NOTES

PROSECUTORIAL POWER AND THE LEGITIMACY OF THE MILITARY JUSTICE SYSTEM

I. INTRODUCTION

In the American criminal justice system, the prosecutor is a uniquely powerful individual.[1] Due to the huge number of prosecutable crimes, he has vast discretion in bringing and dismissing charges, negotiating plea bargains, trying cases, and recommending sentences. Because of these great powers, a prosecutor has a duty beyond that of an ordinary advocate in an adversarial legal system.[2] The legal rules establishing this regime of great prosecutorial discretion evolved in response to a vast number of concerns both within and outside the criminal justice system, including racism, economic inequality, and the need for administrative efficiency. As a result of this variety of motivating principles, the structure of prosecutorial power in the civilian criminal justice system lacks a coherent underlying principle; instead, it struggles to accommodate many contributing forces.

Prosecutorial discretion is similarly broad in the military justice system, where it is wielded by a senior commander who faces many of the same issues as civilian prosecutors. However, military justice is a distinct legal system outlined by the Uniform Code of Military Justice[3] (UCMJ). As it has emerged since the mid–twentieth century, this system has largely developed around the concern that the system appear fair and legitimate. The rules controlling military prosecutorial power reflect and coalesce around this concern. Consequently, the structure of military prosecutorial power strongly manifests the value placed on perceived legitimacy. The coherence of the military rules demonstrates the value of a system of justice that is consciously designed according to a limited number of fixed principles.

Part II of this Note explains the development of the modern civilian and military criminal justice systems. Part III briefly assesses

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[1] *See* Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940) ("The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. . . . While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.").

[2] *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

[3] 10 U.S.C. §§ 801–946 (2006).

the notion of legitimacy in criminal justice. Parts IV and V then analyze two aspects of the process of criminal adjudication — charging discretion and guilty pleas — and consider the effects of different civilian and military procedures on the perceived legitimacy of the two systems. Part IV argues that by situating the authority to choose which defendants to prosecute at a higher level and requiring a thorough adversarial investigation before felony proceedings, the military justice system increases the accountability and perceived legitimacy of charging decisions. Part V argues that heightened scrutiny of guilty pleas, higher-level control of plea bargaining, and substantive limitations on the scope of plea bargains produce a military system that projects a higher value for accuracy and procedural fairness. Part VI concludes that the manifestation of the military justice system's institutional value for legitimacy in the structure of prosecutorial power stems from the conscious design of the system with legitimacy as a core concern.

II. THE DEVELOPMENT OF SYSTEMS OF CRIMINAL JUSTICE

Some legal systems are grown and some are made.[4] Grown systems evolve according to no central plan, are usually incredibly complex, and owe any orderly features to equilibrium, not design.[5] Made systems develop out of the plan of one or several creators, can be understood by looking to the intent of those creators, and function according to a limited number of independent variables.[6]

A. Evolution of the Civilian Criminal Justice System

The civilian criminal justice system and the legal rules that regulate it are best understood as a grown order.[7] The structure of the system is enormously complex: it is formed by the intersection of numerous codes, statutes, and judicial decisions. Moreover, law governing the criminal justice system emerged in response to a multitude of institutional concerns. Early in the Supreme Court's development of modern criminal procedure doctrine, considerations of popular perceptions of fairness were important to the Court's decisions.[8] However, since

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[4] *See generally* 1 FRIEDRICH A. HAYEK, LAW, LEGISLATION, AND LIBERTY (1973).

[5] *See* Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 997 (1996); Mark F. Grady, *Positive Theories and Grown Order Conceptions of the Law*, 23 SW. U. L. REV. 461, 461 (1994).

[6] *See* Allen, *supra* note 5, at 997; Grady, *supra* note 5, at 461.

[7] *See* Allen, *supra* note 5, at 999; *see also* William J. Stuntz, Terry*'s Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1213 (1998) (arguing that the law governing law enforcement is best understood as grown rather than made).

[8] *See* Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 111–12 (2005) (explaining that early-

that time, the Court's doctrines have responded to myriad pressing issues, including the rise of totalitarianism in Europe,[9] institutionalized racism,[10] economic inequities,[11] the popular discontent of the late 1960s,[12] and resource constraints facing the system's actors.[13] Consequently, the modern criminal justice system lacks a single coherent theme that can tie together its disparate aspects.[14]

B. Creation of the Military Justice System

Unlike the civilian justice system, the military justice system is best understood as a made order. It is structured and regulated by the UCMJ, enacted by Congress; the *Manual for Courts-Martial*,[15] issued by the President; and the decisions of the Court of Appeals for the Armed Forces (CAAF). Given the limited number of actors involved in developing the system, much of the evolution of the military justice system has focused on a single concern: its perceived legitimacy.

Historically, the maintenance of discipline as a means of reinforcing the military's combat function was the primary purpose of military justice.[16] Since the discipline of the troops was primarily the responsibility of the commander, the military justice system was seen as a tool of the commander to enforce his authority over his subordinates.[17] As

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twentieth-century applications of the fundamental fairness principle of due process included consideration of the perceived fairness of the system).

[9] *See* Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 522.

[10] *See* Dan M. Kahan & Tracy L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1155–58 (1998); Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 442 (1980).

[11] *See* Jerold H. Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1331–39 (1977); Seidman, *supra* note 10, at 442.

[12] *See* Allen, *supra* note 9, at 539.

[13] *See* Santobello v. New York, 404 U.S. 257, 260 (1971); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 221–22, 229 (1983).

[14] *See* George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819, 1821–22 (1997) (book review).

[15] JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) [hereinafter MCM].

[16] *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955); *see also* MCM, *supra* note 15, pt. I, ¶ 3 ("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."); Patrick Finnegan, *Thirty-Sixth Kenneth J. Hodson Lecture on Criminal Law: 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).

[17] *See* Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?*, 16 TUL. J. INT'L & COMP. L. 419, 423 (2008); Donald N. Zillman, *What Military Criminal Law Can Teach Us: A United States Perspective*, 42 U.N.B.L.J. 229, 230 (1993).

a result, the commander historically had virtually unchecked control over military justice.[18]

However, after millions of ordinary Americans served in the armed forces during the Second World War, mass protests of the unfairness of the military justice system arose.[19] Experiences during the war had revealed that rather than reinforcing discipline, harsh military justice bred resentment among the troops and undermined public confidence.[20] In response to calls for reform, Congress in 1951 adopted the UCMJ, which was meant to strike a balance between the individual rights of servicemembers and fairness, on the one hand, and the interest in maintaining discipline and command authority, on the other.[21] The UCMJ supplanted the previous system and set out the procedures that define the modern system of military justice.

