ENSURING JUSTICE WITHOUT "BEATING THE DEAL"

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INTRODUCTION

In 1950 military justice changed drastically with the enactment of the Uniform Code of Military Justice (UCMJ).[1] The UCMJ brought many protections to service members that were standard in civilian criminal practice, but there still existed differences between the two systems.[2] Recent changes to the UCMJ eliminated more of those differences. The Joint Service Committee recommended further changes, which were accepted,[3] to the way the military handles guilty pleas and plea agreements in the Rules for Courts-Martial (RCM), which govern the procedure and substance of courts-martial.[4] The primary change discussed here is the removal of the military's "beat the deal" provision. Previously, the accused and the convening authority[5] agreed to a guilty plea and the maximum sentence to be permitted by the convening authority.[6] The accused then chose whether he wanted to be sentenced by a panel (the military equivalent of a jury) or a military judge, and "[i]f the sentencing authority impose[d] a less severe sentence than agreed upon [with the convening authority], the accused [received] the lesser sentence. The sentence

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1 *See Truman Signs Code of Service Justice: Bill Provides a Civilian Court of Military Appeals and Safeguards Defendants*, N.Y. TIMES (May 7, 1950), http://www.nytimes.com/1950/05/07/archives/truman-signs-code-of-service-justice-bill-provides-a-civilian-court.html. Prior to the UCMJ, military justice was governed by the Articles of War, established in 1775 and modified several times in the subsequent centuries. Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1, 7–8 (2005).

2 *See infra* Parts I and III.

3 *See* 2018 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,825, 83 Fed. Reg. 9889, annex 2 at 9907 (Mar. 1, 2018).

4 *See infra* Part I.

5 In the military, a convening authority is someone vested with power to convene courts-martial and impose punishment, subject to legal restrictions. *See* Ernesto Gapasin, *What Is a Convening Authority?*, MILITARYLAWYER-DEFENSE.COM (Nov. 23, 2015), http://www.militarylawyer-defense.com/what-is-a-convening-authority/.

6 *See* Francis A. Gilligan, *The Bill of Rights and Service Members*, 1987 ARMY LAW. 3, 9.

[could] never exceed that agreed upon."[7] The sentencing authority was also unaware of the terms for which the accused bargained.[8] The removal of this provision will allow military plea agreements (previously called pretrial agreements) to more closely emulate the civilian system of plea bargaining. However, the civilian system is not without its flaws. To avoid some of the civilian system's pitfalls, military justice will need to rely on the gumption of military judges to reject plea agreements that are unjust, in the same way it relies on military judges to reject guilty pleas that are improvident.[9]

The major flaw in the civilian plea bargaining system is its inherent coercion. Two of the manifestations of that coercion are that innocent people may plead guilty and that guilty people may accept unjust sentences. The military justice system already has an effective process in place to prevent innocent people from pleading guilty.[10] However, the changes to the RCM highlight the importance of preventing the guilty accused from being coerced into accepting unjust plea agreements.

Part I of this Essay begins with a brief history of plea bargaining in the military, and discusses the process the military used to dispose of guilty pleas and pretrial agreements, and then highlights some of the changes. Part II analyzes the civilian method of plea bargaining and delves into the two coercive manifestations of the system. Part III presents how the military avoided the first pitfall of coercive plea agreements and recommends how the military can ensure that changes to its system do not result in unjust sentences. This Essay concludes that while the removal of military judges' independent sentencing ability in concert with a pretrial agreement reduces their authority, it actually increases military judges' responsibility, as they must be actively willing to reject unjust plea agreements.

I. MILITARY PLEA BARGAINING

Plea bargaining began in the military shortly after Congress passed the Uniform Code of Military Justice, and arguably because of it.[11] Recognizing the efficiency value of disposing of cases in this way, "[i]n 1953, the Army became the first service to officially encourage plea-bargaining."[12] Of note, this was nearly two

7 *Id.*; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(b)(2)(E) (2016) [hereinafter MCM].

8 Francis A. Gilligan & Michael D. Wims, *Civilian Justice v. Military Justice: In Many Instances, Service Members Accused of Crime Are Granted More Rights than Civilians*, 5 CRIM. JUST. 2, 37 (1990); *see also* MCM, *supra* note 7, R.C.M. 910(f)(3) (stating that in the case of sentencing by a military judge the "military judge alone . . . shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced").

