhaps by selecting certain types of personalities that might hew toward more severe penalties—without creating an appearance of bias or unlawful influence.[31] So, the shift from panel sentencing to judge-alone sentencing is not only a way to reduce noise and make sentencing more professional, but also a check on the commander's prosecutorial power.

B. The broad sentencing parameters are "mandatory" in name but functionally advisory.

The new model of military sentencing, which takes after the Sentencing Reform Act of 1984, retains the pre-*Booker* scheme's original mandatory sentencing paradigm.[32] *Booker* has not yet been extended to the military context, and may never be, as the authority to govern military justice comes from a unique part of the Constitution.[33] Thus, the military has revived a system that had been frozen in amber at the federal level since 2005.

When the Supreme Court decided *Booker*, it sent shockwaves through federal sentencing practice and displaced a mandatory sentencing regime that had operated for 30 years.[34] During the period of time in which the sentencing guidelines were mandatory, some judges chafed at the "administrative diktats," while others became "wholly passive in their sentencing decisionmaking," shifting power to prosecutors to essentially pre-determine

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either exclusively officers or, if an enlisted member requests it, at least one-third of the panel must be enlisted personnel. *See id.* § 825(c).

30. United States v. Riesbeck, 77 M.J. 154, 163 (C.A.A.F. 2018). *See, e.g.*, United States v. Baldwin, 54 M.J. 308, 310–11 (C.A.A.F. 2001); RULES FOR COURTS-MARTIAL 912(f)(1)(N) (2024).

31. *Cf.* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 1008 (2003) (analyzing the prospective consequences of "nonunanimity in the punishment phase"). This would be useful to a punitively-minded commander because convening authorities have a limited clemency power to summarily reduce sentences upon the completion of the court-martial process but not to enhance sentences. *See* 10 U.S.C. § 860b (2024).

32. *See* Effron & Wroblewski, *supra* note 21, at 75–77.

33. *See* U.S. CONST. art. I, § 8, cl. 14; *Riesbeck*, 77 M.J. at 163.

34. *See* Effron & Wroblewski, *supra* note 21, at 75.

sentences.[35] The same might now occur in the military's newly constituted mandatory sentencing paradigm, at least in theory.

However, in the first version of the parameters that has been promulgated, there are only six offense levels ("categories"), as opposed to the federal civilian system's 43.[36] Category 1 yields a 0–12 month sentence; Category 2 yields a 1–36 month sentence; Category 3, 30–120 months; Category 4, 120–240 months, Category 5, 240–480 months; and Category 6, life.[37] The vast majority of offenses fall within the overlapping Categories 1 and 2; most remaining offenses are in Category 3; and Categories 4, 5, and 6 are reserved for the most serious offenses.[38] Finally, there are a small number of military-specific "criteria" offenses that are uncategorized and left to the judge.[39] The military also did not adopt the federal civilian model's system of sentence enhancements. Moreover, judges were granted significant discretion to determine whether sentences for multiple charges will run consecutively or concurrently.[40]

Given the breadth of the parameters, as well as the substantial overlap between Category 2 "wobbler" offenses and the offenses in Categories 1 and 3, it is hard to see how these parameters will feel like a significant check on a judge's discretion. Perhaps a judge will hesitate to hand down the minimum month of incarceration required for a Category 2 offense in a rare case, or will seek a sentence above three years for a Category 2 offense with rare aggravating yet uncharged circumstances. Either way, the statutory carve-out allowing a departure would entitle a judge to reach those sentences in such non-heartland cases.[41] Insofar as

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35. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 702–03 (2010) (quoting STITH & CABRANES, *supra* note 16, at 23) (add'l quotation omitted).

36. *Compare* M.C.M., *supra* note 8, app. 12B (six categories) *with* U.S. SENT'G GUIDELINES MANUAL § 1A4(h) (U.S. SENT'G COMM'N 2024) (43 offense levels). This choice was cabined by the NDAA, which required no fewer than five but no more than twelve categories, so as to be "sufficiently broad to allow for individualized consideration of the offense and the accused." National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117–81, § 539E(e)(2), 135 Stat. 1541, 1704 (2021).

37. M.C.M., *supra* note 8, app. 12B.

38. *See id.* app. 12C.

39. *See id.* app. 12D; Reyes, *supra* note 27, at 35–37.