Congress's attempts to restore confidence in military justice and to improve perceptions of the system's fairness were not immediately successful. During the Vietnam War era, criticisms of military justice — fueled by widespread opposition to the war[22] — again reached a fever pitch.[23] Even the Supreme Court joined in the disparagement as it limited the jurisdiction of military justice to service-connected crimes and wrote that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[24]

A new wave of reforms responded to these harsh criticisms. The Military Justice Act of 1968[25] sought to improve the perceived fairness of courts-martial by creating the position of military judge and requiring that a military judge be detailed for every general court-martial.[26] The Act also created formal appellate courts within each branch.[27]

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[18] *See* Hansen, *supra* note 17, at 426.

[19] *See* Robinson O. Everett, *The 50th Anniversary of the Uniform Code*, CRIM. JUST., Fall 2001, at 21, 21.

[20] *See* Hansen, *supra* note 17, at 423–24; *cf.* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006) (finding that people are more likely to comply voluntarily with laws when they perceive that those laws are enforced through fair procedures).

[21] Hansen, *supra* note 17, at 427.

[22] H.F. "Sparky" Gierke, *The Thirty-Fifth Kenneth J. Hodson Lecture on Criminal Law: Reflections of the Past: Continuing To Grow, Willing To Change, Always Striving To Serve*, 193 MIL. L. REV. 178, 183 (2007).

[23] *See, e.g.*, ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1970); *see also* John F. O'Connor, *Foolish Consistencies and the Appellate Review of Courts-Martial*, 41 AKRON L. REV. 175, 177 (2008).

[24] O'Callahan v. Parker, 395 U.S. 258, 265 (1969).

[25] Pub. L. No. 90-632, 82 Stat. 1335 (codified as amended in scattered sections of 10 U.S.C.).

[26] *Id.* § 2(3), 82 Stat. at 1335 (codified as amended at 10 U.S.C. § 816 (2006)); *id.* § 2(9), 82 Stat. at 1336 (codified as amended at 10 U.S.C. § 826).

[27] *Id.* § 2(27), 82 Stat. at 1341 (codified as amended at 10 U.S.C. § 866).

The Military Justice Act of 1983[28] enacted further reforms.[29] Concomitant with these legislative changes, the services themselves adapted in ways designed to improve the perceived fairness of courts-martial. For example, in the late 1970s and early 1980s, both the Army and the Air Force created independent chains of command for defense counsel.[30] Judges joined the push for reform as the Court of Military Appeals (later renamed the Court of Appeals for the Armed Forces) developed doctrines specifically aimed at reducing the appearance of unfairness in the military justice system.[31]

At least among the Justices of the Supreme Court, this wave of reforms seems to have significantly altered perceptions of military justice: In 1987, the Court overturned its earlier decision and removed the service-connected requirement for court-martial jurisdiction.[32] Then, in 1994, the Court upheld the system of non-tenured military judges against a due process challenge.[33] Concurring in that decision, Justice Ginsburg wrote: "Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history . . . ."[34] Thus, the military justice system seemed to have achieved its goal of improving its legitimacy in the eyes of those observing it.

III. LEGITIMACY AND CRIMINAL JUSTICE

Legitimacy is an essential feature of an effective system of criminal justice.[35] In order to maintain authority over those it regulates, a criminal justice system must remain legitimate in the eyes of those people.[36] When people perceive the criminal process as fair and legitimate, they are more likely to accept its results as accurate[37] and are more likely to obey the substantive laws that the system enforces.[38]

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[28] Pub. L. No. 98-209, 97 Stat. 1393 (codified as amended in scattered sections of 10 and 28 U.S.C.).

[29] *See* Gierke, *supra* note 22, at 184–85 (summarizing reforms).

[30] *Id.* at 189. The Navy followed suit in 1998. *Id.*

[31] For example, the doctrine of implied bias mandates that a challenge for cause be granted whenever the presence of a certain member on a panel creates the perception that the proceedings might be unfair. *See, e.g.*, United States v. Briggs, 64 M.J. 285, 286–87 (C.A.A.F. 2007).

[32] Solorio v. United States, 483 U.S. 435 (1987).

[33] Weiss v. United States, 510 U.S. 163 (1994).

[34] *Id.* at 194 (Ginsburg, J., concurring).

[35] *See generally* Meares, *supra* note 8, at 107–10. This Note discusses what Professors E. Allan Lind and Tom Tyler call the subjective standard of legitimacy, which considers the degree to which people believe the procedures to be fair. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 3–4 (1988).

[36] *See* Christopher A. Bracey, *Truth and Legitimacy in the American Criminal Process*, 90 J. CRIM. L. & CRIMINOLOGY 691, 705 (2000) (book review).

[37] *See id.* at 727.

[38] *See* TYLER, *supra* note 20, at 3–4.

Moreover, such people are more likely to cooperate with police and prosecutors, who necessarily rely on the trust of the community to carry out their roles in the criminal justice system.[39]

Although a full exploration of the components of a legitimate system of criminal justice is beyond the scope of this Note, certain aspects of criminal procedures that contribute to a perception of legitimacy can be identified. First, procedures that enhance the truth-seeking dimension of criminal adjudication can reassure observers that the system is reaching legitimate results. Factually incorrect outcomes — especially wrongful convictions — severely undermine this dimension and harm the perceived legitimacy of the system.[40]

Second, the legitimacy of criminal procedures is enhanced when observers and defendants believe that prosecutors are pursuing justice.[41] Incidents of prosecutorial misconduct undermine this element of institutional legitimacy[42] and threaten to create the impression that prosecutors are seeking personal gains rather than just outcomes.[43] Prosecutorial misconduct and arbitrariness can also undermine a third dimension of systemic legitimacy: uniformity of outcome.[44] Disparate treatment of similarly situated defendants — whether it appears to be the result of invidious discrimination[45] or prosecutorial whim — can harm popular faith in the criminal justice system.[46]

Fourth, perceptions of the system's legitimacy are substantially affected by the extent to which both the lay community and the defendant are able to participate in its procedures.[47] The participation of a

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[39] *See* Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 101.

[40] *See* Adam I. Kaplan, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227, 241–42 (2008); Sandra Rousseau, *The Use of Warnings in the Presence of Errors*, 29 INT'L REV. L. & ECON. 191, 198 (2009).

[41] *See* Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 61 (2009); *see also* Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 397 (2001) (arguing that as the "chief legal enforcers" of the criminal justice system, prosecutors have the greatest effect on its legitimacy).

[42] *See* Bracey, *supra* note 36, at 726–27.

[43] *See* Lenese C. Herbert, Et in Arcadia Ego*: A Perspective on Black Prosecutors' Loyalty Within the American Criminal Justice System*, 49 HOW. L.J. 495, 533 (2006).

[44] *See* Jeffrey M. Chemerinsky, Note, *Counting Offenses*, 58 DUKE L.J. 709, 736 (2009).

[45] *See, e.g.*, Johnson v. California, 543 U.S. 499, 510–11 (2005) ("[C]ompliance with the Fourteenth Amendment's ban on racial discrimination . . . bolsters the legitimacy of the entire criminal justice system.").