9 *Cf.* Randy V. Cargill, *The Article 63 Windfall*, 1989 ARMY LAW. 26, 26 (discussing the role of the military judge in resolving inconsistencies at the trial level and the ability of inconsistencies to indicate an improvident guilty plea).

10 *See infra* Part III.

11 *See* Carlton L. Jackson, *Plea-Bargaining in the Military: An Unintended Consequence of the Uniform Code of Military Justice*, 179 MIL. L. REV. 1, 2 (2004).

12 *Id.* at 4. In a letter to all Staff Judge Advocates, the Judge Advocate General wrote:

> [O]ver 94.4 per cent, [of convictions in federal court] were based on pleas of guilty or nolo contendre [sic]. . . . [In general courts-martial] the indication is that in only about

decades before the Supreme Court lauded the value of bargaining for guilty pleas.[13] Nonetheless, the Army quickly recognized some of the flaws inherent in the newly encouraged procedure. Most relevant "was a practice by some staff judge advocates that required the accused 'to forego his right to present to the court matters in extenuation or mitigation of the offense charged' in the pretrial agreement."[14] The government correctly realized that if the accused could present this evidence, the defense would have the opportunity to "beat the deal in court."[15] In response to this practice by the government, the Judge Advocate General[16] published that "[w]aiving extenuation and mitigation evidence in pretrial agreements was prohibited."[17]

"Beating the deal" was a staple of military justice. It allowed the sentencing authority to sentence the accused to whatever it believed was just, but did not leave the accused solely at the mercy of the sentencing authority's discretion. Because the accused agreed to a sentence cap, he maintained the benefit of his bargain. Further, the likelihood of the accused facing an unjust sentence was reduced because of an independent sentence by the sentencing authority.

Sentences imposed through pretrial agreements and lesser imposed sentences established by the sentencing authority were subject to appeal. Often military judges used the phrase "beat the deal" in their opinions when they described the practice.[18] The words themselves indicated a possible perception of it, in that the accused may end up in a better position than what was bargained for.

Commentators left no doubt about the potential shortcomings of the practice. Article 63 of the UCMJ, which remained unchanged, states that if an accused's case

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> one per cent of the cases were the findings based wholly on the pleas. Why this great disparity between the two systems in the numbers of sentences based on contest?

Id. app. A at 46–47.

13 Santobello v. New York, 404 U.S. 257, 260 (1971) ("The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged.").

14 Jackson, *supra* note 11, at 25 (citation omitted).

15 *Id.* at 25–26.

16 The Judge Advocate General is the highest-ranking lawyer in each branch of the military. *Cf.* Gilligan & Wims, *supra* note 8, at 36 (discussing the Judge Advocate General's ability to appoint military judges, who are subordinate to the Judge Advocate General position in each of the branches of the service).

17 Jackson, *supra* note 11, at 26 (citation omitted); *see also* Robinson O. Everett, *The 50th Anniversary of the Uniform Code: A Historical Look at Military Justice*, 16 CRIM. JUST. 21, 24 (2001) ("In the 1960s, the U.S. Army . . . allowed a defendant to enter into a written pretrial agreement in which, in return for the accused's guilty plea, the convening authority would disapprove any portion of the defendant's sentence that exceeded the agreed amount. The accused remained free to 'beat the deal' by seeking from the court-martial a sentence below the maximum set by the pretrial agreement.").

18 United States v. Difusco, No. 96 01550, 1999 WL 147599, at *4 (N-M. Ct. Crim. App. Feb. 26, 1999) ("He beat his deal significantly when he only received 30 days confinement . . . ."); United States v. Wooden, No. S29154, 1996 WL 649234, at *1 (A.F. Ct. Crim. App. Oct. 30, 1996) ("She beat the deal at trial . . . ."); United States v. Morales, 12 M.J. 888, 890 (A.C.M.R. 1982) ("[A]n accused [must] be given the tactical option of attempting to 'beat the deal' . . . .").

is reheard, his sentence may not be increased from the initial hearing.[19] "The effect of these provisions is to make an appeal by the accused virtually risk-free."[20] Regardless of what happens during the appeal, the accused's sentence will not be increased, and if it is remanded for resentencing there is a chance that it will be reduced.[21] Furthermore, in resentencing, the panel (if the accused so elects) is directed that the maximum punishment remains that which was previously adjudged, but are not told the statutory basis for why.[22] This means "the accused has a justifiable hope that [the sentence] will be decreased."[23] Therefore, the accused has every incentive to search for a way to invalidate his pretrial agreement, most often by arguing his guilty plea was improvident.[24] Frustration with the current workings led to tense words by practitioners[25] and judges.[26] Article 63 affected, and still affects, all sentences regardless of how imposed. However, there was something particularly striking about an accused bargaining for a deal, receiving a better outcome at sentencing, and then attacking it again.