40. *See* Reyes, *supra* note 27, at 33–35. *Compare* RULES FOR COURTS-MARTIAL 1002(d)(2)(B) (2019) (provisions judges had to follow) *with* RULES FOR COURTS-MARTIAL 1002(d) (2024) (provision now absent). *But see* United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001) (directing military judges to prevent unreasonable multiplication of charges by using concurrent sentencing).

41. *See* 10 U.S.C. § 856(c)(2)(B) (2024).

this system is supposed to be a "sentencing corral,"[42] it is a gentle one. Captain Stephen Reyes, who serves as Chief Trial Judge of the Navy-Marine Corps Trial Judiciary and Chair of the Military Sentencing Parameters and Criteria Board, notes that this system not only embraces judicial discretion but also restrains the "government's ability to influence sentencing and plea bargaining" by cherry-picking its charging decisions to pre-determine a sentence.[43]

Thus, the shift from panel-driven unbounded sentencing to judge-alone parameter sentencing has moved power from convening authorities to judges. In this respect, the military justice system has striven closer to civilian law and further from the commander-driven rough justice of the past. In the future, with more data and with more experience with the parameter system, the Board may elect to further subdivide its parameters, perhaps restraining judicial discretion more meaningfully and resurfacing the question as to whether the military fears judging or not.[44]

Yet in another area, the system has already moved to restrain judicial discretion in favor of prosecutors and the military interest of expedient discipline.

III. TAKING ADVANTAGE OF THE PARAMETERS: BINDING PLEA AGREEMENTS

A. The demise of "beating the deal" concentrates power in the convening authority.

While Congress was partway through undertaking the above reforms, the Department of Defense's Joint Service Committee reconsidered how plea bargains operated in courts-martial. At the time, plea bargains operated through a system informally called "beating the deal."[45] The accused would agree to a certain deal with the prosecutor, and that bargain would set an upper ceiling to the potential sentence; then, the sentencing authority (panel or judge) would announce its own sentence, without being informed

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42. 2003 ANNUAL REPORT OF THE DISTRICT OF COLUMBIA ADVISORY COMM'N ON SENTENCING 35 (2003). *See* Reyes, *supra* note 27, at 21–28 (describing the Military Sentencing Parameters and Criteria Board's attention to the District of Columbia's sentencing guidelines).

43. Reyes, *supra* note 27, at 28.

44. *See id.* at 27.

45. *See* Sean Patrick Flynn, *Ensuring Justice Without "Beating the Deal"*, 94 NOTRE DAME L. REV. ONLINE 128, 128–32 (2019).

of the terms of the deal.[46] The accused was entitled to whichever sentence was lower.[47] Lawmakers scrapped "beating the deal" in 2019, phasing it out and replacing it with a simpler system wherein the terms of the plea bargain are binding unless they are (1) outside of the (very wide) parameters and (2) the judge rejects the deal as being "plainly unreasonable."[48] The judge is aware of the terms of the deal ahead of the proceedings, and the parties may agree to a sentencing range for the judge rather than a particular sentence.[49]

Removing the "beat the deal" paradigm brings military plea bargaining closer to conformity with civilian plea bargaining and eliminates an arcane, convoluted oddity from military sentencing procedure.[50] However, it also strips the judge of some authority; specifically, it restrains the judge's power to grant a lesser sentence than the convening authority might seek. In federal sentencing, meanwhile, the judge retains broad latitude to reject a plea agreement.[51] In both systems, the accused retains the due process right to withdraw his or her plea upon judicial rejection of the deal.[52]

This change impacts a significant portion of military legal practice. While pleas are not as pervasive in the military justice system as they are in typical civilian jurisdictions, they do still occupy the majority of the criminal docket, at least in available Army data.[53] And as in the civilian system, the convening authority's prosecution team retains a number of coercive levers with which to extract the concessions it wants from an accused in exchange for a deal.[54] Barring seriously unwarranted departures from the sentencing parameters or the accused's decision to proceed to trial, the commander holds almost all the cards.

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46. *See id.*

47. *See id.*

48. *See id.* at 132–33; 10 U.S.C. § 853a(b)(1) (2023). Similarly, appellate courts may vacate sentences if they are both above the sentencing parameter and "inappropriately severe." *See* 10 U.S.C. § 866(e)(1) (2023).

49. *See* Flynn, *supra* note 45, at 133; Reyes, *supra* note 27, at 8.

50. *See* Randy V. Cargill, *The Article 63 Windfall*, ARMY LAWYER, Dec. 1989, at 26, 26–27, https://tile.loc.gov/storage-services/service/ll/llmlp/75615419_12-1989/75615419_12-1989.pdf.