[46] *See* Chemerinsky, *supra* note 44, at 736.

[47] *See* Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 591 (1997) (arguing that the lack of lay participation in plea bargaining undermines the legitimacy of that process); Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1328–29 (2009) (arguing that increased testimony by defendants in the criminal process would improve perceptions of legitimacy).

jury may be especially influential in this regard.[48] This dimension of legitimacy can be further enhanced by limiting the secrecy surrounding the process of criminal punishment.[49] Each of these aspects of procedural legitimacy is reflected in the ways in which the civilian and military justice systems structure and regulate prosecutorial power.

IV. THE CHARGING DECISION

Within both the civilian and the military criminal justice systems, some actor has tremendous discretion over the decision to bring charges against a defendant, and that discretion is subject to only minimal judicial review.[50] In the civilian system, this discretion generally rests with the line prosecutor, who chooses the defendant, chooses charges, and then either induces a guilty plea or proceeds to trial. In the military system, charging discretion is exercised by the convening authority — a senior commander who is not a lawyer and takes no part in the actual trial of the defendant. Although both actors possess great discretion, the military justice system manifests its concern for perceived legitimacy in the manner in which it structures the accountability and incentives affecting prosecutorial power.

A. Discretion, Accountability, and Institutional Role

The level at which prosecutorial discretion is exercised affects the degree to which officials can be held accountable for its exercise. In the civilian system, discretion tends to be wielded by line prosecutors — Assistant U.S. Attorneys (AUSAs) or assistant district attorneys — who report up a chain of command headed by a politically accountable official.[51] In the federal system, attorneys general have attempted

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[48] *See* Spaziano v. Florida, 468 U.S. 447, 485 (1984) (Stevens, J., concurring in part and dissenting in part) (emphasizing the importance of the jury to the legitimacy of capital proceedings).

[49] *Cf.* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 687 (1996) (arguing that reducing the secrecy surrounding police interrogations improves police credibility and democratic values).

[50] *See, e.g.*, Schulke v. United States, 544 F.2d 453, 455 (10th Cir. 1976) (military); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 378–80 (2d Cir. 1973) (civilian); United States v. Hagen, 25 M.J. 78, 85 (C.M.A. 1987) (military). In both systems, claims of selective and vindictive prosecution are available, but defendants face a steep evidentiary burden to win such claims. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 463–65 (1996) (civilian selective prosecution); United States v. Goodwin, 457 U.S. 368 (1982) (civilian vindictive prosecution); *Hagen*, 25 M.J. at 83–84 (military selective and vindictive prosecution). The Supreme Court has made it clear that claims of arbitrariness will not succeed: as long as a criminal statute was violated, the government needs no additional reason to prosecute. *See, e.g.*, Wayte v. United States, 470 U.S. 598 (1985).

[51] The rationale behind this system is unclear; it is often defended on the grounds of practical necessity. *See, e.g.*, Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2136 (1998).

to limit the discretion of low-level prosecutors,[52] but "the prosecutorial discretion of individual AUSAs is quite broad and appears to operate largely independent of any formal review mechanisms."[53]

The large size of the population covered by a single prosecutor's office[54] combines with the vast breadth of substantive criminal law to produce a huge number of prosecutable offenses.[55] Apart from certain serious crimes that a district attorney is politically compelled to prosecute, only a tiny fraction of offenses can be punished.[56] Thus, when choosing which lower-level crimes to prosecute, a civilian prosecutor is free to choose only the worst violations and the most easily winnable cases.[57] Such decisions are invisible to the public, which is primarily concerned with higher-level sensational crimes, and even to the line prosecutor's superiors, to a large extent.[58] This invisibility, especially when compounded by the high rate of guilty pleas and the low rate of trials, establishes a relatively low level of accountability over civilian prosecutorial discretion.[59]

By contrast, prosecutorial discretion in the military is usually exercised by a general or admiral in command of a division, fleet, or base.[60] These officers make up a tiny portion of the total military population[61] and are the officers most directly accountable to the service secretaries, Secretary of Defense, and President. However, the community over which a convening authority has power is much smaller than that over which major civilian prosecutors have jurisdiction. For example, the Army — the largest branch — counted only

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[52] *See, e.g.*, Memorandum from John Ashcroft, Att'y Gen., to All Federal Prosecutors (Sept. 22, 2003), *available at* http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm.

[53] Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1497 (2004).

[54] For example, the New York County District Attorney's Office is responsible for prosecuting crimes among a population of more than 1.6 million people. U.S. Census Bureau, New York County QuickFacts, http://quickfacts.census.gov/qfd/states/36/36061.html (last visited Jan. 9, 2010).

[55] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506–07 (2001).

[56] *See* Daniel C. Richman & William J. Stuntz, Essay, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600–01 (2005).

[57] *Cf.* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 28–31 (1997) (arguing that prosecutors are more likely to charge poor defendants because such cases will cost less to litigate than cases against rich defendants).

[58] *See* Richman & Stuntz, *supra* note 56, at 600–01.

[59] *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 983–87 (2009).

[60] *See* Uniform Code of Military Justice art. 22(a), 10 U.S.C. § 822(a) (2006); Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 125 (1992).

[61] By statute, the number of general officers is limited to 307 in the Army, 279 in the Air Force, and 81 in the Marine Corps, and the number of flag officers in the Navy is limited to 216. 10 U.S.C. § 526(a).

slightly more than 650,000 members on active duty in 2008.[62] These 650,000 individuals are divided among dozens of bases and units, each with its own convening authority. Because of the smaller population for which he is responsible, the convening authority has fewer crimes to choose from when deciding whether to bring charges.

In evaluating the performance of a commander, senior officers and service secretaries often take a commander's handling of military justice and the discipline of his subordinates into consideration.[63] Given the smaller number of crimes over which a convening authority exercises charging discretion, each exercise of that discretion — even involving relatively minor crimes — can be subjected to greater scrutiny by his superiors. Accordingly, a convening authority can more easily be held accountable for the full scope of his exercise of prosecutorial discretion rather than just that which concerns spectacular crimes.

Additionally, the subdivision of the military community into relatively small regulated populations and the vesting of discretion at the high level of the convening authority reflect the military system's institutional emphasis on the perception of legitimacy. First, small size and unitary control mean that prosecutorial decisions are more visible to the relevant population: soldiers know who is exercising discretion. Second, because a convening authority is part of the defendant's chain of command,[64] the defendant may have greater familiarity with him and will at least know that they share some common experiences. Third, soldiers are thoroughly trained to respect and obey their superiors, especially senior officers.[65] They are therefore predisposed to view the decisions of a high-ranking convening authority as legitimate.

Fourth, in addition to exercising great discretion over bringing charges, the convening authority has the power to pursue charges by means other than a general court-martial,[66] to dismiss charges at any point during the process of criminal adjudication,[67] and to grant post-conviction clemency.[68] The convening authority's discretion not only

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[62] ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE § 3 app. at 21 (2008) [hereinafter 2008 CODE COMMITTEE REPORT].