Additionally, the government was forced to make an intense effort to ensure that the deal it bargained for was ultimately adjudged. To counter the effect of mitigating evidence presented by the defense at sentencing, "the trial counsel [the military lawyer acting as prosecutor] w[ould] often attempt to include such uncharged misconduct in a stipulation of fact to ensure that the defense does not 'beat the deal.'"[27] While the sentencing authority is constitutionally permitted to consider facts not proved at trial,[28] the Court of Military Appeals (CMA)[29] held in

19 UCMJ art. 63, 10 U.S.C. § 863 (2012) ("Upon a rehearing . . . no sentence in excess of or more severe than the original sentence may be approved . . . ."); *see also* MCM, *supra* note 7, R.C.M. 810(d).

20 *See* Cargill, *supra* note 9, at 27.

21 *Id.*

22 *See id.*

23 *Id.*

24 *See id.* at 26.

25 *See id.* at 27 n.8 ("I believe it is manifestly unfair that an accused should profit from his breach of the pretrial agreement."); John F. O'Connor, *Foolish Consistencies and the Appellate Review of Courts-Martial*, 41 AKRON L. REV. 175, 220 (2008) ("[D]o we really want to have a military justice system that allows an accused to urge a military judge to accept a pretrial agreement a trial and then get up on appeal and have his new appellate defense counsel argue that the very terms that the accused negotiated, accepted, and urged the military judge to accept should be thrown out?").

26 United States v. Epps, 20 M.J. 534, 537 (A.C.M.R. 1985) (Suter, C.J., dissenting). Dissenting from a decision to set aside a finding of guilty due to an improvident guilty plea, Judge Suter stated, "[t]he majority has gone to great lengths to find error in this case. Indeed, this case represents the epitome of legal hair splitting. It is this type of judicial frolicking that erodes confidence in criminal law, military or civilian." *Id.*

27 Mary M. Foreman, *Let's Make a Deal! The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53, 96 (2001).

28 United States v. Fitch, 659 F.3d 788, 790 (9th Cir. 2011) (holding that the district court judge was permitted to consider evidence that the accused murdered his wife to further his fraud, even though he was only convicted for fraud).

29 C.M.A. is the precursor to the Court of Appeals for the Armed Forces (C.A.A.F.). *See Military Courts*, FED. JUD. CTR., https://www.fjc.gov/history/courts/military-courts (last visited Jan. 1, 2019).

United States v. Glazier[30] that unless the admissibility of facts was explicit in the stipulation itself, the "admissibility of any fact so stipulated is governed by the Military Rules of Evidence."[31] This allowed the accused the possibility of stipulating to facts beneficial to the government but later challenging them on evidentiary grounds. The accused would merely need to not stipulate to the admissibility of the facts. A concurring opinion even suggested this could be done without violating a pretrial agreement.[32]

Despite criticism, the accused's ability to "beat the deal" remained part of military justice since its restructuring in the 1950s. However, in response to recent changes to the UCMJ[33] and in furtherance of its mission, the Joint Service Committee issued proposed amendments to the Manual for Courts-Martial (MCM) in July 2017.[34] These amendments were approved in March 2018.[35] Among other major changes, the amendments eliminated "the 'beat the deal' concept under which the accused received the lesser of the adjudged sentence or the sentence cap negotiated with the convening authority."[36] The changes resulted in a substantial revision of RCM 705 (the rule governing pretrial agreements, which are now referred to as plea agreements)[37] and RCM 910 (the rule governing pleas by an accused),[38] especially in regards to the military judge's responsibility. The new rule dictates that if the military judge rejects a plea agreement he must "inform the accused that if the plea is not withdrawn the court-martial may impose any lawful

30 26 M.J. 268 (C.M.A. 1988).

31 *Id.* at 270.

32 *Id.* at 271 (Everett, C.J., concurring) ("Moreover, making such an objection successfully does not violate a pretrial agreement requiring the accused to enter into a particular stipulation of fact and does not entitle the Government to abrogate the pretrial agreement."); *see also* Foreman, *supra* note 27, at 98 ("Thus, it is the government's burden to include in the stipulation of fact a provision regarding admissibility of the matters contained therein . . . .").