51. *See* FED. R. CRIM. P. 11(c)(3), 11(c)(5) (2024).

52. *See id.* 11(c)(5), 11(d)(2); RULES FOR COURTS-MARTIAL 910(f)(7) (2024).

53. *Cf.* Reyes, *supra* note 27, at 7–8 (collecting statistics).

54. *See, e.g.,* Flynn, *supra* note 45, at 137–40; H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 67–75 (2011). *But see* United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969) (requiring military judges to independently find facts supporting guilt).

B. Convening authorities may be able to "thwart" a mandatory parameter.

As discussed, a military judge may only reject a plea agreement that is both outside of a given parameter and "plainly unreasonable."[55] But if both parties, informed by competent counsel, have agreed to the sentence, how likely is it going to be for the sentence to rise to the level of being plainly unreasonable?[56] The two people with the greatest stake in the matter have already determined that it is reasonable, and given the variety of cross-cutting military sentencing principles,[57] it may be difficult in practice to rebut the parties' arguments about reasonable justifications for the sentence.

The deferential posture makes sense in terms of efficiency, but when combined with a convening authority's ability to select which charges it refers to court-martial, the lack of checks may result in a churn of rapidly-processed lenient guilty pleas, just like in some state court environments.[58] Intermediate appellate courts can only reject sentences that are "inappropriately severe," not inappropriately lenient.[59] Of course, most defendants would probably not be upset to receive a more lenient sentence than they might have otherwise. But some of them might never have received a sentence at all; they might have been given nonjudicial punishment or been found innocent at trial. In other words, when combined with the prosecution's power over charging decisions and its ability to threaten to take more severe offenses to court-martial,[60] there will be the classic problem of potentially-innocent defendants being willing to take a guilty plea deal on a lesser offense instead of risking trial—here, unlike in civilian systems, trial by a jury not necessarily composed of one's peers and not required to be unanimous. Plus, unlike in the civilian context, the convening authority can simply disconnect a disruptive individual from the military population permanently if the crime is significant enough to merit a punitive discharge or even just an

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55. *See* 10 U.S.C. § 853a(b)(1) (2023).

56. *Cf.* Wolrich, *supra* note 3, at 166–67 (suggesting a framework where only the "plainly unreasonable" criterion should govern a judge's discretion).

57. *See* 10 U.S.C. § 856(c)(1).

58. For example, the Court of Appeals for the Armed Forces recently upheld the parties' consideration of dismissed charges as a factor in determining the reasonableness of sentencing agreements. *See* United States v. Arroyo, 86 M.J. 89, 94 (C.A.A.F. 2025).

59. *See* 10 U.S.C. § 866(e)(1) (2024).

60. *See generally* Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937 (2010) (describing elements of military prosecutorial power).

administrative separation.[61] So the same incapacitation interests that might restrain a civilian prosecutor from improving their throughput of guilty verdicts at the expense of winning shorter sentences likely will not restrain a commander. Considering that the modern military justice system and the UCMJ owe their inception to mass postwar protests about overly swift courts-martial,[62] military policymakers should pay careful attention to any risk of developing such incentives.

Given the novelty of these reforms, there is no substantial data yet on how they have been received or whether it has indeed resulted in any overreach by convening authorities.[63] No judge appears to have yet rejected a relevant pled sentence as plainly unreasonable.[64] Given the breadth of the parameters, it indeed seems unlikely that any extra-parameter sentences have yet issued for non-criteria offenses. The first reports from the military trial courts under the new system have been released, but they did not mention any extra-parameter sentencing.[65] For now, without data, the best this Comment can do is view the topic from a systems design perspective.

Importantly, the incentives described here do not permit a commander to freely condemn defendants to overly severe sentences. For example, a convening authority will have little success inducing a defendant to plea to the top of the mandatory parameters for the most severe offense; they might as well go to trial and take their chances receiving a sentence from the judge. The risks described are not of a tyrannical prosecutor gone wild, but instead of a system where the allure of expediency may trump the ideal of fairness.[66]

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61. *See, e.g.*, United States v. Harmon, 63 M.J. 98, 101 (C.A.A.F. 2006) (noting that military personal jurisdiction expires upon discharge).

62. *See* Wolrich, *supra* note 3, at 138–39.