[63] *See* Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is It Time for a Change?*, 19 AM. J. CRIM. L. 395, 406 (1992).

[64] *See* Uniform Code of Military Justice art. 22, 10 U.S.C. § 822.

[65] *See* W.G. "Scotch" Perdue, *Weighing the Scales of Discipline: A Perspective on the Naval Commanding Officer's Prosecutorial Discretion*, 46 NAVAL L. REV. 69, 76–77 (1999).

[66] *See* MCM, *supra* note 15, pt. II, R. 306(c); *see also* Uniform Code of Military Justice art. 15, 10 U.S.C. § 815 (nonjudicial punishment); *id.* art. 18, 10 U.S.C. § 818 (general courts-martial); *id.* art. 19, 10 U.S.C. § 819 (special courts-martial); *id.* art. 20, 10 U.S.C. § 820 (summary courts-martial).

[67] MCM, *supra* note 15, pt. II, R. 604(a).

[68] *See* Uniform Code of Military Justice art. 60(c)(2)–(3), 10 U.S.C. § 860(c)(2)–(3). The UCMJ is explicit that this authority "is a matter of command prerogative involving the sole discretion of the convening authority." *Id.* art. 60(c)(1), 10 U.S.C. § 860(c)(1).

to punish, but also to grant reprieves, might mitigate the impression that prosecutorial discretion is harshly and arbitrarily wielded.[69]

The tremendous power vested in the convening authority is not without negative effects on perceived legitimacy.[70] The danger of a commander unlawfully influencing the course of criminal procedures has been called "the mortal enemy of military justice,"[71] and concerns that his vast power might be wielded arbitrarily threaten the perceived fairness of the system.[72] Consequently, many commentators and practitioners have proposed reforms to reduce the power of the convening authority.[73] However, the UCMJ and its amendments were drafted specifically to address this issue and have arguably "created a model that moved in the direction of greater individual rights to the accused at the expense of command control."[74] Additionally, the CAAF has shown on many occasions that it "is willing to address issues of unlawful command influence with severe and even drastic remedies, including setting aside the findings and sentence with prejudice."[75] Given these responses, the dangers of great command power have been mitigated at least to the extent that their ability to undermine public confidence in the military justice system has been minimized.

B. Systemic Incentives Affecting the Decision To Prosecute

Systemic incentives special to the military place conflicting pressures on the manner in which the convening authority exercises his charging discretion. On the one hand, unlike a civilian prosecutor, the convening authority has substantial exogenous interests that affect his decisionmaking. As the commander of a unit, he has a strong incentive to use the military justice system to maintain order and discipline within his unit so that it maintains peak effectiveness; indeed, the need

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[69] *Cf.* Medwed, *supra* note 41, at 61 (arguing that the creation of prosecution "innocence units" would improve the perception that prosecutors were trying to "do justice" (internal quotation marks omitted)).

[70] In addition to those discussed in this Note, the convening authority's powers include authorizing searches, MIL. R. EVID. 315; immunizing witnesses, MCM, *supra* note 15, pt. II, R. 704(c); and, if a court-martial proceeds to trial, hand-picking the members who will comprise the panel, Uniform Code of Military Justice art. 25(d)(2), 10 U.S.C. § 825(d)(2).

[71] *E.g.*, United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

[72] *See* WALTER T. COX III ET AL., NAT'L INST. OF MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 6–7 (2001).

[73] *See, e.g.*, *id.* at 6–8 (proposing to reduce the role of the convening authority in panel selection); Hansen, *supra* note 17, at 449–51 (explaining proposed reforms, including tenure for military judges and the abolition of summary courts-martial).

[74] Zillman, *supra* note 17, at 231.

[75] Mark L. Johnson, *Confronting the Mortal Enemy of Military Justice: New Developments in Unlawful Command Influence*, ARMY LAW., June 2007, at 67, 67 (citing United States v. Lewis, 63 M.J. 405, 417 (C.A.A.F. 2006)).

for the commander to maintain discipline is the justification for granting him great discretion over charging.[76] Thus, in addition to being essentially required to prosecute serious crimes in the same way that a civilian prosecutor is, the convening authority is likely to want to vigorously prosecute crimes that threaten the good order of his unit in order to remove disruptive elements. Although a civilian prosecutor has a similar interest in deterring crime, his interest is much less urgent than that of his military counterpart.

On the other hand, the convening authority may have an incentive not to prosecute less serious crimes in order to avoid the paradoxical perception that he has allowed disorder to flourish under his watch, which might negatively affect his performance evaluations. To prevent this perception, the convening authority might be inclined to use tools other than general courts-martial to deal with minor offenses.[77] So, although it is reasonable to believe that a higher proportion of military than civilian offenders are punished, the rate at which offenders are subject to general courts-martial might not be correspondingly higher.

Nevertheless, punishment of a higher fraction of military than civilian crimes has likely affected the manner in which the two systems have developed. In the civilian system, which is dominated in popular and judicial perceptions by a relatively small number of cases involving the most heinous crimes, the law of criminal procedure and the substantive criminal law have steadily evolved to make convictions easier to obtain.[78] A similar trend has not been evident in the military justice system, in which most major changes in the last half century have been in favor of defendants.[79] Likewise, the CAAF has not developed noticeably pro-prosecution doctrines and instead focuses heavily on the perceived fairness of the system.[80]

C. Pretrial Investigation

The civilian and military justice systems diverge further in what they require before the initiation of felony-level proceedings. On the civilian side, even in the federal system, in which the Constitution

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[76] *See* Finnegan, *supra* note 16, at 196; Zillman, *supra* note 17, at 230.

[77] In the Army in 2008, nonjudicial punishment was imposed in 44,390 cases as compared to 1252 summary courts-martial, 488 special courts-martial, and 674 general courts-martial. 2008 CODE COMMITTEE REPORT, *supra* note 62, § 3 app. at 20–21.

[78] *See, e.g.*, Stuntz, *supra* note 55, at 512–19 (explaining the great expansion in the scope of the substantive criminal law).

[79] *See supra* TAN 25–31.

[80] *See, e.g.*, United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006) (noting that the court will find a due process violation when "delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system").

mandates a grand jury indictment,[81] that procedure is more effective as a tool for prosecutors than as a protective barrier for defendants.[82] The Federal Rules of Criminal Procedure give the prosecutor full control over the grand jury, from which any adversarial testing is excluded.[83] The prosecutor is under no obligation to present exculpatory evidence to the grand jury,[84] and once a grand jury approves an indictment, a court will review that indictment only for facial validity.[85]

By contrast, an Article 32 investigation — which is required any time the convening authority wishes to refer charges to a general court-martial[86] — serves as a valuable information-gathering tool for both the prosecution *and* the defense. The investigation must be "thorough and impartial," and throughout it, the accused has the right to be represented by appointed military defense counsel, to cross-examine witnesses, and to present evidence to the investigating officer.[87] There is a strong presumption in favor of keeping the investigation open to the public.[88] Article 32 investigations serve to reduce information asymmetries rather than increase them.