33 *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016) (to be codified in scattered sections of 10 U.S.C.).

34 *See* Proposed Amendments to the Manual for Courts-Martial, United States (2016 ed.), 82 Fed. Reg. 31,952 (July 11, 2017).

35 *See* 2018 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,825, 83 Fed. Reg. 9889 (Mar. 1, 2018).

36 *Executive Summary of Proposed Amendments to the Manual for Courts-Martial*, JOINT SERV. COMM., https://jsc.defense.gov/Portals/99/Documents/ExecutiveSummary.pdf?ver=2017-07-19-103048-967 (last visited Jan. 1, 2019).

37 The changes include changing the name of the rule from pretrial agreements to plea agreements, itself indicating the new focus on the outcome. *Compare* MCM, *supra* note 7, R.C.M. 705, *with* Proposed Amendments to the Manual for Courts-Martial, United States (2016 ed.), 82 Fed. Reg. 31, 952, annex 2 at 113 (July 11, 2017), *and* 2018 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,825, 83 Fed. Reg. 9889, annex 2 at 9965 (Mar. 1, 2018).

38 *Compare* MCM, *supra* note 7, R.C.M. 910, *with* Proposed Amendments to the Manual for Courts-Martial, United States (2016 ed.), 82 Fed. Reg. 31,952, annex 2 at 161 (July 11, 2017), *and* 2018 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,825, 83 Fed. Reg. 9889, annex 2 at 9990 (Mar. 1, 2018).

punishment."[39] This change brought the military sentencing process significantly more in line with the civilian system and became effective January 1, 2019.[40]

The role of the sentencing authority, and especially the military judge, will dramatically change. He, or the panel, will no longer independently create a sentence for every accused. While this may decrease the military judge's authority in plea agreements, it increases his responsibility. The judge will see in advance what the convening authority believes is a fair sentence or sentence range, and the accused can only rely on the military judge to reject an unjust plea agreement. To highlight the importance of this judicial protection, the next Part highlights some pitfalls of the civilian system.

II. CIVILIAN PLEA BARGAINING

In the words of the Supreme Court, "plea bargaining . . . *is* the criminal justice system."[41] And while the system's flaws may be extensive and well documented, it is worth further discussing some of the relevant features that may now become pertinent to military sentencing. One of the greatest concerns about civilian plea bargaining is its inherent coercion.[42] While the Supreme Court rejected that the process is coercive in the legal sense,[43] in a practical sense its coercive aspects are irrefutable.[44] Relevant here are two manifestations of coercion: the coercion that induces an accused to plead guilty and the coercion that induces the guilty accused to accept an unjust sentence.

Early American and most common-law justice actually dissuaded guilty pleas,[45] not to mention plea bargains. By the 1920s "[t]he dominance of the guilty plea apparently came as a remarkable surprise to contemporary observers."[46] While for many years the Supreme Court declined to rule on the legality of plea bargaining,[47] it ultimately gave it positive reviews in *Santobello v. New York*.[48] The Court recognized that while there were some safeguards to protect the accused, there were inherent issues with plea bargaining. For example, earlier, in *United States v.*

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39 2018 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,825, 83 Fed. Reg. 9889, annex 2 at 9992 (Mar. 1, 2018).

40 *Id.* at 9890.

41 Missouri v. Frye, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

42 *See generally* Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67 (2005) (describing some of the coercive aspects of plea bargaining).

43 *See* Santobello v. New York, 404 U.S. 257, 260 (1971).

44 *See, e.g.*, McCoy, *supra* note 42, at 95–96.

45 Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 7 (1979).

46 *Id.* at 26.

47 *Id.* at 37 ("[T]he Supreme Court had . . . opportunities to consider the legality of plea negotiation but did not use them."); *id.* at 37 n.208; *see also* Carlino v. United States, 394 U.S. 1013 (1969); Cooper v. Holman, 385 U.S. 855 (1966); Bailey v. MacDougall, 384 U.S. 962 (1966); Darrah v. Illinois, 383 U.S. 919 (1966); Pinedo v. United States, 382 U.S. 976 (1966); Green v. Oklahoma, 358 U.S. 905 (1958); Shelton v. United States, 356 U.S. 26 (1958).

48 404 U.S. 257, 260 (1971).