63. 10 U.S.C. § 946a requires each service to submit a military justice report annually. *See also* United States v. Colletti, 84 M.J. 690, 691 (N.M.C.C.A. 2024) ("Although the Military Justice Act of 2016 (MJA 16) is rapidly approaching its tenth anniversary, the legal issues mustered by that legislation are only now approaching the pickets of the military appellate courts in force.").

64. *See also* United States v. Raines, 82 M.J. 608, 613 (N.M.C.C.A. 2022) ("[W]e imagine that rejections of plea agreements by military judges will continue to be extremely rare.").

65. 10 U.S.C. § 946a (2024). *See* U.S. ARMY REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2024, at 16–18 (2024); U.S. NAVY REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2024, at 17–19 (2024); DEPARTMENT OF THE AIR FORCE REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2024, at 20–21, 28–31 (2025); U.S. MARINE CORPS REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2024, at 12–14 (2024); MILITARY JUSTICE IN THE COAST GUARD (FY 2024), at 2 (2024).

66. *See, e.g.*, Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737, 769 (2009). *But see* United States v. Allen, 25 C.M.R.

Unlike the judge-alone sentencing reform, these newly binding plea agreements would appear to be more of a challenge to judicial discretion than a boon. The change places significantly more power in the hands of a prosecutor, who can pre-ordain the charges and sentence merely by negotiating the right plea agreement.[67] Yes, it happens to more closely mirror civilian justice, but in this instance, civilian justice happens to be less "deliberately cumbersome" than the old military "beat-the-deal" system.[68]

Why cabin judicial discretion in this way? It likely has to do with the military justice system's unique goal of promoting "efficiency and effectiveness" alongside justice.[69] For its marginal benefits to the defendant, "beat the deal" also often resulted in a complicated set of hearings and rehearings and was something of a circus act involving the sentencing authority's deliberate ignorance as to the nature of the plea deal that initiated the proceedings.[70] For another thing, the military criminal appeals process is quite long relative to the average four-year term of active duty enlistment, and assuring that more cases proceed directly to final judgment is helpful for moving people along.[71] Courts-martial are not standing courts, and they have already strayed far from their origin as a fast adjudicative procedure suited to times of war.[72] Binding plea agreements that accelerate the process could be helpful when the military needs to free up resources.

Aside from the administrative benefits, though, the change may also reflect a fear of judging. Commanders have become somewhat reticent to employ courts-martial for many court-martialable offenses, instead opting for lesser nonjudicial administrative actions: Secretary of Defense James Mattis sent out a memo in 2018 urging commanders that "[a]dministrative actions should not be the default method to address illicit conduct simply because it is less burdensome than the military justice

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8, 11 (C.M.A. 1957) (holding that a plea agreement "cannot transform the trial into an empty ritual").

67. *See* Note, *supra* note 60, at 943–56.

68. *See* Curry v. Sec'y of the Army, 595 F.2d 873, 877, 880 (D.C. Cir. 1979).

69. 1 M.C.M., *supra* note 8, at 1 (preamble).

70. *See* Flynn, *supra* note 45, at 130–31.

71. *See* Dwight H. Sullivan, *The Military Justice Decrescendo*, 68 VILL. L. REV. 849, 868–70 (2023) (noting criticisms of the "tempo" of military justice).

72. *See, e.g.*, Edward F. Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3, 3–4, 103 (1970); Fredric I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MIL. L. REV. 512, 512–13 (2017).

system."[73] While military punishment is down across the board, there is a particular drought in special courts-martial, the lower-stakes version of a court-martial suitable in "elastic" situations as one available disciplinary option alongside nonjudicial and administrative measures.[74] The drought likely signals that commanders, when given the opportunity, will indeed avoid a potentially yearslong court-martial process when they are able to.[75] Adverse administrative actions can result in sufficiently severe punishments, including incarceration, and commanders have the benefit of being prosecutor, judge, and jury in those proceedings.[76] With commanders disincentivized from pursuing courts-martial, perhaps the ability to negotiate a binding plea agreement and more quickly reach final judgment will help to restore the use of military justice tools instead of administrative ones.

IV. CONCLUSION

In establishing a judge-alone sentencing paradigm with relatively loose parameters, the military justice system embraced judging. In allowing judicial discretion in sentencing to be pierced by binding plea agreements, the military justice system eschewed judging. Yet these two reforms happened in relatively short, interlocking sequence. Why the inconsistency?