By increasing the amount and availability of information, a more thorough and adversarial investigation enhances the truth-seeking aspect of the military justice system. With access to more information at an earlier stage in the proceedings, military defendants are less likely to feel that they are being treated unfairly by the system. Military defendants are not at the mercy of better-informed prosecutors, a fact that becomes especially important in the plea bargaining context.[89]

D. The Function of the Prosecuting Attorney

The role of the military trial counsel reinforces these positive effects on the system's projected concern for accuracy and legitimacy. Unlike a civilian prosecutor, who is responsible for choosing the defendant and the charges, the military prosecutor is not formally part of the charging decision. This institutional separation from the charging de-

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[81] U.S. CONST. amend. V, cl. 1. The constitutional right to a grand jury indictment has not been incorporated against the states. *See* Hurtado v. California, 110 U.S. 516, 534–35 (1884).

[82] *See* Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 58–59 (2004).

[83] *See* FED. R. CRIM. P. 6.

[84] *See* United States v. Williams, 504 U.S. 36, 55 (1992).

[85] *See* Costello v. United States, 350 U.S. 359, 363 (1956).

[86] Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (2006).

[87] *Id.* art. 32(b), 10 U.S.C. § 832(b); MCM, *supra* note 15, pt. II, R. 405(f) & discussion.

[88] *See* MCM, *supra* note 15, pt. II, R. 405(h)(3) discussion; *see also* ABC, Inc. v. Powell, 47 M.J. 363, 365 (C.A.A.F. 1997) ("[A]bsent 'cause shown that outweighs the value of openness,' the military accused is . . . entitled to a public Article 32 investigative hearing." (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 509 (1984))).

[89] *See infra* p. 956.

cision has conflicting possible effects. Because the trial counsel is free of the value judgments inherent in the charging decision, he may feel free to act purely as an advocate without having to temper his conduct with policy considerations.

Alternatively, because the trial counsel does not choose his cases, he has less of a personal stake in their outcomes and less incentive to push the boundaries of the law to obtain a conviction. This effect is reinforced by the career incentives of JAG officers, who — unlike civilian prosecutors — usually spend only a small fraction of their careers prosecuting cases. Thus, the military system dilutes the importance of conviction rates for military lawyers since prosecution is only one of many duties they will perform.[90] Accordingly, the military trial counsel's institutional role allows him to take greater care to ensure the accuracy of outcomes and to avoid single-mindedly pursuing convictions. By projecting such an increased concern for accuracy, the military justice system reassures defendants that their proceedings are being handled conscientiously by both sides of the adversary process.

Overall, the manner in which the charging decision is structured in the military justice system is more theoretically sound than in the civilian system. Whereas a civilian prosecutor's great discretion stems from limited resources and interests in administrative efficiency, a convening authority has discretion because the military justice system is — at least to an extent — his tool to maintain discipline. This theoretical soundness has beneficial effects in practice. As a senior officer, the convening authority can more easily be held accountable for his exercise of prosecutorial discretion and is likely perceived as a more legitimate exerciser of this power. Furthermore, because great discretion for the convening authority was consciously built into the military justice system, mechanisms such as the Article 32 investigation were created to provide a more substantive check on that discretion than can be found in the civilian system. These added safeguards reinforce perceptions of the military justice system's legitimacy.

V. GUILTY PLEAS AND PLEA BARGAINING

The massive caseloads of prosecutors, defense attorneys, and judges have brought guilty pleas and the process of plea bargaining to the forefront of the criminal justice system.[91] Although plea bargaining occupies a place of prominence in both the civilian and military

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[90] *Cf.* Kenneth Bresler, Essay, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537 (1996) (criticizing the practice of civilian prosecutors keeping track of their wins and losses).

[91] For an overview of the historical conditions and institutions that elevated plea bargaining to its current position, see George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000).

justice systems, military procedural rules limit its ability to subsume the entire criminal process. By making the act of pleading guilty more difficult, restricting the terms of plea bargains, and limiting the pressure that can be exerted to induce a guilty plea, the military justice system reduces the percentage of felony cases that end in guilty pleas. The effects of these differences reinforce the military justice system's projected concern for accuracy and procedural legitimacy.

A. The Act of Pleading Guilty

The act of pleading guilty is substantially more difficult in the military than in the civilian system. Although the two procedures are formally very similar, the heightened degree of scrutiny during the procedure in the military system has important consequences.[92] The civilian system adopts a permissive approach to guilty pleas that primarily seems to serve interests in administrative efficiency. By contrast, the military justice system's more searching inquiry into guilty pleas communicates the greater institutional value that it places on the perceived accuracy of those pleas.

In the civilian system, Federal Rule of Criminal Procedure 11 sets out three primary procedural requirements in order for a court to accept a guilty plea: the court must advise the defendant of the rights he is relinquishing and ensure that he understands the charges against him, determine that there is a factual basis for the plea, and ensure that the plea is voluntary.[93] Fulfilling the first of these three requirements is largely a mechanical formality that offers little real protection to defendants; even if the colloquy is not properly conducted, a defendant has little chance of overturning his guilty plea on appeal.[94] Similarly, the mandate that a plea have a factual basis has little effect because of the low threshold that must be met to satisfy the requirement. The Supreme Court has held that the factual basis requirement can be satisfied even when the defendant refuses to admit guilt.[95] Lastly, the

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[92] The CAAF has explained the rationale behind the heightened inquiry into guilty pleas:

> The military justice system takes particular care to test the validity of guilty pleas because the facts and the law are not tested in the crucible of the adversarial process. Further, there may be subtle pressures inherent to the military environment that may influence the manner in which servicemembers exercise (and waive) their rights. The providence inquiry and a judge's explanation of possible defenses are established procedures to ensure servicemembers knowingly and voluntarily admit to all elements of a formal criminal charge.

United States v. Pinero, 60 M.J. 31, 33 (C.A.A.F. 2004) (citing United States v. Chancelor, 16 C.M.A. 297, 299 (1966); United States v. Care, 18 C.M.A. 535, 539 (1961)).

[93] FED. R. CRIM. P. 11(b).

[94] *See, e.g.*, United States v. Dominguez Benitez, 542 U.S. 74, 85 (2004).