Jackson,[49] the Court stated that "[i]t is established that due process forbids convicting a defendant on the basis of a coerced guilty plea."[50] The Court in *Jackson* held that a statute that removed the possibility of death for defendants who forwent their right to a jury trial, but mandated it if the jury recommended death, "[could not] be justified by its ostensible purpose . . . [and] Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right."[51] Nonetheless, the Supreme Court continued to authorize and encourage plea bargaining.

While recognizing that coercion could not be permitted, the Supreme Court set a high bar for coercion to be legally recognized. In the landmark case *Brady v. United States*[52] the Court confronted head-on the possibility of coercion due to the threat of an extreme sentence. There, the Court held that "a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty."[53] Rather, impermissibly coerced pleas are those produced by "actual or threatened physical harm or by mental coercion overbearing the will of the defendant."[54] It determined there was no "evidence that Brady was so gripped by fear of the death penalty . . . that he did not or could not" act rationally.[55] By holding that the threat of death was not per se coercion and did not overbear the will of the defendant, the Supreme Court made clear there was little that would qualify as coercion.

Regardless of how the Supreme Court defines unlawful coercion, many commentators staunchly believe that the system is coercive. Professor John Langbein has even gone so far as to analogize plea bargaining to torture.[56] He believes that while we may not use archaic devices like the rack, thumbscrew or Spanish boot, "we make it terribly costly for an accused to claim his right to the constitutional safeguard of trial,"[57] and any difference between the two is one of degree.[58] In a similar vein, Professor Donald Dripps argues that "extreme trial penalties are not just analogous to coerced confessions, . . . they are constitutionally

49 390 U.S. 570 (1968).
50 *Id.* at 581 n.20 (citing Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116, 118 (1956)).
51 *Id.* at 582–83.
52 397 U.S. 742 (1970).
53 *Id.* at 755.
54 *Id.* at 750.
55 *Id.*
56 John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 3 (1978).
57 *Id.* at 12.
58 *Id.* at 13 ("Plea bargaining, like torture, is coercive.").

indistinguishable."[59] Others suggest "that plea bargaining is not just coercive under abnormally stressful conditions, but that coercion is the norm."[60]

A seminal Supreme Court case demonstrated how that coercion may come about in practice. In *Bordenkircher v. Hayes*, Paul Lewis Hayes was indicted for forging a check for $88.30, a crime punishable by a term between two and ten years in prison.[61] The prosecutor offered to recommend five years in prison.[62] However, if Hayes refused the offer, the prosecutor threatened to return to the grand jury and indict Hayes under a habitual offender statute, which carried a mandatory sentence of life in prison.[63] Hayes inexplicably refused, was reindicted, found guilty of forging the check and violating the habitual offender statute, and sentenced to life in prison.[64] He appealed.[65] The Supreme Court held that "Hayes was properly chargeable under the recidivist statute" and "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[66] The Supreme Court allowed a prosecutor to threaten a defendant with a severe sentence, life in prison, for a nonviolent crime. Further, it intimated there was little practical limit on the bargaining tactics prosecutors could employ to obtain a guilty plea.[67] Prosecutors responded, and there are several innovative techniques to pressure defendants to accept a plea bargain.[68]

The first possible victim of the coercive system is an innocent accused, who will feel the same pressures to plea bargain as guilty individuals. The fear of innocent people being convicted through guilty pleas has been realized and "we now know that innocent people plead guilty in the United States."[69] Although seemingly irrational, innocent people may think the state's evidence—even if false—will be

59 Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 WM. & MARY L. REV. 1343, 1364 (2016); *see also id.* at 1343–46 (including a thought experiment where individuals are forced to choose between seventy-two hours of enhanced interrogation or forty years at a typical American penitentiary; and noting that while most individuals would prefer the torture, most courts would not accept the pleas induced by fear of torture, but would accept those induced by fear of extended prison terms); Brandi Buchman, *Trump Judicial Nominees Get Tough Going Over from Hawaii's Hirono*, COURTHOUSE NEWS (Oct. 4, 2017), https://www.courthousenews.com/senate-democrats-grill-trump-judicial-nominees/ (discussing a nonpublished paper Stephanos Bibas wrote where he advocated for defendants to be given some nondisfiguring corporeal punishment, as opposed to prison sentences).

60 ALAN WERTHEIMER, COERCION 122 (1987) (emphasis omitted).

61 Bordenkircher v. Hayes, 434 U.S. 357, 358 (1978).

62 *Id.*

63 *Id.* at 358–59.