The overriding determinant of a policy's construction is the set of goals it is intended to achieve. The problem is that military justice, for better or worse, has too many goals. It is hard enough to balance the goals of civilian sentencing;[77] the added military-specific goals make for a confusing soup of crosswise objectives. "To promote justice" might require exhausting every avenue of due process in favor of an accused, while "good order and discipline" might prioritize speedy resolutions and preserving a commander's reputation as a disciplinary authority.[78] Or, for example, the

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73. Memorandum from Sec'y of Def. James N. Mattis to Sec'ys of Mil. Dep'ts, Chiefs of Mil. Servs., & Commanders of Combatant Commands on Discipline & Lethality (Aug. 13, 2018), https://www.usfk.mil/Portals/105/Documents/SECDEF/DISCIPLINE%20AND%20LETHALITY%20OSD010042-18%20FOD%20Final.pdf?ver=2018-08-13-194823-403.

74. *See* Sullivan, *supra* note 71, at 865–70.

75. *See id.*

76. *See generally* Anthony Godwin, Note, *Army Commander's Role—The Judge, Jury, & Prosecutor for the Article 15*, 46 SEATTLE U. L. REV. 889 (2023).

77. *See generally* PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? (2008).

78. *See* 10 U.S.C. § 856(c)(1).

military system might lightly sentence an individual it views as rehabilitated, for the sake of preserving manpower.[79] It is because of these conflicting goals that the military system is "predicated on the principle of individualized sentencing"—more so than the civilian system.[80] "Individualized" justice might not quite be the word for it, though; really, it is still systematic, but with a broader variety of dimensions to be considered, including not only the philosophies that drive the civilian system but also military readiness factors, all of which can cut different ways against one another and give the appearance of individualized variety among case outcomes, especially when combined with the variety of additional military-specific punishments available.[81]

It is possible that the military's progress toward imitating the deliberativeness and uniformity of civilian criminal justice has started to reach its ceiling. This Comment reviewed one step forward toward judicial independence and one step back for commanders to reassert control over courts-martial, but there are similar give-and-takes in other recent military justice reforms.[82] Unless this pattern changes, it seems to indicate that the military may believe that further "deliberately cumbersome" policy choices, while they might "promote justice," would come at too great a cost to the military's other efficiency and readiness policy goals.[83] Indeed, it is notable that the military has most recently been drawing on aspects of civilian systems that improve throughput and reduce appeals, like plea bargaining and mandatory sentencing parameters, rather than more deliberative aspects, like adding a presentence report system or instituting unanimous jury verdicts and the potential for hung juries. Given the apparent challenges that the military faces in reconciling its goals of expediency and justice, further reforms on the "deliberately cumbersome" side of the equation seem unlikely at best. As changes continue to build on one another and fewer Pareto

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79. *See* RULES FOR COURTS-MARTIAL 1002(c)(3)(F–G) (2024).

80. James E. Baker, *Is Military Justice Sentencing on the March? Should It Be? And if So, Where Should It Head? Court-Martial Sentencing Process, Practice, and Issues*, 27 FED. SENT'G REP. 72, 79 (2014).

81. *See, e.g.*, MJRG Report, *supra* note 11, at 335–39; Reyes, *supra* note 27, at 16–17.

82. For example, the new "short martial" may breathe life back into an increasingly sparsely used military judiciary, but it also makes it easier for a commander to assert her own disciplinary power of non-judicial punishment, as she can credibly threaten to send a disputed non-judicial punishment to quick trial by a military judge sitting alone. *See generally* Jacob E. Thayer & Jessica Dobry, *Dealing with the "Shorter" Limited Special Courts-Martial*, 67 NAVAL L. REV. 191 (2021).

83. *See* 1 M.C.M., *supra* note 8, at 1; Curry v. Sec'y of the Army, 595 F.2d 873, 877, 880 (D.C. Cir. 1979).

improvements can be made to the system, policymakers should be expected to pay even closer attention to trade-offs like the ones highlighted in this Comment.

The civilian system is not perfect, and neither is the military one. This Comment does not say that the military system normatively *should* mirror civilian justice. Instead, it suggests that, in discussions about "civilianizing" or "modernizing" military law, policymakers and commentators might benefit from instead looking beneath the veneers of those labels to identify which military justice policy goal a given proposal seeks to achieve. By being analytically precise about how their proposals shape the allocation of power between convening authorities, judges, and defendants—for example, in sentencing parameters and plea bargains—they can be more clear-eyed as to which military justice objectives a given policy proposal might achieve or compromise.

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