[95] *See* North Carolina v. Alford, 400 U.S. 25, 37–38 (1970).

voluntariness requirement has been effectively eviscerated by the Court's permissive approach toward plea bargaining.[96]

Although facially very similar to the civilian procedures, military guilty plea requirements are in practice much stricter. In conducting the colloquy with the defendant, the military judge must satisfy himself that the defendant understands the nature of the charges against him and the possible penalties, that he understands the rights he is forfeiting, and that the plea is voluntary.[97] The judge must then inquire into the accuracy — or providence — of the plea by questioning the defendant until he is satisfied that the defendant committed the crime and that he had no defense to the charge.[98] During this inquiry, the judge must elicit a significant level of detail from the defendant.[99]

This inquiry into the providence of the plea is then subject to thorough appellate review by the service courts of criminal appeals and the CAAF. For example, in *United States v. Coffman*,[100] a Marine lance corporal had pled guilty to larceny.[101] However, on appeal, the Navy-Marine Corps Court of Criminal Appeals independently identified an issue with the providence of the guilty plea.[102] After carefully reviewing the facts of the case and the proceedings in the trial court, the appellate court concluded that the plea was improvident because during the providence inquiry, the military judge did not inquire into the possibility that the defendant might have believed that the stolen property was abandoned and thus had a mistake-of-fact defense.[103] By relying too heavily on yes-or-no questions and not explaining the law behind the questions, the judge "denied the [defendant] the ability to make an informed decision concerning [his] answers."[104] Thus, because the process of taking the plea was faulty, it was ruled improvident, and the charge was remanded for further proceedings.

Even after a plea is accepted, if the defendant makes any statements inconsistent with the plea, the judge must renew his inquiry into the plea's providence.[105] If the judge finds that the plea was entered improperly or through a lack of understanding of its meaning or effect,

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[96] *See, e.g.*, Brady v. United States, 397 U.S. 742 (1970) (holding that the threat of capital punishment does not make a plea involuntary).

[97] *See* MCM, *supra* note 15, pt. II, R. 910(c)–(d); *see also* U.S. DEP'T OF THE ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK 8–29 (2002) (suggesting a script for a plea inquiry).

[98] *See* MCM, *supra* note 15, pt. II, R. 910(e) & discussion.

[99] *See id.* pt. II, R. 910(e) discussion ("A plea of guilty must be in accord with the truth. . . . [T]he accused must be convinced of, and able to describe all the facts necessary to establish guilt.").

[100] 62 M.J. 676 (N-M. Ct. Crim. App. 2006).

[101] *Id.* at 677.

[102] *Id.*

[103] *See id.* at 679.

[104] *Id.* at 680.

[105] *See* MCM, *supra* note 15, pt. II, R. 910(h)(2).

a plea of not guilty is entered for the defendant.[106] For example, in *United States v. Phillippe*,[107] a defendant had pled guilty to an unauthorized absence of nearly three years. However, at his sentencing hearing, the defendant gave an unsworn statement that he had tried to return to military control during that period, which, if true, would have rendered his guilty plea factually inaccurate.[108] The military judge failed to reopen the providence inquiry after this statement, so on appeal, the CAAF set aside the defendant's guilty plea because there existed a "substantial basis" to question its providence.[109]

Thus, unlike a civilian defendant, who can plead guilty with extreme ease whether he is actually guilty or not, for a military defendant, pleading guilty is never a sure thing.[110] The military justice system's guilty plea rules can restrict the ability of factually innocent defendants to plead guilty or force a guilty defendant to go to trial if he is not able to successfully complete the providence inquiry. Both of these effects reflect enhanced concern for the perceived fairness of the military justice system, as observers can be more confident that innocent people are not pleading guilty and will not see questionably guilty defendants punished with minimal process. The rigor of the military guilty plea process has two further effects: First, military defendants participate in the proceedings to a greater degree, increasing the likelihood that they will view the process as legitimate.[111] Second, the more elaborate proceedings mitigate the perception that the system treats guilty pleas casually or arbitrarily, creating an enhanced sense of confidence in the system.

B. Unwaivable Rights and Prosecutorial Incentives To Plea Bargain

In recognition of and to counteract the great power of the convening authority, the military justice system limits the rights that the defendant can waive as part of a pretrial agreement.[112] Unlike a civilian

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[106] Uniform Code of Military Justice art. 45, 10 U.S.C. § 845 (2006); MCM, *supra* note 15, pt. II, R. 910(h)(2).

[107] 63 M.J. 307 (C.A.A.F. 2006).

[108] *Id.* at 308–09.

[109] *Id.* at 311.

[110] *See* Edye U. Moran, *The Guilty Plea — Traps for New Counsel*, ARMY LAW., Nov. 2008, at 61 (discussing the difficulties facing defense counsel in preparing for a guilty plea); John Siemietkowski, *Preparing Your Client for Providency*, ARMY LAW., Apr. 2008, at 44.

[111] *See* TYLER, *supra* note 20, at 163–64; Sampsell-Jones, *supra* note 47, at 1328–29.

[112] *See* United States v. Tate, 64 M.J. 269, 270 (C.A.A.F. 2007) ("In the UCMJ, Congress sought to balance the relatively autonomous power of convening authorities by centralizing review and clemency functions in the appellate courts and senior executive branch officials."). This arrangement stands in contrast to the civilian system, in which the Supreme Court has upheld broad waivers of rights as part of plea bargains. *See, e.g.*, Peretz v. United States, 501 U.S. 923, 936 (1991).

defendant, for whom a waiver of the right to appeal is a staple term in most plea bargains,[113] a military defendant cannot waive his right to post-trial clemency review or his right to appeal.[114]

By ensuring that all defendants who plead guilty retain their right to appeal, the military justice system reinforces the substantive nature of the providence inquiry, which would be much less effective at weeding out improper pleas if it were not subject to appellate review. Because they review numerous guilty plea cases, military appellate courts see a more complete picture of what takes place in the military justice system and are better able to adjust their jurisprudence to shape the system in desirable ways.[115] Military appellate courts can therefore more effectively regulate guilty pleas and plea bargaining. Such improved regulation likely partially explains the increased scrutiny of guilty pleas and plea bargaining.[116]

In addition to the right to appeal, a military defendant necessarily retains the right to a full adversarial sentencing proceeding,[117] a right that is especially important given the military's almost completely indeterminate sentencing regime.[118] Unlike in the civilian system, in which prosecutors generally offer only sentence recommendations from which the judge can deviate,[119] the sentence agreed to in a pretrial agreement serves as a hard cap on the defendant's potential punishment: his final sentence will be the lesser of the agreed-to sentence or that imposed at the sentencing hearing.[120]

This dynamic has two probable effects. First, because a military defendant who has pled guilty pursuant to a pretrial agreement has al-

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[113] *See* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment, and Alienation*, 68 FORDHAM L. REV. 2011, 2029–30 (2000); *see also* Robert K. Calhoun, *Waiver of the Right To Appeal*, 23 HASTINGS CONST. L.Q. 127 (1995).

[114] *See* MCM, *supra* note 15, pt. II, R. 705(c)(1)(B); *see also Tate*, 64 M.J. at 272 (refusing to enforce a pretrial agreement waiver of the defendant's right to consideration by the Navy Clemency and Parole Board).