64 *Id.* at 359.

65 *Id.* at 360.

66 *Id.* at 364.

67 *Id.* at 365.

68 *See* Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, 17 NEV. L.J. 401, 407 (2017) (noting that prosecutors will use exploding offers, threats to add enhancements, threats to add additional charges, take-it-or-leave-it offers, and threats to seek the death penalty to acquire a guilty plea).

69 *Id.* at 414 ("For example, 17 percent of those exonerated in 2013 first pled guilty to the charges.").

compelling to a neutral party, the offer from the prosecutor "is too good to refuse," and/or they are not convinced they will "receive a fair and unbiased hearing."[70] Those defendants with criminal records "will accept another mark on their record[s] as the price to pay for avoiding the process costs of trials or the significantly worse sentences they might receive if they exercised their right to trial and were convicted."[71] Ideally we would never punish those innocent of a crime,[72] but that ideal is not the reality.

There is also the coercive effect on guilty defendants who intend to plead guilty. They are susceptible to similar pressures, and in their case it may lead them to "fail to litigate issues, such as search and seizure motions" that could potentially spare them a conviction.[73] And even if the hope of a dismissal or other nonconviction is far-fetched, defendants should be able to expect a just sentence. However, pressure from the prosecutor may convince defendants to "accept[] bad deals as they try to avoid potentially much higher sentences after trial."[74] Furthermore, "[d]efendants may get higher sentences depending on who the prosecutor is and what the particular prosecutor offers" and therefore "defendants often find they have no option but to take the bad deal, because the sentence after conviction at trial would be worse."[75]

While defendants in this situation may, at a glance, appear less sympathetic than the innocent, their treatment by the system has important implications. Treating similarly situated defendants the same contributes to trust in the system and process. But nonetheless, "[a]mong states and even within a single state, the prevalence of process discounts is extraordinarily varied, as are the causes and methods of discounting."[76] The coercion that some defendants face, which results in varied sentences, is not beneficial to the perception of our justice system, or fair to those it

70 Russell D. Covey, *Plea-Bargaining Law After* Lafler *and* Frye, 51 DUQ. L. REV. 595, 616–17 (2013). *But see* Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 339 (2012) ("[I]nnocents are significantly less likely to accept plea offers that appear attractive to similarly situated guilty defendants.").

71 Richard L. Lippke, *Plea Bargaining in the Shadow of the Constitution*, 51 DUQ. L. REV. 709, 722 (2013).

72 One scholar interestingly posits that "innocent defendants are better off in a world with plea bargaining than one without it." Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1117–18 (2008) (arguing that the system should make simpler the process of pleading guilty for innocent defendants because "many recidivist innocent defendants are punished by process and released by pleas").

73 Alkon, *supra* note 68, at 404. While the failure of individual defendants to litigate these issues may not make a difference to them, it has serious policy implications such as allowing "prosecutors and judges [to] uncover larger problems, such as police officers who are acting abusively and illegally." *Id.* at 415.

74 *Id.* at 404.

75 *Id.* at 415. This line of thinking by defendants is justified as sentences given at trial can be up to four times higher than a defendant who took a plea deal. Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 HASTINGS CONST. L.Q. 561, 603–04 (2014).

76 Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 959 (2005).

affects. Furthermore, even consistent but overly harsh sentences serve no one, and are only a drain on the people and institutions involved.

While held legal, the coercive pressure to plead guilty is very real for those charged with a crime. Regardless of whether it manifests as pressure for an innocent defendant to plead guilty, or pressure for a guilty defendant to take a plea that is not necessarily just, the coercion a defendant feels impacts her choice.

III. THE NEW ROLE OF THE MILITARY JUDGE, INSPIRED BY THE OLD

This Part will discuss how the concerns of the civilian system transfer over to the military system, especially considering recent changes to military justice. Removing the accused's ability to "beat the deal" and disincentivizing the military judge's ability to independently sentence brought military justice more in line with the civilian system.[77] As discussed above, that system is not perfect. The military already has a unique process in place to prevent innocent accused from pleading guilty, discussed below. Now, it must more directly confront the possibility of the guilty accused receiving unjust sentences.

Interestingly, the removal of the "beat the deal" provision, likely never coercive standing alone, may actually take away some incentive for an accused to plead guilty. While it may not have been rational to hope for a military judge or panel to adjudge a more lenient sentence, the accused knew the sentence could not be harsher. The safe harbor and the possibility of a reduction may have been just enough incentive to get some accused to sign on to a plea.[78] This change puts military accused in substantially the same position as their civilian counterparts: what they agree to is what they will probably get.[79]

In the military system, the responsibility to prevent innocent accused from pleading guilty rests with the military judge. Although all guilty pleas must establish some sort of factual basis for the crime, in the civilian system the rigor that goes into the plea colloquy, and the practical consequence of the plea colloquy, varies.[80] In the military system, there is no such inconsistency. Before accepting a plea bargain, military judges inform the accused of many of the same rights civilian judges do.[81]

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77 Although civilian judges are not bound by plea agreements, the overwhelming perception is that they rarely reject them based on a disagreement with the sentence. *See generally* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976).

78 For an interesting analysis of "plea bargaining through the lens of game theory," see H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 67–75 (2011).

79 This assumes judicial acceptance of the plea. *See supra* note 77.

80 *See* William T. Stone, Jr., Note, *Waiving Good-Bye to Inconsistency: Factual Basis Challenges to Guilty Pleas in Federal Courts*, 45 GA. L. REV. 311, 315–24 (2010) (noting the requirement of a factual basis in the Federal Rules of Criminal Procedure, but highlighting a circuit split on whether an inadequate factual basis may serve as a basis for appeal).

81 *See* MCM, *supra* note 7, R.C.M. 910(c) (informing the accused of the nature of the offense, mandatory minimums and maximums, the right to counsel, to plead not guilty, a trial by court-martial, and the possibility of perjury in his answers during the providence inquiry).

Then, they ensure the plea is voluntary[82] and determine the accuracy of the plea.[83] Although also required in federal civilian courts, the Court of Military Appeals made clear in *United States v. Care*[84] that much more is expected of military judges. It is not enough in the military to make a cursory statement of guilt for the requisite elements of a crime.[85] The obvious purpose of this is to ensure that service members who plead guilty are in fact guilty.

Since *Care*, the military made clear it takes the precedent laid down very seriously. Not only does *Care* have over 1500 citing references from cases alone,[86] but the specific treatment it continues to receive demonstrates its authority. In *United States v. Jordan*,[87] the U.S. Court of Appeals for the Armed Forces ("CAAF") held that "[i]t is not enough to elicit legal conclusions. The military judge must elicit facts to support the plea of guilty."[88] Later in *United States v. Blouin*,[89] CAAF determined that an inconsistency in explaining offenses to the accused, as well as the failure of the judge to make further inquiries once he determined that several of the pieces of evidence did not qualify as child pornography, created "a substantial basis in law and fact to question the providence of the guilty plea."[90] The importance of the providence inquiry has stood nearly half a century and arguably gained strength over time. It affects how, and ultimately if, an accused is able to plead guilty. But while the providence inquiry is meant to ensure an accused is guilty of exactly what he is charged with, it does not by itself prevent all coercive plea agreements.

Similar to RCM 910(e)'s purpose in ensuring accuracy, 910(d) is meant to ensure voluntariness.[91] However, 910(d) has received significantly less attention.[92] This may be because the rule is relatively straightforward. It, in substantial part,

82 *Id.* R.C.M. 910(d).

83 *Id.* R.C.M. 910(e) ("The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea.").

84 40 C.M.R. 247 (1969).

85 *Id.* at 253 ("This requirement will not be satisfied by questions such as whether the accused realizes that a guilty plea admits 'every element charged and every act or omission alleged and authorizes conviction of the offense without further proof.'").

86 Westlaw search conducted on November 16, 2018. Further, all but two of these citations come from the military courts, the vast majority coming from the individual services courts of criminal appeals, for which it is binding precedent.

87 57 M.J. 236 (C.A.A.F. 2002).

88 *Id.* at 238.

89 74 M.J. 247 (C.A.A.F. 2015).

90 *Id.* at 252.

91 MCM, *supra* note 7, R.C.M. 910(d) ("The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705.").

92 Only thirty-eight military court decisions cite R.C.M. 910(d) as opposed to over 450 military court decisions citing R.C.M. 910(e), in addition to the numerous citing references for *United States v. Care*, 40 C.M.R. 247 (1969) as mentioned in note 86.

mirrors the standard set out in *Brady*.[93] However, as previously discussed, this broad standard does not, and will not, prevent all coercion from affecting plea bargaining.