[115] *Cf.* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 823–24 (2006) (arguing that many of the effects of the Supreme Court's decisions are invisible to the Justices because guilty plea cases are largely excluded from their view).

[116] Many of the procedural restraints on guilty pleas and plea bargaining codified in the Manual for Courts-Martial began as decisions announced by the Court of Military Appeals. *See* Michael E. Klein, United States v. Weasler *and the Bargained Waiver of Unlawful Command Influence Motions: Common Sense or Heresy?*, ARMY LAW., Feb. 1998, at 3, 4–12.

[117] *See* MCM, *supra* note 15, pt. II, R. 705(c)(1)(B).

[118] *See id.* pt. II, R. 1002.

[119] *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1953–54 (1992).

[120] *See* Bradley J. Huestis, *You Say You Want a Revolution: New Developments in Pretrial Procedures*, ARMY LAW., Apr.–May 2003, at 17, 20. In order to prevent the bargain from influencing the independent determination of the sentence, the portion of the pretrial agreement that concerns the sentence is concealed from the panel or military judge. MCM, *supra* note 15, pt. II, R. 705(e), 910(f)(3).

ready admitted in detail to his conduct and has a guaranteed maximum punishment, he may be willing to be more forthright about the reasons for his crime. By enabling such increased candor, the military justice system communicates the importance it places on the perception that the guilty plea reflects an accurate result and on increasing popular confidence in the system. Second, even defendants who plead guilty take part in some formal proceedings and adversarial testing. Ensuring this opportunity to participate demonstrates commitment to improving defendants' perceptions of the system's legitimacy.[121]

Because the military system prevents the waiver of rights to sentencing proceedings and appeal in plea negotiations, the military prosecutor has less to gain from a plea bargain than does a civilian prosecutor, for whom a plea bargain is essentially the end of the proceedings and a virtually irreversible conviction.[122] With such a strong incentive to obtain a plea bargain, the danger exists that civilian prosecutors single-mindedly pursuing quick convictions may use the many tools at their disposal to induce a plea without truly considering whether a particular defendant is innocent or guilty.[123]

The military system mitigates this danger. Even if a pretrial agreement is reached, the trial and defense counsel must continue to develop the facts of the case for sentencing. Moreover, the convening authority — who must give the final approval of the pretrial agreement but who is not involved in the actual litigation at either a trial or sentencing hearing — has less personal incentive to reach a pretrial agreement in order to save himself time.[124]

The reduced caseload pressure on military attorneys further lessens their time and resource incentives to plea bargain. In the civilian system, prosecutors often must deal with an overwhelming number of cases, essentially requiring them to obtain plea bargains from a large proportion of defendants.[125] Military prosecutors do not face similar pressures. For example, in 2008, 349 attorneys worked in Navy Legal Services Command, which is responsible for providing both trial and defense counsel for courts-martial as well as a variety of other legal

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121 *See* TYLER, *supra* note 20, at 163–64.

122 *Cf.* Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("These advantages [of plea bargaining] can be secured . . . only if dispositions by guilty plea are accorded a great measure of finality.").

123 *See* F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 190 (2002) ("[T]he incentives to a plea bargain are powerful enough to blind the prosecutor to the defendant's actual culpability.").

124 *See* Cole, *supra* note 63, at 405–06.

125 *See, e.g.*, Fisher, *supra* note 91, at 903. The Supreme Court has acknowledged this practical necessity when upholding various aspects of the plea bargaining system. *See, e.g.*, *Blackledge*, 431 U.S. at 71.

services.[126] In the same year, the Navy held only 269 general courts-martial, including those in which the defendant pled guilty.[127] Thus, each attorney's caseload necessarily fell far short of the sixty felony cases per year handled by an assistant district attorney in Queens.[128] With less caseload pressure to plea bargain, a military prosecutor is less likely to go to as great a length to obtain a guilty plea. This lower incentive reduces the risk — real or perceived — that an innocent defendant will be induced to plead guilty.

C. Prosecutorial Pressure on the Defendant To Plead Guilty

In addition to limiting the prosecutor's incentive to push hard for a plea bargain, the military justice system limits the amount of pressure that a convening authority or trial counsel can exert on a defendant to induce him to plead guilty. This restriction stands in contrast to the civilian system, in which the prosecutor is given great latitude to make any good faith legal threat in order to induce a plea.[129] Most starkly, in the limited number of military capital cases, plea bargaining is not even a possibility,[130] which removes one major issue that plagues the civilian system: the fear that the threat of the death penalty is so coercive that it can induce even an innocent defendant to plead guilty.[131] Additionally, the convening authority cannot bring additional charges if a defendant refuses to plead guilty,[132] removing another suspect weapon from the prosecution's arsenal.

Furthermore, in all cases, the military prosecutor's bargaining position is weaker than that of his civilian counterpart because of the more thorough investigation performed before the guilty plea and the reduced information asymmetry in the military system. The requirement that an Article 32 investigation take place before charges can be referred to a general court-martial contrasts with the civilian system, in

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126 2008 CODE COMMITTEE REPORT, *supra* note 62, § 4, at 7.

127 *Id.* § 4 app. at 14.

128 Shaila K. Dewan, *Prosecutors Say Cuts Force Plea Bargains*, N.Y. TIMES, Mar. 10, 2004, at B3.

129 *See, e.g.*, Brady v. United States, 397 U.S. 742 (1970) (affirming guilty plea even if threat of the death penalty was a but-for cause of the plea). Permissible threats need not even be against the defendant whom the prosecutor is attempting to induce to plead guilty, but can be against third parties. *See, e.g.*, United States v. Pollard, 959 F.2d 1011 (D.C. Cir. 1992) (upholding a plea induced by a prosecutor who threatened a harsher sentence for the defendant's wife).

130 *See* Uniform Code of Military Justice art. 45(b), 10 U.S.C. § 845(b) (2006).

131 *Cf.* Parker v. North Carolina, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting) (arguing that using the death penalty to induce a guilty plea "presents a clear danger that the innocent, or those not clearly guilty, or those who insist upon their innocence, will be induced nevertheless to plead guilty").