Previously, the practical impacts of Rule 910(d) may have been less significant. If an accused agreed to an unjust sentence—especially one that was patently unjust, but even one that was unjust at the margins—there was an independent check on it by the military judge or panel. The sentencing authority's ability to make a sentence based wholly on the stipulated facts and those presented during extenuation and mitigation arguments was an additional security for the justness of the imposed sentence. The decision would not be influenced by knowledge of an already agreed upon sentence. And, if all things considered, the sentencing authority thought the accused deserved more punishment, the accused made a good deal. The ability to "beat the deal" was an additional check on severity which arguably minimized the importance of a just agreement with the convening authority. However, that additional check no longer exists.[94]

Moving forward, the only way for military judges to ensure an accused receives a just sentence is to hold a plea agreement to the fire. The judges' evaluations of just sentences will no longer be done in a vacuum, but rather will have to be applied to the agreement they are evaluating. It may be ironic, but as military judges' authority is in a sense decreased, their responsibility actually increases. This responsibility is to zealously reject unjust plea agreements. For the first time, they will be responsible for scrutinizing the plea agreement for a just sentence or sentence range, something very different from creating a sentence from scratch. By rejecting plea agreements for unjust terms, and explaining their reasoning as required by the rules,[95] military judges will be telling convening authorities what sentences are appropriate. While this will occur in a much more roundabout way than the sentencing authority merely doing what they believe is just, it will accomplish the necessary purpose of preventing unjust plea agreements from being approved.

But how will military judges know what a just sentence truly is? The new system may lead to less evidence being presented in extenuation or mitigation. Trial and defense counsel may believe they have already reached a fair deal. The burden again falls on military judges. They may have to inquire independently. Following a providence inquiry, the military judge should ask if there were any circumstances outside of the factual basis uncovered during the providence inquiry that went into the formulation of the plea agreement. While there may be incrimination or other concerns military judges must navigate, a complete picture is needed when determining if a sentence is just.

Military judges are up to the task of ensuring convening authorities and trial counsel are not unjust in their sentences or sentence ranges. However, hurdles and perverse incentives remain. When a military judge decides to reject a plea agreement, one of two things will happen. Either the accused will withdraw his plea,

93 *Compare* Brady v. United States, 397 U.S. 742, 750 (1970) (defining coercion as "actual or threatened physical harm or by mental coercion overbearing the will of the defendant"), *with* MCM, *supra* note 7, R.C.M. 910(e).

94 *See* 2018 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,825, 83 Fed. Reg. 9889 (Mar. 1, 2018).

95 *Id.* annex 2 at 9992.

or the accused will plead straight up and the court-martial "may impose any lawful punishment."[96] If the military judge makes clear that he is rejecting the plea because the sentence is too harsh, or some similar reason, it is possible the accused will plead straight up, or at the very least the accused will gain leverage with the convening authority and attempt to renegotiate. Either way, the process is significantly extended, resulting in either sentencing arguments, or a new plea agreement being presented to the judge. If the military judge rejects the agreement because the sentence is not harsh enough, or some other reason not clearly favoring the accused, then the accused is very unlikely to plead straight up, and may be motivated to seek a trial. Furthermore, in this situation the accused may justifiably believe it would be unfair to have the same judge sitting at his contested trial and might request a recusal. Military judges, in all circumstances, will save themselves a lot of trouble by simply accepting the plea agreement presented.

At this point, the motivations and external pressures military judges will face in dealing with cases begin to look very similar to those faced by civilian judges. A full docket and a responsibility to resolve cases is no small concern. The increased incentives to accept plea agreements highlights the importance of judges truly believing the agreements they approve are just, even at the margins.

CONCLUSION

The aforementioned changes to the Rules for Courts-Martial are just one aspect of many changes to military justice, courtesy of the Military Justice Act of 2016.[97] The Act brought military justice more in line with the civilian system. The ultimate removal of the "beat the deal" provision by the Joint Service Committee brought it even closer. However, as discussed above, the civilian system is not without its flaws. The military created, and uses effectively, a process to ensure the providence of guilty pleas. That process relies extensively on a military judge. Military justice must again call upon the military judge to exercise more responsibility in ensuring all plea agreements are not only truthful, but also just. The removal of the ability to "beat the deal" will not benefit the accused. However, that does not necessarily mean that military sentences will become more unjust. It does necessarily mean that military judges are responsible for ensuring they do not.

96 *Id.*

97 *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016) (to be codified in scattered sections of 10 U.S.C.).