132 *See* Uniform Code of Military Justice art. 30(a), 10 U.S.C. § 830(a); *cf.* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (upholding addition of habitual offender charge after defendant refused to plead guilty to fraud).

which it is common for very little factual development to take place before a guilty plea and for the prosecutor to hold what facts he has close to his chest.[133] The disadvantaged position in which this practice places the defendant is exacerbated when the defendant must rely on appointed counsel, who rarely has the time or resources to conduct an independent investigation.[134] The civilian defendant's further sacrifice of at least some of his rights under *Brady v. Maryland*[135] deprives him of material that could help him at trial or at least improve his bargaining position during plea negotiations.[136]

Thus, by reducing the amount of pressure a convening authority or trial counsel can bring to bear on a defendant, the military justice system further signals the importance it places on the appearance of fairness. With each incremental increase in the pressure exerted, more defendants are likely to plead guilty. Although the majority of these additional plea bargains will be made by guilty defendants, the sweep will almost certainly include some innocent defendants. Because prosecutors offer greater sentence discounts for weaker cases, "the greatest pressures to plead guilty are brought to bear on defendants who may be innocent."[137] Thus, the military justice system's approach to plea bargaining shows greater respect for the coercive pressures of plea bargaining and the dangers of inducing innocent defendants to plead guilty. Accordingly, the military justice system includes heightened requirements for the acceptance of a guilty plea and guarantees the retention of the right to appeal. These added hurdles likely ensure that some innocent defendants who might have been induced to plead guilty by the pressures of the civilian system instead go to trial. With a diminished risk of punishing innocent defendants, the military justice system further appears more legitimate and fair.

D. Empirical Comparison

An empirical comparison between the civilian and military systems reveals the effects of the different influences on plea bargaining. Although data on the military guilty plea rate is not widely available, most figures suggest that approximately seventy-five percent of general

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[133] *See* Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got To Do With It?*, CRIM. JUST., Fall 2008, at 28, 28.

[134] *See* Strickland v. Washington, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting); Stuntz, *supra* note 55, at 570 n.242.

[135] 373 U.S. 83 (1963).

[136] Although the Supreme Court has not explicitly approved the practice of waiving *Brady* rights in a plea bargain, the Court has approved waivers of access to helpful impeachment material. *See* United States v. Ruiz, 536 U.S. 622 (2002); *see also* Blank, *supra* note 113, at 2038–40 (summarizing the courts of appeals' treatment of plea bargain *Brady* waivers).

[137] Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968).

court-martial convictions are the result of guilty pleas.[138] This number is significantly lower than in the civilian system, in which, in 2001, approximately ninety-five percent of all federal convictions were obtained by guilty plea.[139] Similarly, in 2000, approximately ninety-five percent of all state felony convictions were obtained by guilty pleas.[140]

With less incentive for prosecutors to plea bargain and less pressure on defendants to do so, it is not surprising that a smaller proportion of military defendants plead guilty. The resulting increased prevalence of court-martial trials has substantial consequences. For one, because the court-martial trial process is used more frequently, the military system is less vulnerable to the criticism that the elaborate trial process is mere "window dressing" for the real system that takes place at the plea bargaining stage.[141] The system thus projects greater concern for a fair and just outcome in individual cases rather than simply for the efficient processing of criminal defendants. Furthermore, the increased frequency of trials provides more opportunities for appellate courts and military officials to observe the court-martial system and to calibrate it to best serve the needs of the military and reinforce the system's adherence to the principle of projected legitimacy.

VI. CONCLUSION — THE BENEFITS OF A MADE ORDER

The manner in which prosecutorial power is defined and regulated by the military justice system demonstrates the benefits of a made legal order. In the civilian criminal justice system, the prosecutorial scheme and doctrines shaping it serve myriad principles, ranging from political expediency to administrative efficiency. However, the military rules structuring the charging discretion of the convening authority and the process of plea bargaining manifest the quest for legitimacy — a major motivator of the development of the modern military justice system. Charging discretion is situated with an official who has a legitimate claim to vast power and who can be held accountable for its exercise. An open, adversarial pretrial investigation reduces information asymmetries and increases the degree of defendant participation

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[138] *See* 2008 CODE COMMITTEE REPORT, *supra* note 62, § 3 app. at 20 (indicating that approximately ninety-five percent of general courts-martial ended in convictions); Alfred F. Arquilla, *Crime in the Home*, ARMY LAW., April 1988, at 3, 11 n.79 (stating that in fiscal year 1987, 911 of 1483 Army courts-martial ended in guilty pleas); Huestis, *supra* note 120, at 20 n.33 (stating that between 2000 and 2002, 76.9% of Army courts-martial ended in guilty pleas); Moran, *supra* note 110, at 62 n.7 (stating that in 2006, approximately seventy-five percent of Army courts-martial ended in guilty pleas).

[139] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 418 tbl.5.17 (2005).

[140] *Id.* at 450 tbl.5.46.

[141] *See* Blank, *supra* note 113, at 2016; *see also* Scott & Stuntz, *supra* note 119, at 1912 ("[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.").

in the process. More rigorous guilty plea procedures ensure that convicted defendants at least appear guilty, and restrictions on plea bargaining limit the danger that innocent defendants will be punished.

By contrast, no single principle unifies the rules defining prosecutorial power in the civilian criminal justice system.[142] Allowing line prosecutors sweeping charging discretion reflects both political expediency and efficiency concerns.[143] Most crimes are not important enough to draw the attention of an elected prosecutor,[144] and even if they were, such an official in a major city could not possibly give every case individualized attention. Similarly, the civilian grand jury seems simultaneously designed both to enhance the investigatory power of prosecutors and to increase the efficiency of pretrial procedures.[145] Far from being a "protective bulwark" of defendants' rights,[146] the modern grand jury is more effective as a tool for prosecutors to develop their cases.[147] Likewise, although the Supreme Court's permissive approach to plea bargaining primarily reflects efficiency concerns, it also manifests the value the Court places on a system of criminal justice that can control crime by quickly and conclusively determining guilt.[148] The criminal justice system attempts to strike a precarious balance among these competing principles, but that equilibrium can be destabilized with any shift in the motivations underlying the system's rules.[149] Such a tenuous balance of motives and the large number of interacting variables complicate reform efforts and limit the ability of courts and lawmakers to push the system in a specific direction.[150]

The modern military justice system suggests an alternative model of institutional design: it emerged as a made order with legitimacy as its organizing principle. Since the experience of World War II brought the military justice system into the popular consciousness and shook confidence in the system's fairness, those designing the system have made enhancing the perceived legitimacy of the system a central principle of its development. This concern for legitimacy is strongly reflected in the system's procedures, demonstrating the value of consciously adhering to a plan of design with a coherent driving principle.

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142 *Cf.* Thomas, *supra* note 14, at 1821–24 (arguing that criminal procedure lacks coherence).

143 *Cf.* Allen, *supra* note 9, at 524 (explaining the political necessity of a system of numerous local prosecutors with no central control); Arenella, *supra* note 13, at 199 (arguing that criminal procedures allocate power among institutions based on competency and political norms).

144 *See* Richman & Stuntz, *supra* note 56, at 600–01.

145 *See* Kuckes, *supra* note 82, at 33–53.

146 *See* United States v. Dionisio, 410 U.S. 1, 17 (1973).

147 *See* Kuckes, *supra* note 82, at 58–59.

148 *See* Arenella, *supra* note 13, at 192, 221.

149 *Cf.* Kahan & Meares, *supra* note 10 (arguing that a crisis is approaching because of a change in the racial politics that motivated many doctrines of criminal procedure).

150 *See* Allen, *supra* note 5, at 999.